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## CRIMINAL MUNICIPAL COURTS

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## CRIMINAL MUNICIPAL COURTS

*Alexandra Natapoff\**

*Municipal courts are the lowest and least scrutinized echelon of the U.S. criminal system. Largely ignored by judicial theorists, municipal governance scholarship, and criminal theory alike, these city-controlled courts operate on the intellectual sidelines; even basic public information about their dockets and operations is scarce. This Article brings municipal courts into the broader legal and scholarly conversation, offering the first comprehensive analysis of the enormous municipal court phenomenon. Nationwide, there are over 7,500 such courts in thirty states. Collectively they process over three and a half million criminal cases every year and collect at least two billion dollars in fines and fees. Created, funded, and controlled by local municipalities, these courts — sometimes referred to as “summary” or “justice” or “police” courts — are central to cities’ ability to police, to maintain public safety, and to raise revenue. At the same time, they often exhibit many of the dysfunctions for which lower courts have been generally criticized: cavalier speed, legal sloppiness, punitive harshness, and disrespectful treatment of defendants. Unlike their state counterparts, however, the U.S. Supreme Court has formally excused municipal courts from some basic legal constraints: judges need not be attorneys and may simultaneously serve as city mayors, while proceedings are often summary and not of record. These hybrid institutions thus pose thorny conceptual challenges: they are stand-alone judicial entities that are also arms of municipal government operating under reduced constitutional constraints as they mete out criminal convictions. As such, they create numerous tensions with modern norms of due process, judicial independence, and other traditional indicia of criminal court integrity.*

*This Article provides a framework for appreciating the institutional complexity of this lowest tier of American criminal justice. Municipal courts deviate substantially from the classic model of courts as neutral, independent guardians of law. They are also vehicles for cities to express their political autonomy and redistribute wealth, and thus constitute underappreciated engines of local governance. As criminal adjudicators, they quietly contribute to localized mass incarceration while threatening the integrity of some foundational features of the criminal process. At the same time, they represent a potentially attractive opportunity to render criminal institutions more locally responsive. Finally, they reveal a deep dynamic at the bottom of the penal pyramid: low-status cases and institutions exert a formative influence over law itself. These complexities make reform especially challenging. There are doctrinal reforms that could strengthen municipal court operations, but they are inherently limited. The deeper reform would be to stop dismissing these courts as minor, inferior institutions and to take them and their millions of defendants seriously across the board of law, policy, and politics. Widely influential,*

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\* Lee S. Kreindler Professor of Law, Harvard Law School. Special thanks to Michelle Wilde Anderson, Nestor Davidson, Sharon Dolovich, Amanda Frost, Rick Hasen, Don Herzog, Justin Levitt, Carrie Menkel-Meadow, Doug NeJaime, Richard Re, and Adam Zimmerman. This Article benefitted immensely from faculty workshops at Buffalo, Chicago, U.C. Davis, Harvard, U.C. Irvine, USC Gould, Wisconsin, and the annual Southern California Criminal Justice Roundtable. It also benefitted from excellent work by its *Harvard Law Review* editors. This Article is dedicated to the memory of my grandfather, Samuel Natapoff, who ran for the office of Municipal Court Justice in the Second Municipal Court District, Borough of the Bronx, on November 6, 1945. He was a candidate for the American Labor Party; he received 50,724 votes. *Ginsberg v. Heffernan*, 60 N.Y.S.2d 875, 877 (Sup. Ct. 1945); see also *Flaw in Machines Mars Bronx Vote: Special Election and Court Fight Held Possible in Municipal Court Races*, N.Y. TIMES, Nov. 7, 1945, at 1, 3.

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*jurisprudentially challenging, and democratically complicated, municipal courts deserve a more central place in the modern legal conversation.*

## INTRODUCTION

Far from the marble halls of the U.S. Supreme Court lurks a judicial animal of a completely different character: the lowly municipal court. City courts in the United States go by a variety of names, including “municipal,” “town,” “summary,” “justice,” “mayor,” and “police” courts. Created and operated independently by cities and towns, these are courts of limited jurisdiction that hear misdemeanors, local ordinance violations, and sometimes civil claims involving small amounts. A few such courts are large — the Seattle municipal court filed nearly 10,000 criminal cases in 2019<sup>1</sup> — but many are small — just a room in the local municipal building or police station where the judge might preside once or twice a month. In the aggregate, however, municipal courts comprise a substantial percentage of U.S. judicial operations. There are over 7,500 such courts in thirty states scattered across the country, they adjudicate over three and a half million criminal cases every year, and they collect over two billion dollars for local jurisdictions.<sup>2</sup> They are central to the authority of cities to police, to maintain public safety, and to raise revenue. And yet they are commonly ignored or underestimated by scholars who study courts, cities, and criminal law.

The local criminal court phenomenon sits at the intersection of several legal disciplines: criminal justice, local government law, and the institutional role of courts. It has almost entirely slipped beneath the radar of each.<sup>3</sup> The vast scholarship theorizing the nature of courts, adjudication, and the judicial role barely mentions them. No leading casebook on municipal governance devotes a section to municipal courts, and most do not discuss them at all.<sup>4</sup> In the past fifty years,

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<sup>1</sup> *Seattle Municipal Court, Criminal Case Filings*, SEATTLE.GOV, <https://www.seattle.gov/courts/about/data-and-publications/general-data-reports/criminal-case-filings> [https://perma.cc/DYT8-3JXY].

<sup>2</sup> See *infra* section I.A.1.h, pp. 982–85; *infra* Table 3.

<sup>3</sup> Although historians and sociologists occasionally engage with local criminal courts. See DORIS MARIE PROVINE, *JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM* (1986) (analyzing the historical evolution of the demand for legally trained judges in lower courts). See generally, e.g., LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870–1910* (1981); MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003).

<sup>4</sup> GERALD E. FRUG ET AL., *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* (6th ed. 2014) (no section and no discussion); RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* (8th ed. 2016) (no section and no discussion); LYNN A. BAKER ET AL., *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* (5th

there have been a mere handful of criminal law review articles analyzing any aspect of this type of court, even though these courts have been around since before the nation's founding.<sup>5</sup> At the same time, or perhaps by way of explanation, data on these courts are scant. No centralized authority collects comprehensive information about them, how many there are, and the size of their dockets.<sup>6</sup> Some individual states publish such information; most do not.<sup>7</sup>

This inattention might make sense if municipal courts were materially indistinguishable from the lowest tier of state trial courts that also adjudicate low-level crimes. Those state trial courts — typically referred to as “district courts” or “superior courts” or sometimes “limited-jurisdiction courts” — are part of integrated state judicial systems, created by the state and managed by a central state authority. Their dockets and operations are for the most part publicly reported, and as trial courts they receive a modicum of attention.<sup>8</sup> These lower state

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ed. 2014) (no section and no discussion); *see also* OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW, ch. 24 (4th ed. 2015) (discussing municipal ordinances, law enforcement, and defendants' procedural rights, but not municipal courts, in a chapter titled “Local Controls on Criminal Activity”).

<sup>5</sup> Few contemporary legal scholars focus on local courts at all. One exception is Professor Ethan Leib. *See* Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 902 (2013) [hereinafter Leib, *Statutory Interpretation*] (theorizing how local courts — including but not limited to municipal courts — interpret local statutes); Ethan J. Leib, *Local Judges and Local Government*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 707, 707, 711–12, 714 (2015) [hereinafter Leib, *Local Judges*] (interviewing twenty-three New York town and village court judges). Professor Wayne Logan is the rare scholar who has written about municipal criminal law promulgation by city legislatures, although he does not address municipal courts. *See* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1436 (2001) [hereinafter Logan, *Shadow Law*] (analyzing municipal authority to pass criminal codes and noting, without discussion, that such codes are enforced by municipal courts); *see also* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1177 (documenting the municipal use of criminal fines and fees to raise revenue). A few scholars have examined municipal court systems in specific jurisdictions. *See, e.g.,* Annie Decker, *A Theory of Local Common Law*, 35 CARDOZO L. REV. 1939, 1956–66 (2014) (describing array of local courts in New York state and locating them against the historical backdrop of British and colonial courts); Samuel P. Newton et al., *No Justice in Utah's Justice Courts: Constitutional Issues, Systemic Problems, and the Failure to Protect Defendants in Utah's Infamous Local Courts*, 2012 UTAH ONLAW 27, 46–47 (2012) (criticizing Utah's justice court system); Julia Lamber & Mary Lee Luskin, *City and Town Courts: Mapping Their Dimensions*, 67 IND. L.J. 59, 61 (1991) (describing Indiana's town and city courts).

<sup>6</sup> The National Center for State Courts (NCSC), a nonprofit organization, collects partial data from most states on their limited jurisdiction courts, but not all courts provide complete data to the NCSC. CT. STAT. PROJECT, NAT'L CTR. FOR STATE CTS., STATE COURT CASELOAD DIGEST 2018 DATA 20–21 (2020), [http://www.courtstatistics.org/\\_data/assets/pdf\\_file/0014/40820/2018-Digest.pdf](http://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf) [https://perma.cc/978X-LC62].

<sup>7</sup> *See infra* section I.A.1, pp. 975–85.

<sup>8</sup> *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2052 (2016) (noting “academic tendency to discount the role of trial courts in studies of judicial administration, adjudication, and institutional design”); *see also* Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*,

courts process the majority of misdemeanor cases in the United States.<sup>9</sup> They have been increasingly criticized for their hurried, dehumanizing, and sometimes unconstitutional processing of minor offenses, their tendency to criminalize poverty and race, and their regressive reliance on criminal fines and fees.<sup>10</sup> Municipal courts share many of the same operational pathologies as their state counterparts and are sometimes included in, and conceptually subsumed under, this more general umbrella of the “lower court.”<sup>11</sup>

But municipal courts have structural features and political dynamics that distinguish them from lower state courts in significant and sometimes startling ways. They are created, funded, and occasionally dissolved by city officials who have deep interest in and influence over how their courts operate, especially with respect to the amount of revenue they generate.<sup>12</sup> Sometimes municipal courts report to the state central judicial authority, sometimes they do not, even in purportedly unified judicial systems.<sup>13</sup> Judges may be appointed by local city councils or by mayors. Sometimes the judge *is* the mayor.<sup>14</sup> Sometimes the judge is not a lawyer. Prosecutors may be part-time lawyers running their own private practices with strong connections to the judge, to the police, or to city businesses. Sometimes those prosecutors also serve as judges in other cities. Sometimes there is no professional prosecutor and the prosecutorial role is filled by the arresting police officer.<sup>15</sup> In many of these courtrooms, defense attorneys are scarce to nonexistent.

In other words, municipal courts routinely lack the usual indicia of independence, impartiality, and legal due process that conventionally characterize the judiciary and on which criminal law relies for much of its integrity. These courts are often run in informal fashion by interested parties, or by parties whose salary and tenure depend on satisfying local political and economic interests.<sup>16</sup> Judges perform work closely associated with city officials, law enforcement, and even tax collectors. Such

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143 DAEDALUS, Summer 2014, at 129, 134 (describing historical lack of data on state trial courts due to their local origins).

<sup>9</sup> ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 2 (2018) [hereinafter NATAPOFF, PUNISHMENT WITHOUT CRIME].

<sup>10</sup> See *infra* section II.A.1, pp. 1012–14.

<sup>11</sup> See, e.g., *Limited Jurisdiction Courts Resource Guide*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/limitedjurisdiction> [<https://perma.cc/3NLT-YDHY>] (counting municipal courts under the “courts of limited jurisdiction” umbrella).

<sup>12</sup> See *infra* section I.B.5, pp. 1005–10.

<sup>13</sup> See *infra* section I.A.1.g, pp. 980–82 (discussing unification).

<sup>14</sup> See, e.g., OHIO REV. CODE ch. 1905 (2020) (regulating Ohio mayor’s courts).

<sup>15</sup> Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1331–32, 1343 n.230 (1998) (listing fourteen states that arguably authorize police prosecutors).

<sup>16</sup> See *infra* section I.B.5, pp. 1005–10.

conflicts and informality do not accord with many basic structural guarantees of criminal court integrity.<sup>17</sup>

Municipal courts also present a variety of functional challenges, some of which they share with state lower courts, some of which flow from their own unique features. As the 2015 U.S. Department of Justice (DOJ) investigation of Ferguson revealed, the revenue from municipal courts may supply a substantial percentage of a municipality's budget and thus incentivize systemic overcriminalization.<sup>18</sup> Because municipal court judges are selected locally, they may have political relationships with local officials, law enforcement, and city elites that create conflicts, corrupt individual cases, or fuel inequitable practices. In courts where judges are not attorneys, the lack of legal expertise in the courtroom may result in illegal or inaccurate outcomes. While many of these dysfunctions plague lower courts more generally, municipal court structures often magnify them.

This Article offers the first comprehensive description of and analytic framework for the modern criminal municipal court phenomenon in the United States. Because municipal courts have been largely ignored in the legal literature, no previous work has documented how many there are nationwide, the size of their dockets, how they operate, or their aggregate impact on the U.S. criminal process. The first half of this Article fills this descriptive gap. Part I provides an empirical description of the phenomenon based on new data collected on municipal courts in all thirty states. This Part further provides a taxonomy of basic municipal court characteristics including their informality, their reliance on incarceration to collect fines and fees, and the types of financial and institutional conflicts that plague key legal actors. The municipal court in Ferguson is best known as an especially troubling example of these challenges, but Ferguson is just one of many possible stories: other municipal courts exhibit the kinds of positive qualities that have kept these courts popular for centuries, including their local political responsiveness and their flexibility to experiment with criminal justice reforms.

Part II maps the unique legal and institutional character of modern municipal courts. They have a long constitutional pedigree and special status as local institutions, which partially explain why the Supreme Court has given them special procedural dispensations: nonattorney judges, lack of jury trials, limited rights to defense counsel, unique appellate procedures, and room to engage in a high degree of informality.

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<sup>17</sup> See *infra* section II.C.2, pp. 1040–63 (discussing legitimating role of rules and formalism in criminal law).

<sup>18</sup> C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [https://perma.cc/T5YX-TUVG] [hereinafter FERGUSON REPORT]; see also *infra* Table 3 (documenting fines and forfeits revenues and collections).

They are also exempt from the constraints of separation of powers. As a result, their peculiar interbranch relationships — for example, when the judge also happens to be the mayor — have given rise to their own, more permissive doctrine of adjudicatory conflict and judicial neutrality. Even as the U.S. criminal system has undergone massive jurisprudential and institutional changes over the past seventy years, much of this less formal municipal court regulatory structure has persisted. It creates various tensions with judicial norms, due process, and other traditional indicia of criminal court integrity. In these ways, municipal courts evade and weaken key constitutional and normative boundaries that define and constrain modern criminal courts.

This Article focuses on *criminal* municipal adjudication. Although some courts also perform civil functions, city courts are primarily criminal institutions both historically and in practice.<sup>19</sup> More fundamentally, it is in the exercise of criminal jurisdiction that their influence and peculiarities are most problematic. Many low-level civil tribunals grapple with similar challenges of informality, lack of resources, and litigant socio-economic disadvantage, but by definition they lack the unique power to convict and impose criminal punishment.<sup>20</sup> Criminal courts, by contrast, must fulfill an additional and special institutional function. They are the traditional, primary check against law enforcement overreach, an independent bulwark — at least in theory — that stands between the vulnerable defendant and the coercive arm of the state.<sup>21</sup> Criminal procedure, in turn, is one of the legitimating features of the modern criminal state's authority, a primary protection against state coercion, discrimination, and disrespect of the system's perennially vulnerable subjects. Because norms of independence and legal procedure are routinely weakened in municipal court, these thousands of courts — and the millions of convictions and sentences they issue — push the legitimating boundaries of criminal court adjudication in troubling and underappreciated ways.<sup>22</sup>

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<sup>19</sup> See EDWARDS, *supra* note 3, at 79–80 (describing how low-status criminal law was left to post-Revolutionary local courts while commercial civil law was regularized and centralized); cf. Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2946 (2015) (noting that early twentieth-century municipal courts were one of the primary institutional contexts in which Progressives sought to develop the use of civil arbitration).

<sup>20</sup> See Cathy Lesser Mansfield, *Disorder in the People's Court: Rethinking the Role of Non-lawyer Judges in Limited Jurisdiction Court Civil Cases*, 29 N.M. L. REV. 119, 141 (1999) (“29 of the 50 states allow non-lawyer judges to adjudicate civil matters in one form or another.”). *But see* Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1250 (2019) (questioning “the supposedly distinct purposes, procedures, and penalties in civil and criminal law” in the nonsupport context). See generally 1 THE POLITICS OF INFORMAL JUSTICE (Richard Abel ed., 1982) (surveying various local experiments in informal civil adjudication).

<sup>21</sup> See, e.g., Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (“[Judges’] most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of [the] popular will . . .”).

<sup>22</sup> See *infra* section II.A, pp. 1012–22; section II.C, pp. 1035–47.

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The second half of this Article proposes a conceptual framework for making sense of these courts and their normative implications. Municipal courts are hybrid governance institutions: simultaneously courts and municipal government entities. Their structures and practices test the boundaries of the neutral adjudicator model. Collectively, they are a major engine of low-level misdemeanor conviction, the criminalization of race and poverty, and local mass incarceration. Although municipal courts have mostly fallen between the cracks of scholarly discourses on courts, cities, and criminal justice, they are natural subjects for each of these disciplines. In turn, they offer provocative insights into the nature of criminal adjudication, the risks and benefits of strong city authority, and the challenges of misdemeanor criminal justice in the era of wealth-based and racialized mass incarceration.

Specifically, municipal courts are a problematic species of *court*. They often operate without the kinds of neutrality, independence, and formality that scholars have long associated with and demanded from the judicial function. These courts' close relationships to their parent cities can even resemble relationships between administrative adjudicators and their parent agencies. By exploring the theoretical discourse on the nature of the judicial function, including the Supreme Court's recent discussion of "judicial character,"<sup>23</sup> and insights from the administrative context, section II.A reveals how municipal courts fit uneasily within existing normative judicial frameworks.

Just as importantly, municipal courts are created and run by *cities*. Although these entities are central to city governance, they have received little attention from the local government literature. Section II.B deploys some of that literature to identify the influential local governance and economic functions of municipal courts, and to suggest how they could become a more prominent part of existing conversations around cities, localism, and urban economic development and disadvantage.

Municipal courts are also *criminal justice institutions*. This Article brings local government and criminal justice scholarship together in order to consider how municipal courts might contribute to the newly invigorated debate over local criminal justice democracy. On the one hand, municipal courts exhibit many localist dangers of parochialism and informality that threaten their integrity as independent neutral adjudicators. On the other hand, they are deeply rooted local institutions that offer the possibility of improved local control over, and responsiveness to, the unique criminal justice needs of individual communities. Even as they pose democratic risks, they offer potential democratic benefits. They are paradigmatic examples of the tense relationship between criminal justice and local democracy, not only in the abstract but in their

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<sup>23</sup> *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018).



treatment of millions of politically and socially vulnerable defendants who pass through these courts every year.

Finally, municipal courts reveal jurisprudential compromises that have been made for centuries at the lowest levels of the criminal system. Modern misdemeanor processing is increasingly criticized for its legal flouting and cavalier erosions of many aspects of rule of law. But for municipal courts, the phenomenon is more complex than mere lawlessness. Rather, the positive law governing municipal courts accommodates the pettiness of their cases, their local character, and their presumed lack of resources, by ratcheting down traditional due process requirements. Out of respect for these courts' historical informality and unique institutional posture, the Supreme Court has affirmatively validated the lack of jury trials, the lack of counsel, the lack of legally trained judges, the lack of a record, and the summary quality of proceedings.<sup>24</sup> One might say that municipal courts have been partially excused from the Warren Court criminal procedure revolution.<sup>25</sup> Criminal law is different here: the inferior status of municipal courts exerts a gravitational pull on the law itself, blurring definitional lines between criminal and civil, and injecting informality into a relatively formalistic jurisprudential culture. In this sense, municipal courts resemble other low-status institutions such as juvenile courts, immigration proceedings, and family courts where greater informality is officially sanctioned even as the state metes out highly punitive treatments including incarceration. At the bottom of the penal pyramid, rule of law is thus not merely flouted: it is substantively rewritten.<sup>26</sup>

I have written extensively about misdemeanors and the thirteen million low-level cases that comprise eighty percent of the U.S. criminal docket.<sup>27</sup> In particular, I have argued that the informality and punitiveness of misdemeanor processing is central to the identity of the American

<sup>24</sup> See *infra* notes 438–442 and accompanying text.

<sup>25</sup> Cf. Carol S. Steiker, *Counter-revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996) (describing the “relative stability” of Warren Court criminal procedure norms).

<sup>26</sup> See Alexandra Natapoff, *The Penal Pyramid*, in THE NEW CRIMINAL JUSTICE THINKING 71, 72 (Sharon Dolovich & Alexandra Natapoff eds., 2017) [hereinafter Natapoff, *The Penal Pyramid*] (theorizing the erosion of rule of law at the bottom of the penal pyramid where offenses are pettiest).

<sup>27</sup> NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 9, at 2; Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043 (2013) (describing the erosion of the individual fault model in misdemeanor processing); Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013) (exploring structural barriers to effective misdemeanor representation); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) (discussing the inegalitarian effects of decriminalization); Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445 (2015) (describing the welfarization of crime around petty offenses); Natapoff, *The Penal Pyramid*, *supra* note 26 (exploring the erosions of legality that occur around misdemeanors).

penal system and a major contributor to the criminalization of poverty and race. This Article takes that project a step further by zeroing in on a unique institution that shapes and drives much of that enormous machinery. Above and beyond the pettiness of misdemeanor crimes themselves, the bottom of the criminal system is centrally defined by these local institutions and their special characteristics and practices. Indeed, municipal courts have quietly defined the misdemeanor space for a very long time.

For all these reasons, municipal courts are central to the larger criminal justice governance project. They exert political, regulatory, and expressive authority in thousands of cities. Nationally, they generate a substantial portion of the U.S. criminal docket; they contribute heavily to low-level misdemeanor criminalization; and they represent a sizeable fraction of the nation's judiciary.<sup>28</sup> These courts deserve to be brought out of obscurity and into the foundational disciplines, not only of criminal law and procedure, but of judicial theory and local government law. Each of these fields offers new insights into this centuries-old penal practice, and each could be enriched by engagement with the municipal court phenomenon.

The Article concludes by grappling with the challenges of meaningful reform. As an initial matter, it supports stronger conventional procedural protections for defendants in municipal court. It does so, however, with full recognition of the inherent limits to doctrinal and formalist reforms, especially in low-status spaces where defendants typically lack the resources to take advantage of legal tools. Criminal procedure fixatives for social vulnerability and inequality are always partial and sometimes problematic, and they will be no panacea in municipal court either. Accordingly, the more fundamental reform is to elevate the status of the lowest echelons of the American criminal process. Ultimately, many of the injustices that plague municipal courts result from their invisibility and perceived unimportance. The Supreme Court, government officials, and scholars alike too often dismiss these courts as inferior and their cases as minor, and thus fail to scrutinize their operations or protect the defendants who pass through them. By raising their profile and bringing them into longstanding conversations about the judiciary, local governance, and criminal justice, this Article lays the groundwork both for appreciating these courts and for holding them accountable.

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<sup>28</sup> The NCSC identifies 2,705 state trial courts of general jurisdiction. *State Court Organization 3.1c: Trial Courts*, NAT'L CTR. FOR STATE CTS., <http://data.ncsc.org/QvAJAXZfc/open-doc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true> [https://perma.cc/Z2MK-BZS8].

## I. THE MUNICIPAL COURT PHENOMENON

A. *The Modern American Municipal Court*

The National Center for State Courts (NCSC) has previously defined the municipal court as a “stand-alone trial court of limited jurisdiction that may or may not provide jury trials and that defined is funded largely by a local unit of government.”<sup>29</sup> Thirty states permit their cities to create municipal courts — or comparable “justice courts” or “town courts.”<sup>30</sup> All but three confer criminal jurisdiction over local criminal ordinance violations.<sup>31</sup>

The key characteristic of these courts is that they are “stand-alone,” which means that they are controlled by individual cities and not by state judiciaries.<sup>32</sup> All fifty states maintain an array of trial-level courts which comprise the lowest tier of an integrated statewide judicial system. These trial courts can resemble municipal courts in that they preside over misdemeanors, traffic cases, and small civil claims; like municipal courts, their jurisdiction may be limited to such cases. These trial courts, however, are not stand-alone: they are created and supervised by the state and are part of the state judicial branch.<sup>33</sup> By contrast, thirty states authorize cities to create and manage their own local criminal tribunals in addition to the state apparatus. Depending on the extent and depth of judicial unification in the state, municipal courts

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<sup>29</sup> SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., MUNICIPAL COURTS: AN EFFECTIVE TOOL FOR DIVERTING PEOPLE WITH MENTAL AND SUBSTANCE USE DISORDERS FROM THE CRIMINAL JUSTICE SYSTEM 2 (2015) (quoting NCSC definition). The NCSC website now treats municipal courts as a subspecies of limited jurisdiction courts. See *Limited Jurisdiction Courts Resource Guide*, *supra* note 11.

<sup>30</sup> See *infra* Table 1 for details on all thirty states. Missouri and Rhode Island have municipal courts, *see id.*, but the NCSC does not account for them, *see Methods of Judicial Selection: Limited Jurisdiction Courts*, NAT’L CTR. FOR STATE CTS., [http://www.judicialselection.us/judicial\\_selection/methods/limited\\_jurisdiction\\_courts.cfm](http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm) [<https://perma.cc/JSG4-SNSW>]; *see also infra* note 42. There are approximately 20,000 municipal governments and 16,000 township governments in the United States. *Cities 101 — Number of Local Governments*, NAT’L LEAGUE OF CITIES (Dec. 13, 2016), <https://www.nlc.org/resource/cities-101-number-of-local-governments> [<https://perma.cc/6A6K-CWSS>].

<sup>31</sup> Wisconsin and Indiana municipal ordinances are civil, as are the majority of Tennessee’s. *See infra* pp. 950–96.

<sup>32</sup> Some states also maintain hybrid county-level courts that can straddle differences between city and state control. *See infra* p. 953 (describing such courts in Texas, Oregon, South Carolina, and Ohio). Table 1 does not include county courts.

<sup>33</sup> Although local governments may be required to pay for them. *See* U.S. COMM’N ON C.R., TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 26–27 (2017), [https://www.usccr.gov/pubs/2017/Statutory\\_Enforcement\\_Report2017.pdf](https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf) [<https://perma.cc/42UX-EBBC>] (listing state local courts that self-fund).

may or may not have any organizational relationship to the state judiciary; in particular, they may or may not report their caseloads or other data to a centralized authority.

Municipal courts vary widely from state to state and from city to city. Some are large, well-resourced, relatively formal, and nearly indistinguishable from their state counterparts. Others, by contrast, seem like throwbacks to an earlier century when criminal justice was meted out informally, off the record, by local lay justices of the peace. The sections below describe in more detail — both quantitative and qualitative — the scope and character of this lowest tier of the American judiciary.

1. *The Data.* — I stumbled onto municipal courts while researching my book *Punishment Without Crime*,<sup>34</sup> which is about the American misdemeanor system writ large. Because public misdemeanor data were woefully scarce at the time,<sup>35</sup> I sent a records request to every state Administrative Office of the Court (AOC) asking for information regarding their state's misdemeanor dockets. It is the job of each state AOC to collect and monitor data on criminal cases and judicial processes, and so I was struck when many AOCs responded that they simply did not know how many misdemeanor cases were being filed in their municipal courts. When I looked for alternative sources for the information from state, municipal, and other organizations, I came up nearly empty. Although I had been writing about misdemeanors for years, I had not realized the extent to which there was a municipal court subculture tucked away within the larger lower court phenomenon and that it was, if anything, even more underdocumented and opaque.<sup>36</sup>

The Appendix to this Article is a response to that lack of data and attention. As far as I know, it contains the first and only compilation of national data on basic municipal court characteristics: (1) the number of such courts in each of the thirty states that have them (over 7,500 total); (2) their respective criminal caseloads (at least 3.5 million total, excluding traffic); (3) maximum penalties for municipal ordinance violations (typically between thirty days and six months incarceration); (4) methods of judicial selection (about half elected and half appointed); (5) whether all judges must have law degrees (mostly not); (6) whether the state has a two-tier system of de novo appellate review (almost all do); and (7) whether municipal courts are legally unified with their state's judiciary

<sup>34</sup> NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 9.

<sup>35</sup> I did the bulk of the research for the book in 2016. The misdemeanor data situation has substantially improved since then. *See, e.g.*, Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 747 (2018) (estimating national misdemeanor cases filed annually since 2007); *see also Research Network On Misdemeanor Justice*, DATA COLLABORATIVE FOR JUST. AT JOHN JAY COLL., <https://datacollaborativeforjustice.org/project/research-network-on-misdemeanor-justice> [<https://perma.cc/GEC7-GBCP>] (presenting six studies documenting falling misdemeanor filing rates in Durham, NC; Los Angeles, CA; Louisville, KY; Prince George's County, MD; Seattle, WA; and St. Louis, MO).

<sup>36</sup> *See generally* NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 9 (describing the underdocumented quality of the U.S. misdemeanor system in general).

(about half and half). Table 3 contains data, such as it is, on the fines and fees collected by municipal courts (varies wildly).

Describing the empirical characteristics of municipal courts requires a number of judgment calls. National totals are a patchwork from different systems. Different entities provide data in different ways. The data described below represent my best effort to assemble the information I collected from state AOCs, from judicial reports, and from other public records as they currently exist. It provides a rough and empirically conservative view of the overall size and workings of the municipal court phenomenon; I hope this initial effort will support and spur greater empirical scrutiny.

(a) *Number of Municipal Courts.* — In counting municipal courts in each state, I limited myself to those courts controlled and staffed exclusively by cities, that is, true “municipal” courts. I thus excluded a variety of other types of local courts that operate in similar but not identical ways. Texas, for example, maintains approximately 800 justice courts that operate at the county level and have concurrent jurisdiction with municipal courts over misdemeanor state law violations.<sup>37</sup> These courts are created by the state, so they are not municipal, although most jurisdictions hold local judicial elections.<sup>38</sup> Oregon has thirty-three stand-alone justice courts, which are county-level courts whose judges are elected within districts or counties, and which are not accountable to the state judiciary.<sup>39</sup> South Carolina has approximately 200 county magistrate courts that operate much like its roughly 200 municipal courts.<sup>40</sup> In addition to its mayor’s courts, Ohio also has municipal courts, but despite their title they operate countywide and are created by the state legislature, not by individual cities.<sup>41</sup> These hundreds of additional local courts are not included in the Appendix total.<sup>42</sup>

<sup>37</sup> OFF. OF CT. ADMIN., STATE OF TEX. JUD. BRANCH, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2015, at iv, vi (2015).

<sup>38</sup> *Id.* at xvii. Texas designates both municipal and justice courts as “Local Trial Courts of Limited Jurisdiction.” *Id.* at vi.

<sup>39</sup> *Oregon Justice/Municipal Court Registry*, OR. JUD. DEP’T (Oct. 8, 2020), [https://www.courts.oregon.gov/courts/Documents/rpt\\_JP-Muni\\_Court\\_Registry\\_by\\_County.pdf](https://www.courts.oregon.gov/courts/Documents/rpt_JP-Muni_Court_Registry_by_County.pdf) [<https://perma.cc/GE6T-VKCS>]; *Justice Courts*, OR. SEC’Y OF STATE, <https://sos.oregon.gov/blue-book/Pages/state/judicial/justice-courts.aspx> [<https://perma.cc/EJW6-45BJ>]; see also *Other Courts*, OR. JUD. DEP’T, <https://www.courts.oregon.gov/courts/Pages/other-courts.aspx> [<https://perma.cc/75MU-S83P>] (“Municipal, county, and justice courts are ‘local’ courts outside the state-funded court system.”).

<sup>40</sup> DIANE DEPIETROPAOLO PRICE ET AL., NAT’L ASS’N OF CRIM. DEF. LAWS. & ACLU, SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA’S SUMMARY COURTS 9–10 (2016).

<sup>41</sup> *Judicial System Structure*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/JudSystem/default.asp> [<https://perma.cc/43H8-JU8G>].

<sup>42</sup> A few large cities like Boston and Philadelphia also each have a single municipal court, but those states do not generally authorize any other cities to create their own courts, and so they are not included. See *Massachusetts Court System*, MASS.GOV, <https://www.mass.gov/orgs/massachusetts-court-system>

Sometimes the number of municipal courts in a particular state is difficult to pin down. Since 2012, Arkansas city courts have been going through a multiyear process of consolidation with state district courts and being redesignated as “departments” of those district courts.<sup>43</sup> In Indiana, official sources provide conflicting data.<sup>44</sup> I was unable to find data regarding the number of West Virginia municipal courts more current than 1997.<sup>45</sup>

(b) *Criminal Caseloads.* — No centralized authority tracks municipal court dockets, and each state handles data collection differently, so there are no definitive data on their scale. Based on 2015 data, I estimate that a minimum of 3.5 million criminal cases are filed in municipal courts every year, excluding speeding and other traffic offenses. The actual total is substantially higher, since for ten states I was unable to locate criminal case data. New York State, for example, reports that over two million cases are filed in its town and village courts, but the data do not distinguish between traffic, civil, and criminal filings so I did not include them.<sup>46</sup> Similarly, Delaware does not distinguish between criminal, traffic, and other filings, and Arkansas does not distinguish between municipal and other local court filings. Only sixteen out of ninety North Dakota municipal courts report their caseloads to the state central authority.<sup>47</sup> I found no caseload data at all for municipal

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[<https://perma.cc/BKJ2-5PXY>] (listing all Massachusetts courts including Boston’s Municipal Court); *Minor Courts of Pennsylvania*, UNIFIED JUD. SYS. OF PA., <http://www.pacourts.us/courts/minor-courts> [<https://perma.cc/5VF9-GT7K>] (listing only the cities of Philadelphia and Pittsburgh as having municipal courts).

<sup>43</sup> See ARK. CODE ANN. §§ 16-17-1202, -1113 (2020). Once consolidated, they are referred to as local district courts. See, e.g., *Lonoke County v. City of Lonoke*, 430 S.W.3d 669, 670 (Ark. 2013) (referring to the municipal court as “Lonoke District Court”).

<sup>44</sup> Compare *Indiana Trial Courts: Types of Courts*, COURTS.IN.GOV, <https://www.in.gov/judiciary/2674.htm> [<https://perma.cc/L6VK-WZ96>] (listing “forty-seven city courts and twenty-eight town courts”), with *Organizational Chart of the Indiana Judicial System*, COURTS.IN.GOV, <https://www.in.gov/judiciary/2681.htm> [<https://perma.cc/6SQQ-ZKBU>] (listing forty-three city courts and twenty-two town courts).

<sup>45</sup> See D.C. Offutt, Jr., *President’s Page: The Future of the Judicial System in West Virginia*, W. VA. LAW., Dec. 1997, at 4, 4 (referencing “122 municipal courts”); cf. Chuck Smith, *The Courts*, W. VA. ENCYC. (citing Richard A. Brisbin, Jr., *The West Virginia Judiciary*, in WEST VIRGINIA’S STATE GOVERNMENT: THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES (1993)), <https://www.wvencyclopedia.org/articles/1655> [<https://perma.cc/22NN-DSPF>].

<sup>46</sup> See *City, Town & Village Courts*, N.Y. STATE UNIFIED CT. SYS. (Dec. 5, 2013), <http://nycourts.gov/courts/townandvillage/introduction.shtml> [<https://perma.cc/7JQK-5S2W>]; see also DENISE KRONSTADT & AMELIA T.R. STARR, *FUND FOR MOD. CTS., FINES AND FEES AND JAIL TIME IN NEW YORK TOWN AND VILLAGE JUSTICE COURTS: THE UNSEEN VIOLATION OF CONSTITUTIONAL AND STATE LAW 2* (2019) (citing aggregated state statistics).

<sup>47</sup> Letter from Sally Holewa, State Ct. Adm’r, State of North Dakota, to author (Mar. 10, 2017) (on file with the Harvard Law School Library) (“16 municipal courts . . . have voluntarily chosen to use the district court’s case management system.”); Spreadsheet from Sally Holewa, State Ct. Adm’r, State of North Dakota (on file with the Harvard Law School Library). The North Dakota judiciary is technically unified. See *infra* Table 2.

court filings of any kind in Colorado, Louisiana's mayor's courts, New Mexico,<sup>48</sup> Oklahoma, Oregon,<sup>49</sup> Rhode Island,<sup>50</sup> West Virginia,<sup>51</sup> and Wyoming<sup>52</sup> — over 1,100 municipal courts in total.<sup>53</sup>

These admittedly partial numbers indicate that the scale of municipal court case processing is substantial, representing at least one quarter of the thirteen million misdemeanor cases filed every year in the United States.<sup>54</sup> By way of comparison, there are 2,576 state trial courts of general jurisdiction that processed approximately 5.6 million criminal cases in 2015.<sup>55</sup> Ninety-four federal district trial courts, which have long received the lion's share of academic scrutiny, processed just 80,000 criminal cases that same year.<sup>56</sup> As with misdemeanors more generally, municipal courts remind us that the criminal process often devotes the fewest resources to counting and tracking official decisions that affect the largest number of people.<sup>57</sup>

(c) *Legal Penalties.* — Municipal courts have limited jurisdiction, which means they can only issue misdemeanor convictions, namely, offenses carrying a maximum sentence of one-year incarceration. The

<sup>48</sup> Letter from Barry Massey, Commc'n Officer, New Mexico Admin. Off. of the Cts., to author (Dec. 15, 2016) (on file with the Harvard Law School Library) (“[N]o municipal court reports its data to the Judiciary’s central state data repository.”).

<sup>49</sup> The Oregon AOC does not collect caseload data from municipal and justice courts. Telephone Interview with Tim Lewis, Oregon Admin. Off. of the Cts. (Sept. 8, 2017).

<sup>50</sup> The Rhode Island 2015 Annual Judicial Report does not include municipal courts although the state is legally unified. See R.I. JUDICIARY, RHODE ISLAND JUDICIARY ANNUAL REPORT (2015), <https://www.courts.ri.gov/PublicResources/annualreports/PDF/2015.pdf> [<https://perma.cc/6CHD-CC94>].

<sup>51</sup> Email from Tabettha D. Blevins, Senior Analyst, Div. of Ct. Servs., West Virginia Sup. Ct. of Appeals, to author (Jan. 4, 2017, 08:27 EST) (on file with the Harvard Law School Library) (“Municipal Courts do not report to the Administrative Office.”).

<sup>52</sup> Letter from Lily Sharpe, State Ct. Adm’r, Wyoming Sup. Ct., to author (Dec. 2016) (on file with author) (“We do not maintain reports for municipal courts.”).

<sup>53</sup> See *infra* Table 1.

<sup>54</sup> Since my original estimate of thirteen million misdemeanor cases omitted some municipal court caseloads, the percentage is only approximate. See also Stevenson & Mayson, *supra* note 35, at 742 & n.56, 764 (omitting municipal ordinance violations from national misdemeanor count).

<sup>55</sup> *State Court Organization 3.1c: Trial Courts*, NAT’L CTR. FOR STATE CTS., <http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true> [<https://perma.cc/Z2MK-BZS8>] (including all district, superior, county, and circuit courts); see also RICHARD Y. SCHAUFFLER ET AL., NAT’L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS 3 (2016), [http://www.courtstatistics.org/\\_data/assets/pdf\\_file/0028/29818/2015-EWSC.pdf](http://www.courtstatistics.org/_data/assets/pdf_file/0028/29818/2015-EWSC.pdf) [<https://perma.cc/9NHY-47AS>] (including district, superior, county, and circuit courts); CT. STAT. PROJECT, NAT’L CTR. FOR STATE CTS., STATE COURT CASELOAD DIGEST: 2016 DATA 6 (2018), [http://www.courtstatistics.org/\\_data/assets/pdf\\_file/0029/23897/sccd\\_2016.pdf](http://www.courtstatistics.org/_data/assets/pdf_file/0029/23897/sccd_2016.pdf) [<https://perma.cc/4W5R-32HY>] (including single-jurisdiction courts that process misdemeanor as well as felony cases, in addition to general jurisdiction courts in two-tier systems that process mostly felonies, but excluding courts of limited jurisdiction).

<sup>56</sup> *U.S. District Courts — Judicial Business 2015*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2015> [<https://perma.cc/PTQ6-YFUW>].

<sup>57</sup> See *infra* section ILC, pp. 1035–47 (discussing low-status cases).

typical statutory punishment authorized for a misdemeanor or municipal ordinance violation ranges between thirty days and six months incarceration; fines typically range between \$500 and \$2,500.<sup>58</sup>

State law sets the parameters of municipal ordinance penalties. Cities can usually opt for lesser penalties than the statutory maximum, although not always. Arkansas municipalities, for example, lack authority to set penalties lower than state law.<sup>59</sup> This means that Arkansas cities cannot insist on punishing conduct by a fine where the state punishes that same conduct through potential incarceration.<sup>60</sup>

(d) *Judicial Selection.* — The NCSC maintains a database that describes methods of judicial selection used in municipal courts.<sup>61</sup> Municipal court judges can be elected by city residents; appointed by the mayor, city manager, or city council; or some combination of appointment and approval. About half of all states require election and half require appointment, although some permit individual cities to choose their own methodology.<sup>62</sup> There is almost no empirical data on the effect of different selection processes, for example, on the levels of fines and fees collected.<sup>63</sup>

(e) *Lay or Lawyer Judges.* — The NCSC database also indicates the qualifications required for municipal court judges, specifically whether the judge must be a member of the state bar.<sup>64</sup> In the majority of states with municipal courts, law degrees are not required, at least not for all judges. In some states, requirements vary by jurisdiction: smaller cities can choose lay judges while larger cities must choose attorneys.<sup>65</sup> Courts that are not of record also often permit nonlawyer judges.<sup>66</sup> Many states require some form of training for nonlawyer judges which range from a few days to several months.<sup>67</sup>

<sup>58</sup> See *infra* Table 1.

<sup>59</sup> ARK. CODE ANN. § 14-55-502 (2020).

<sup>60</sup> See *id.*; *Wright v. Burton*, 648 S.W.2d 794, 796 (Ark. 1983) (declaring fine-only city ordinance invalid because state statute for same offense authorized incarceration as a penalty and municipality lacked authority to set penalties lower than state law).

<sup>61</sup> *Methods of Judicial Selection: Limited Jurisdiction Courts*, *supra* note 30.

<sup>62</sup> See *id.*

<sup>63</sup> See *infra* pp. 1025–26 (discussing scant data).

<sup>64</sup> *Methods of Judicial Selection: Limited Jurisdiction Courts*, *supra* note 30.

<sup>65</sup> See *id.*

<sup>66</sup> See, e.g., OR. REV. STAT. § 221.342(6) (2019) (“[A] municipal judge for any municipal court that becomes a court of record must be a member of the Oregon State Bar.”); *Town of Frisco v. Baum*, 90 P.3d 845, 847 (Colo. 2004) (stating that a judge must be an attorney only if municipal court is a court of record); *State v. Davis*, 371 P.3d 979, 983 (Mont. 2016).

<sup>67</sup> See, e.g., KAN. STAT. ANN. § 12-4114 (2019) (requiring a training program, exam, and continuing judicial education for nonlawyer municipal court judges); PRICE ET AL., *supra* note 40, at 10 (describing two-week training requirement for municipal court judges); GORDON M. GRILLER ET AL., NAT’L CTR. FOR STATE CTS. & STATE JUST. INST., MISSOURI MUNICIPAL COURTS: BEST PRACTICE RECOMMENDATIONS 15 (2015) [hereinafter MISSOURI MUNICIPAL COURTS: BEST PRACTICES]; Matt Ford, *When Your Judge Isn’t a Lawyer*, THE ATLANTIC (Feb. 5, 2017),



(f) *Appellate Structure.* — Municipal court appellate structures are highly idiosyncratic.<sup>68</sup> Almost all municipal courts are part of so-called “two-tiered” appellate review systems in which convictions are appealed, not to a state appellate court for error review but to a state trial court which holds a new trial de novo.<sup>69</sup> Many municipal courts are not of record and so there is no record to go to an appellate court at all, while a handful of trial courts review municipal court convictions based on a record created below, so-called “de novo review on the record.”<sup>70</sup> Whether review is de novo or de novo on the record may also depend on whether the municipal judge was an attorney or not.<sup>71</sup>

(g) *Unification and Data Collection.* — About half of all municipal courts are technically part of unified state judiciaries.<sup>72</sup> Judicial unification is both a legal and an operational matter, and the two often diverge. Legal unification refers to whether the state constitution or supreme court has declared the judiciary to be unified as a matter of law and thus where a centralized state authority has titular administrative responsibility for all courts in the state.<sup>73</sup> About one-half of all states are legally unified.<sup>74</sup> But even in purportedly unified states, as a practical matter municipal courts may operate autonomously without supervision or control from the state judicial apparatus.

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<https://www.theatlantic.com/politics/archive/2017/02/when-your-judge-isnt-a-lawyer/515568> [<https://perma.cc/3BB5-5DBP>] (citing a four-day certification course as the necessary prerequisite to become a justice of the peace in Montana).

<sup>68</sup> See CT. STAT. PROJECT, NAT’L CTR. FOR STATE CTS., STATE TRIAL COURTS WITH INCIDENTAL APPELLATE JURISDICTION, 2010 (2012), [http://www.courtstatistics.org/\\_data/assets/pdf\\_file/0017/24308/state\\_trial\\_courts\\_with\\_incidental\\_appellate\\_-\\_jurisdiction.pdf](http://www.courtstatistics.org/_data/assets/pdf_file/0017/24308/state_trial_courts_with_incidental_appellate_-_jurisdiction.pdf) [<https://perma.cc/733C-QSF3>].

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*; *infra* Table 2.

<sup>71</sup> See, e.g., MONT. CODE ANN. §§ 3-10-101, 25-33-301 (2019); OR. REV. STAT. §§ 221.359, .342(6), .390 (2019) (establishing de novo appeals from courts not of record, in which judges need not be attorneys); *Town of Frisco*, 90 P.3d at 847; *Davis*, 371 P.3d at 983; see also *infra* Table 2 (describing variations of de novo review requirements).

<sup>72</sup> See William Raftery, *Unification and “Bragency”: A Century of Court Organization and Reorganization*, JUDICATURE, May–June 2013, at 337, 344 [hereinafter Raftery, *Unification and “Bragency”*].

<sup>73</sup> See William E. Raftery, *Efficiency of Unified vs. Non-unified State Judiciaries: An Examination of Court Organizational Performance 2–3*, 55–56 (Dec. 2015) (Ph.D. dissertation, Virginia Commonwealth University) [hereinafter Raftery, *Efficiency*], <https://scholarscompass.vcu.edu/cgi/view-content.cgi?article=5117&context=etd> [<https://perma.cc/9Z5W-RQY7>] (using a thirty-one-factor test to evaluate widely varying levels of unification in twenty-four states); Yeazell, *supra* note 8, at 135–36 (describing the history of state court unification during the early twentieth century in which many states assumed supervision over and funding responsibility for what had been local courts and thereby converted local courts into state district courts); see also Harry O. Lawson, *State Court System Unification*, 31 AM. U. L. REV. 273, 275 (1982) (noting that a state undergoing unification may choose to “create a single trial court whose jurisdiction does not include municipal matters”).

<sup>74</sup> See Raftery, *Unification and “Bragency,” supra* note 72, at 337, 344; see also *infra* Table 2 (identifying seventeen nonunified states including Arkansas, Colorado, Delaware, Indiana,

Every state is a bit different. At the fully unified end of the spectrum, municipal courts are strongly integrated into state court administrations. For example, municipal courts in New Jersey and Kansas are part of unified systems in which they are subject to centralized supervision and regulation,<sup>75</sup> and they regularly report their caseloads to the AOC.<sup>76</sup> In other unified states, by contrast, municipal courts are less integrated. Alabama's state judiciary is legally unified<sup>77</sup> and municipal courts report their caseloads to the AOC,<sup>78</sup> but the U.S. Department of Justice nevertheless describes these municipal courts as highly autonomous in practice: "In contrast to district and circuit courts, which are part of the Alabama Unified Court System and subject to the oversight of the AOC, municipal courts in Alabama report to their city councils. The AOC has no authority to discipline or sanction municipal court judges or employees."<sup>79</sup> Missouri's judiciary has technically been unified since 1976,<sup>80</sup> but prior to 2015 the state supreme court did not meaningfully exercise its supervisory authority over the state's hundreds of municipal courts.<sup>81</sup> North Dakota's system is unified, but only sixteen out of the state's ninety municipal courts actually report their data to the AOC.<sup>82</sup> Oklahoma is legally unified,<sup>83</sup> but the state AOC provides no data regarding its 340 or so municipal courts.<sup>84</sup>

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Louisiana, Mississippi, Montana, Nevada, New Mexico, Ohio, Oregon, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming).

<sup>75</sup> See *infra* Table 2.

<sup>76</sup> N.J. JUDICIARY, ANNUAL REPORT OF THE NEW JERSEY COURTS: COURT YEAR 2017–2018, at 27 (2018), [https://njcourts.gov/public/assets/annualreports/AnnualReportCY18\\_web.pdf](https://njcourts.gov/public/assets/annualreports/AnnualReportCY18_web.pdf) [<https://perma.cc/467N-PUE3>] (reporting municipal court caseloads); OFF. OF JUD. ADMIN., KAN. SUP. CT., ANNUAL REPORT OF THE KANSAS MUNICIPAL COURTS FY 2016, at 1, <https://www.kscourts.org/KSCourts/media/KsCourts/Municipal%20Courts/MunicipalCaseloadAnnualReportFY2016.pdf> [<https://perma.cc/V2WT-64AK>].

<sup>77</sup> ALA. CONST. art. VI, § 139(a).

<sup>78</sup> ALA. ADMIN. OFF. OF CTS., ALABAMA UNIFIED JUDICIAL SYSTEM: FISCAL YEAR 2015 ANNUAL REPORT AND STATISTICS 160–63 (2015), <http://www.alacourt.gov/Annual%20Reports/2015AOCAnnualReport.pdf> [<https://perma.cc/XU7K-Y33R>].

<sup>79</sup> U.S. ATT'Y S. DIST. OF ALA., U.S. DEP'T OF JUST., ALABAMA MUNICIPAL COURTS OBSERVATION PROJECT: SOUTHERN DISTRICT OF ALABAMA 2 (2017), <https://www.justice.gov/usao-sdal/page/file/934936/download> [<https://perma.cc/W3EY-4JTA>]; see also ALA. CONST. art. VI, § 149 ("Adequate and reasonable appropriations shall be made by the legislature for the entire unified judicial system, exclusive of probate courts and municipal courts.").

<sup>80</sup> Raftery, *Unification and "Bragency," supra* note 72, at 344.

<sup>81</sup> See MISSOURI MUNICIPAL COURTS: BEST PRACTICES, *supra* note 67, at 7, 10.

<sup>82</sup> Spreadsheet from Sally Holewa, *supra* note 47. This data represents caseloads from only sixteen out of ninety North Dakota municipal courts; they are the only ones to report their caseloads to the state central authority. Letter from Sally Holewa, *supra* note 47.

<sup>83</sup> *Petuskey v. Cannon*, 742 P.2d 1117, 1120 (Okla. 1987) ("Art. VII of the Oklahoma Constitution provides for a unified system of judicial management under the authority of the Supreme Court.").

<sup>84</sup> I received no answer to my records request to the Oklahoma AOC, and the state judiciary website provides no data regarding municipal courts. See OKLA. STATE CTS. NETWORK, <https://www.oscn.net> [<https://perma.cc/GD64-3Q9W>].

At the nonunified end of the spectrum, municipal courts can operate off the state grid altogether. New Mexico's judiciary is not unified and its municipal courts operate entirely autonomously. When I asked the New Mexico AOC for caseload data, I was informed that "no municipal court reports its data to the Judiciary's central state data repository" so that my only recourse would be to call each of the eighty-one municipal courts individually to ask for that information.<sup>85</sup> Similarly, Colorado's judiciary is not unified and its municipal courts do not report their data to the AOC. Sometimes it's just confusing. Delaware is not unified and the Delaware AOC states that "Alderman's Courts are not part of the Delaware court system. They are independent entities within their respective Municipalities."<sup>86</sup> Nevertheless, the Rehoboth Beach aldermanic court website describes the court as "fall[ing] under the Jurisdiction of the State of Delaware Chief Justice" and notes that "[t]he Alderman is nominated by the Governor and confirmed by State Senate."<sup>87</sup>

(h) *Aggregate Fines and Fees.* — It was especially difficult to obtain data on fines and fees collected by municipal courts,<sup>88</sup> notwithstanding the scholarly and political attention that has been lavished on the issue since the Ferguson Report.<sup>89</sup> The U.S. Census Bureau collects data from cities regarding revenue received from "fines and forfeits," which the Bureau defines as:

Receipts from penalties imposed for violations of law; civil penalties (e.g., for violating court orders); court fees if levied upon conviction of a crime or violation; court-ordered restitutions to crime victims where government actually collects the monies; and forfeits of deposits held for performance guarantees or against loss or damage (such as forfeited bail and collateral).<sup>90</sup>

The amount of city fines-and-forfeits revenue is related to but not the same as the amount collected by municipal courts. Municipal courts are the primary institution through which cities collect criminal and traffic

<sup>85</sup> See Letter from Barry Massey, *supra* note 48 (noting the exception of the Albuquerque Metro Court, which does report its data).

<sup>86</sup> ADMIN. OFF. OF THE CTS., DEL. CTS., ALDERMAN'S COURTS, STATE OF DELAWARE: 2018 ANNUAL REPORT STATISTICAL INFORMATION 2, <https://courts.delaware.gov/aoc/annualreports/fy18/doc/Alderman2018Statistics.pdf> [<https://perma.cc/LYV3-9UW2>].

<sup>87</sup> *Alderman Court 37*, CITY OF REHOBOTH BEACH, <https://www.cityofrehoboth.com/government/departments/alderman-court-37> [<https://perma.cc/YTN5-XBRG>].

<sup>88</sup> Special thanks to Harvard Law School librarian Michelle Pearse who unearthed this data and helped me understand what was available. Her description of the census data extraction methodology is provided below in connection with Table 3, in footnote 624.

<sup>89</sup> See FERGUSON REPORT, *supra* note 18; COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 2 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) [<http://perma.cc/F7VB-ZNQZ>].

<sup>90</sup> *Government Finance and Employment Classification Manual: Descriptions of Miscellaneous General Revenue Categories*, U.S. CENSUS BUREAU, [https://www.census.gov/govs/www/class\\_ch7\\_misc.html](https://www.census.gov/govs/www/class_ch7_misc.html) [<https://perma.cc/5RSS-2EKU>]. For full methodology, see *infra* note 624. Some of the revenue in the database is imputed, not reported.

finances and fees, but cities share some of that revenue with states and counties. Conversely, municipal courts are not the only revenue collectors: in states without municipal courts (and even in states with them), fines and forfeits are also collected by state and county courts and sometimes shared with cities. According to census data contained in Table 3, the total national fines-and-forfeits revenue that goes to all state and local governments amounts to nearly \$15 billion. Of that, city revenues alone represent approximately \$4.7 billion. In those thirty states that have municipal courts, cities get approximately \$3.1 billion.<sup>91</sup>

Census revenue data offers at best an indirect, partial picture of collections from municipal courts, but I was only able to locate direct data on actual collections for ten states, which together collected a total of nearly \$2 billion.<sup>92</sup> Sometimes that information was consistent with census data. According to the Goldwater Institute, Arizona municipal courts collect \$167 million in fines and fees of which cities keep about half.<sup>93</sup> The census similarly reports that Arizona cities receive approximately \$80 million in fines and fees. In Nevada, a 2003 judicial study found that the state's seventeen municipal courts collected \$24 million in fines, fees and other assessments, representing forty-two percent of all revenues collected by courts in the state, the largest share of any type of court.<sup>94</sup> The study also indicated that the vast majority of municipal court collections are deposited directly into city general funds, which are then used to fund those courts.<sup>95</sup> This is consistent with census data, which indicate that cities received a total of \$38.8 million in fines and forfeit revenue from all sources. In Texas, the AOC reported that Texas municipal courts collected \$697.4 million in 2015,<sup>96</sup> while the census indicates that cities received \$353.5 million.

<sup>91</sup> Over \$1.1 billion of that money goes to New York cities alone.

<sup>92</sup> See *infra* Table 3 (providing data on municipal court collections for Arizona, Georgia, Missouri, Nevada, New Jersey, New York, South Carolina, Texas, Utah, and Washington); cf. Emily Shaw, *Where Local Governments Are Paying the Bills with Police Fines*, SUNLIGHT FOUND. (Sept. 26, 2016, 12:02 PM), <https://sunlightfoundation.com/2016/09/26/where-local-governments-are-paying-the-bills-with-police-fines> [https://perma.cc/7M7N-BBAF] (“[W]e received no information from our public records requests for detailed data on the kind and amount of fines levied by a sample of cities. Frankly, it’s challenging to even get *aggregate* information on fines issued by local law enforcement and local courts.”).

<sup>93</sup> MARK FLATTEN, GOLDWATER INST., CITY COURT: MONEY, PRESSURE AND POLITICS MAKE IT TOUGH TO BEAT THE RAP 6, 7 (2017) [hereinafter FLATTEN, CITY COURT: MONEY, PRESSURE AND POLITICS].

<sup>94</sup> SUP. CT. OF NEV. CT. FUNDING COMM’N, NEVADA JUDICIAL BRANCH FUNDING: RESOURCES AND OPERATIONS DURING FISCAL YEAR 2003, at 36, 37 tbl.9 (2005) (documenting \$22,385,583 in fines and \$1,688,501 in administrative assessments).

<sup>95</sup> *Id.* at 35.

<sup>96</sup> Spreadsheet from Texas Adm’r of Cts. (on file with the Harvard Law School Library) (providing this information in response to my 2015 records request); see also STATE OFF. OF CT. ADMIN., MUNICIPAL COURT FINANCIAL MANAGEMENT HANDBOOK FOR TEXAS CITIES 19–23 (2009), <https://www.txcourts.gov/media/478285/mn-finmgmthndbk-deco7.pdf> [https://perma.cc/29Z2-33VJ]

Sometimes the collection/revenue numbers diverge. For example, the New Jersey Supreme Court Working Group on the Municipal Courts states that “Municipal Courts collect in excess of \$400 million annually. Approximately \$220 million of that total is distributed by Municipal Courts to municipalities.”<sup>97</sup> Census data, by contrast, reports that New Jersey cities received only \$98.8 million in fines and forfeit revenues.<sup>98</sup> Often it is impossible to discern the relationship between various accountings. When I asked North Dakota for data on fines and fees collected from misdemeanor cases, the AOC reported approximately \$14 million collected from all courts, including the few municipal courts that report to the AOC.<sup>99</sup> The census reports that North Dakota cities received \$8.0 million in fines and forfeit revenue. Presumably that second number is included in the first, but maybe it isn’t. For most states, there are no direct data at all.<sup>100</sup>

As a result, we still do not know how much revenue most municipal courts collect. If we imagine that, like New Jersey and Arizona, cities get to keep about half of their municipal court collections and the rest goes to the state and other governments, that could mean that U.S. municipal courts are collecting on the order of seven billion dollars each year. On the other hand, if cities are also getting a percentage of state court collections, the municipal court share of total city revenues would be smaller, which would indicate a lower municipal court collection rate. We don’t know enough to say.

I decided to include here all the data I could find, even though their full significance and even accuracy remain unclear. Table 3 contains census fines and forfeits data and, separately, all other collections data for states with municipal courts. An electronic database available on the *Harvard Law Review* website contains all 2018 fines and forfeits

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(documenting varying percentages of municipal court collections remitted to the state and/or retained by cities); Tyler Whitson, *Why Your Speeding Ticket Doesn't Pay for What You Think It Does*, AUSTIN MONITOR (Apr. 22, 2015), <https://www.austinmonitor.com/stories/2015/04/why-your-speeding-ticket-doesnt-pay-for-what-you-think-it-does> [<https://perma.cc/4XL7-STJY>] (noting that municipal courts “send[] the bulk of the[ir] revenue back to the state”).

<sup>97</sup> N.J. CTS., REPORT OF THE SUPREME COURT WORKING GROUP ON THE MUNICIPAL COURTS 20 (2019), <https://njcourts.gov/courts/assets/supreme/reports/2019/supremecrtwrkgrprrpt.pdf> [<https://perma.cc/P3NS-Q4DG>].

<sup>98</sup> Spreadsheet on file with the Harvard Law School Library, derived from U.S. public use ASCII files.

<sup>99</sup> Criminal Fines Spreadsheet from Sally Holewa, State Ct. Adm’r (Mar. 10, 2017) (on file with the Harvard Law School Library) (includes Fines, Bond Forfeiture, Indigent Recoupment, Criminal Administration, Indigent Defense Application, Indigent Defense/Facility, Community Service Supervision, and Victim Witness fees collected statewide from all courts, not only municipal courts).

<sup>100</sup> See, e.g., NAT’L CTR. FOR STATE CTS., REPORT TO THE JOINT INTERIM COMMITTEE ON STATE JUSTICE SYSTEM REVENUES app. A (2010), <https://ncsc.contentdm.oclc.org/digital/collection/financial/id/167> [<https://perma.cc/63MS-5979>] (studying court collections in seven states but omitting municipal courts).

census data for all cities in all states.<sup>101</sup> I hope that making these (admittedly limited) data more accessible here will assist others in moving this vital conversation along.

2. *A Thicker Picture: Municipal Court Culture and Character.* — As these statistics show, states vary widely in how they create and deploy their municipal courts. But institutional data do not capture the unique flavor of individual jurisdictions, or how these various characteristics intersect — sometimes controversially — on the ground. The following descriptions offer a thicker, more nuanced picture of municipal court culture. The picture is admittedly partial: we lack good information about the workings of most municipal courts. Nevertheless, these samples suggest the range of issues to which municipal courts can give rise.

South Carolina is a case study in municipal court informality. Its 200 municipal courts are speedy and often lacking in due process. Cases are commonly brought and prosecuted by the arresting police officer, not by attorney prosecutors;<sup>102</sup> judges are not required to have bachelor's degrees, let alone law degrees;<sup>103</sup> defense counsel is typically lacking even where defendants are constitutionally entitled to representation.<sup>104</sup> As a series of critical reports by the National Association of Criminal Defense Lawyers and the ACLU points out, many defendants are thus convicted summarily and jailed with no attorneys present in the courtroom at all.<sup>105</sup> When discussing in 2007 the routine failure to appoint counsel — in clear violation of the Supreme Court's mandate in *Alabama v. Shelton*<sup>106</sup> — the then-Chief Justice of the South Carolina Supreme Court was unapologetic:

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<sup>101</sup> Special thanks to the Harvard Law School Library and Michelle Pearse in particular for making these data available and accessible. A handful of researchers have relied on the census to quantify municipal reliance on criminal fines and fees, but none of them have shared national data for all states. See, e.g., Mike Maciag, *Addicted to Fines*, GOVERNING (Aug. 21, 2019), <https://www.governing.com/gov-data/other/local-governments-high-fine-revenues-by-state.html> [<https://perma.cc/Z752-VKKK>]; Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), <https://priceonomics.com/the-fining-of-black-america> [<https://perma.cc/G59S-ZDC9>]; Shaw, *supra* note 92; see also Dick Carpenter, Ricard Pochkhanawala & Mindy Menjou, *Municipal Fines and Fees: A 50-State Survey of State Laws*, INST. FOR JUST. (Jan. 1, 2020), <https://ij.org/report/fines-and-fees-home> [<https://perma.cc/LJN4-J5YY>] (no data).

<sup>102</sup> PRICE ET AL., *supra* note 40, at 19.

<sup>103</sup> Compare S.C. CODE § 14-25-15 (2019) (eligibility for municipal court judge with no degree requirement), with *id.* § 22-1-10(B)(2)(b) (eligibility for magistrate court judge requiring four-year baccalaureate degree after 2005).

<sup>104</sup> See ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIM. DEF. LAWS., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 15 (2009) (documenting South Carolina's flouting of the right to counsel).

<sup>105</sup> PRICE ET AL., *supra* note 40, at 7; see also ALISA SMITH ET AL., NAT'L ASS'N OF CRIM. DEF. LAWS., RUSH TO JUDGMENT: HOW SOUTH CAROLINA'S SUMMARY COURTS FAIL TO PROTECT CONSTITUTIONAL RIGHTS 16 (2017), <https://www.nacdl.org/getattachment/ab9d6bo3-2b45-4235-890e-235461a9bb2d/rush-to-judgment-how-south-carolina-s-summary-courts-fail-to-protect-constitutional-rights.pdf> [<https://perma.cc/EW44-7ZLJ>].

<sup>106</sup> 535 U.S. 654 (2002).

*Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would have the right to counsel probably . . . by dragooning lawyers out of their law offices to take these cases in every magistrate's court in South Carolina, and I have simply told my magistrates that we just don't have the resources to do that. So I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.<sup>107</sup>

Municipal and county magistrate courts constitute the primary criminal adjudicators in South Carolina.<sup>108</sup> While caseloads are not publicly reported on the state court website, a 2016 records request revealed that municipal courts process nearly 90,000 criminal cases every year.<sup>109</sup>

By way of contrast, Seattle's enormous municipal court has undergone a series of reforms in the past decade making it a relatively formal, transparent, high-functioning institution. Caseloads and other court data are publicly accessible from a comprehensive website.<sup>110</sup> The court runs numerous specialty and diversion programs.<sup>111</sup> According to the NCSC, the court maintains one of the best public defense systems of any large urban area.<sup>112</sup>

Since the Ferguson Report, perhaps the most prominent public criticism of municipal and other lower courts is their heavy use of incarceration to raise revenue and extract payment, the so-called "new debtor's prison."<sup>113</sup> New Jersey has over 500 municipal courts that collect over \$400 million a year, and they have been excoriated in this regard.<sup>114</sup> A committee convened by the state supreme court expressed "profound[] concern[] with the excessive imposition of financial obligations . . . [that] ultimately have little to do with the fair administration of justice."<sup>115</sup> The committee also criticized the courts' "excessive use of bench warrants and license suspensions as collection mechanisms" and "the

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<sup>107</sup> BORUCHOWITZ ET AL., *supra* note 104, at 15 (alterations in original) (quoting Chief Justice Jean Hoefer Toal, S.C. Bar Ass'n, 22nd Annual Criminal Law Update (Jan. 27, 2007)).

<sup>108</sup> SMITH ET AL., *supra* note 105, at 9.

<sup>109</sup> *Id.* at 10.

<sup>110</sup> *Seattle Municipal Court, Criminal Case Filings, supra* note 1.

<sup>111</sup> See GORDON GRILLER ET AL., NAT'L CTR. FOR STATE CTS., MUNICIPAL COURT, CITY OF SEATTLE, WASHINGTON: IMPROVING CRIMINAL CASE PROCESSING, at ii–iii (2010), [http://www.sji.gov/wp/wp-content/uploads/Seattle\\_Municipal\\_Court\\_Improving\\_Criminal\\_Case\\_Processing\\_Final\\_Report.pdf](http://www.sji.gov/wp/wp-content/uploads/Seattle_Municipal_Court_Improving_Criminal_Case_Processing_Final_Report.pdf) [<https://perma.cc/W8BM-Q95E>].

<sup>112</sup> *See id.* at iv.

<sup>113</sup> See generally SARAH ALEXANDER ET AL., ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010) [hereinafter ACLU, IN FOR A PENNY], [https://www.aclu.org/sites/default/files/field\\_document/InForAPenny\\_web.pdf](https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf) [<https://perma.cc/Q4P2-JDL9>].

<sup>114</sup> N.J. CTS., REPORT OF THE SUPREME COURT COMMITTEE ON MUNICIPAL COURT OPERATIONS, FINES, AND FEES 2, 12 (2018), <https://www.njcourts.gov/courts/assets/supreme/reports/2018/sccmcoreport.pdf> [<https://perma.cc/R52X-7FNN>].

<sup>115</sup> *Id.* at 2 (emphasis omitted).

excessive use of discretionary contempt assessments.”<sup>116</sup> In Ohio, a 2013 ACLU report described municipal and mayor’s courts’ financial practices as illegal and “draconian.”<sup>117</sup> Courts in Colorado,<sup>118</sup> Georgia,<sup>119</sup> Louisiana,<sup>120</sup> Wisconsin,<sup>121</sup> and Texas,<sup>122</sup> among others, have been criticized in this same vein.<sup>123</sup>

Municipal courts are not the only lower courts that self-fund through fines and fees: some state district and county courts are funded by local revenues as well.<sup>124</sup> But municipal courts provide some of the most extreme examples. Missouri municipalities like the one in Ferguson are heavily reliant on their courts for revenue, as are many towns in Louisiana, Texas, Georgia, and Oklahoma, which receive ten percent or more of their budgets from fines and fees.<sup>125</sup> All of these states have municipal courts. By contrast, the average U.S. city collects only two percent of its operating budget from fines and fees.<sup>126</sup>

Municipal reliance on fines and fees is a regressive redistributive policy: by definition it impacts the poor more heavily than the

<sup>116</sup> *Id.* (emphasis omitted).

<sup>117</sup> ACLU OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO’S DEBTORS’ PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES 5 (2013), [http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013\\_04.pdf](http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf) [<https://perma.cc/KA2V-6YFF>] (documenting how Ohio mayor’s courts routinely incarcerate defendants for failure to pay fines and fees in violation of both federal and Ohio constitutional law).

<sup>118</sup> See BECCA CURRY & REBECCA WALLACE, ACLU OF COLO., JUSTICE DERAILED: A CASE STUDY OF ABUSIVE AND UNCONSTITUTIONAL PRACTICES IN COLORADO CITY COURTS 4 (2017), <https://aclu-co.org/wp-content/uploads/2017/10/JUSTICE-DERAILED-web.pdf> [<https://perma.cc/P6BW-FER4>] (“[A]fter conviction, it is poor people who are jailed when they are unable to make payments to the court, contributing to a still-prevalent system of unlawful debtor’s prisons in some municipalities.”).

<sup>119</sup> ACLU, IN FOR A PENNY, *supra* note 113, at 7.

<sup>120</sup> *Id.* at 6.

<sup>121</sup> See JOHN PAWASARAT & MARILYN WALZAK, JUST. INITIATIVES INST., CITED IN MILWAUKEE: THE COST OF UNPAID MUNICIPAL CITATIONS 1 (2015), [https://dc.uwm.edu/cgi/viewcontent.cgi?article=1000&context=eti\\_pubs](https://dc.uwm.edu/cgi/viewcontent.cgi?article=1000&context=eti_pubs) [<https://perma.cc/HM3N-NU4Q>].

<sup>122</sup> See Kendall Taggart & Alex Campbell, *In Texas It’s a Crime to Be Poor*, BUZZFEED NEWS (Oct. 7, 2015, 5:21 PM), <https://www.buzzfeednews.com/article/kendalltaggart/in-texas-its-a-crime-to-be-poor> [<https://perma.cc/ALP3-8Q8K>].

<sup>123</sup> See ACLU, IN FOR A PENNY, *supra* note 113, at 5–8 (describing debtor’s prison practices in Georgia, Louisiana, Michigan, Ohio, and Washington); ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf) [<https://perma.cc/8RPA-CLB4>].

<sup>124</sup> See U.S. COMM’N ON C.R., *supra* note 33, at 26–27 (listing locally funded courts).

<sup>125</sup> Nick Sibilla, *Nearly 600 Towns Get 10% of Their Budgets (or More) from Court Fines*, FORBES (Aug 29, 2019, 12:45 PM), [www.forbes.com/sites/nicksibilla/2019/08/29/nearly-600-towns-get-10-of-their-budgets-or-more-from-court-fines](http://www.forbes.com/sites/nicksibilla/2019/08/29/nearly-600-towns-get-10-of-their-budgets-or-more-from-court-fines) [<https://perma.cc/D5VK-G36A>]; Maciag, *supra* note 101.

<sup>126</sup> Sibilla, *supra* note 125; see also U.S. COMM’N ON C.R., *supra* note 33, at 21 (finding that the median city with population over 5,000 receives less than one percent of revenue from fines and fees).



wealthy.<sup>127</sup> It is also implemented in racially disparate ways. The U.S. Commission on Civil Rights found that “[m]unicipalities that rely heavily on revenue from fines and fees have a higher than average percentage of African American and Latino populations relative to the demographics of the median municipality,”<sup>128</sup> and that in practice, “[m]unicipalities target poor citizens and communities of color for fines and fees.”<sup>129</sup> Another study concluded that “[t]he best indicator that a government will levy an excessive amount of fines is if its citizens are Black.”<sup>130</sup>

Jurisprudentially speaking, the most prominent feature of municipal courts is the threat of conflict that arises from the tight connection between judges and city officials. This conflict can manifest in a number of ways. In Ohio mayor’s courts, the town mayor, who need not be a lawyer, can preside as judge.<sup>131</sup> Under Ohio law, mayors also have the power of police officers, although they are not permitted to preside as judges over cases where they were also the arresting officer.<sup>132</sup> The U.S. Supreme Court has considered and upheld the general constitutionality of the Ohio mayoral court scheme three different times in the past century.<sup>133</sup>

Conflicts arise even when the mayor is not sitting as judge. Arizona, for example, has eighty-two city courts that process about one million civil and criminal cases every year, more than half of Arizona’s total judicial docket.<sup>134</sup> City court judges are appointed by mayors and city councils; they do not need to be lawyers.<sup>135</sup> A series of 2017 reports by the Goldwater Institute criticized the politicization of these local courts, pointing out that “city court . . . judges [are] completely beholden to the political branch of government: the city council, which not only appoints and retains them, but can fire them at any time if council members

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<sup>127</sup> See NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 9, at 223, 225–26, 239–40 (discussing misdemeanor fines and fees as a form of regressive taxation).

<sup>128</sup> U.S. COMM’N ON C.R., *supra* note 33, at 3.

<sup>129</sup> *Id.* at 4.

<sup>130</sup> Kopf, *supra* note 101 (listing top 100 municipalities that rely most heavily on fines).

<sup>131</sup> ACLU OF OHIO, *supra* note 117, at 7.

<sup>132</sup> OHIO REV. CODE § 1905.20(A), (C) (2020) (“The mayor of a municipal corporation has, within the corporate limits, all the powers conferred upon sheriffs to suppress disorder and keep the peace.” *Id.* § 1905.20(A)).

<sup>133</sup> See *Ward v. Village of Monroeville*, 409 U.S. 57, 60–61 (1972); *Dugan v. Ohio*, 277 U.S. 61, 65 (1928); *Tumey v. Ohio*, 273 U.S. 510, 534 (1927).

<sup>134</sup> FLATTEN, CITY COURT: MONEY, PRESSURE AND POLITICS, *supra* note 93, at 5–6.

<sup>135</sup> *Id.* at 4, 6.

determine there is sufficient cause.”<sup>136</sup> As a result, judges may be under pressure to raise revenue or to provide special treatment to city insiders.<sup>137</sup>

In a similar vein, until 2008 Utah justice court judges were appointed by cities and under overt pressure to raise revenue for their municipalities.<sup>138</sup> The State Court Administrator in Utah related that judges would complain to him about the pressure: “[M]y mayor told me I got to get the revenue up,” said one judge.<sup>139</sup> Reforms created a county-wide judicial selection committee and retention elections in order to lessen the conflict.<sup>140</sup>

The appearance of conflict can also arise because municipal court legal actors maintain multiple legal roles and political relationships. In New Jersey, for example, state legislators may also work as prosecutors or defense attorneys.<sup>141</sup> A recent newspaper headline proclaimed, “Municipal courts: Local lawmakers who profit from them could derail reform.”<sup>142</sup> The article documented state lawmakers who opposed legislative court reforms while they received additional salaries as municipal court prosecutors and public defenders.<sup>143</sup> Similarly in New York, some village judges “admitted that as long as the party in control of the legislature and in control of the court was the same, there was informal and casual contact between the court and other [municipal] officials” that could lead to “collaboration as well as some advocacy.”<sup>144</sup>

No discussion of municipal courts would be complete without acknowledging the powerful and opaque role of the court clerk. In some courts, clerks are authorized to set bail, issue warrants, and take guilty

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<sup>136</sup> *Id.* at 2; *see also* MARK FLATTEN, GOLDWATER INST., CITY COURT: ELECTIONS PROTECT JUDGES FROM “GOOD-OLD-BOY” SYSTEM OF APPOINTMENT 2–3 (2017) [hereinafter FLATTEN, CITY COURT: ELECTIONS], <https://goldwaterinstitute.org/wp-content/uploads/2017/11/Yuma-paper-final-white-cover-1.pdf> [<https://perma.cc/JHH9-9F4L>].

<sup>137</sup> FLATTEN, CITY COURT: MONEY, PRESSURE AND POLITICS, *supra* note 93, at 2; FLATTEN, CITY COURT: ELECTIONS, *supra* note 136, at 2–3; *cf.* ARIZ. ADMIN. OFF. OF THE CTS., MUNICIPAL COURT GOVERNANCE ROLES AND RESPONSIBILITY 11 (2017), <https://www.azcourts.gov/Portals/0/MunicipalCourtRolesandResponsibilities.pdf> [<https://perma.cc/NBX8-JoLF>] (outlining guidelines attempting to protect judges from undue influence).

<sup>138</sup> Newton et al., *supra* note 5, at 51–53 (describing official commission concerns with justice court revenue generation).

<sup>139</sup> FLATTEN, CITY COURT: MONEY, PRESSURE AND POLITICS, *supra* note 93, at 5.

<sup>140</sup> Newton et al., *supra* note 5, at 52; *see id.* at 53 (describing continued postreform pressures on judges to generate revenue).

<sup>141</sup> Kala Kachmar & Susanne Cervenka, *Municipal Courts: Local Lawmakers Who Profit from Them Could Derail Reform*, ASBURY PARK PRESS (Aug. 8, 2018, 5:00 AM), <https://www.app.com/story/news/investigations/watchdog/investigations/2018/08/08/municipal-court-reform-nj/818677002> [<https://perma.cc/WF5M-PPRF>].

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Leib, *Local Judges*, *supra* note 5, at 721.

pleas.<sup>145</sup> They often explain legal entitlements — sometimes incorrectly — to defendants regarding their right to counsel, or regarding the threat of incarceration for failure to pay.<sup>146</sup> They may communicate with defendants, police, prosecutors, judges, and counsel in ways that parties are not permitted to do, and that can alter case outcomes. As described in the Ferguson report, for example, Ferguson’s Court Clerk “is employed under the Police Chief’s supervision [and] plays the most significant role in managing the court and exercises broad discretion in conducting the court’s daily operations,” including accepting guilty pleas and disposing of charges without judicial oversight.<sup>147</sup> In these ways, court clerks perform all sorts of functions deemed quintessentially judicial in other court systems, and can wield enormous influence that makes them central to municipal courts’ informal culture.<sup>148</sup>

3. *Ferguson*. — The poster child for municipal court failure is the court in Ferguson, Missouri, whose high-profile dysfunctions put the issue of municipal court revenue collection on the political map.<sup>149</sup> In the aftermath of the fatal police shooting of Michael Brown, an unarmed Black teenager, the U.S. Department of Justice issued a scathing report. The 2015 report described the Ferguson Police Department, prosecutorial practices, and the local court system as collectively filled with rampant constitutional violations, intentional racism, and the crass pursuit of revenue. The report concluded:

Ferguson’s law enforcement practices are shaped by the City’s focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson’s police department, contributing to a pattern of unconstitutional policing, and has also shaped

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<sup>145</sup> CURRY & WALLACE, *supra* note 118, at 13–14 (outlining how defendants in one Colorado court are expected to plead guilty to clerks in violation of Colorado court rules); JENNIFER TURNER, ACLU, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 16 (2018), [https://www.aclu.org/sites/default/files/field\\_document/022118-debtreport.pdf](https://www.aclu.org/sites/default/files/field_document/022118-debtreport.pdf) [<https://perma.cc/22QF-Y2MW>] (telling story of a court clerk who threatened defendant with arrest if he did not pay); *see* Shadwick v. City of Tampa, 407 U.S. 345, 348, 352 (1972) (upholding municipal clerks’ authority to issue warrants).

<sup>146</sup> *See* AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 25 (2004), <https://www.in.gov/publicdefender/files/ABAGideon%27sBrokenPromise.pdf> [<https://perma.cc/EW2A-V44X>] (discussing how in many Georgia courts, clerks instruct defendants to sign counsel waiver forms or their cases will not be called).

<sup>147</sup> FERGUSON REPORT, *supra* note 18, at 8.

<sup>148</sup> *See id.* (“[T]he Court Clerk and assistant clerks routinely perform duties that are, for all practical purposes, judicial.”); *cf.* Petuskey v. Cannon, 742 P.2d 1117, 1122 (Okla. 1987) (enjoining clerk from his practice of collecting fines and fees without a judicial hearing and holding that the “district court clerk has no authority to act in a judicial capacity and demand payment of fines, fees and costs, until there has been an adjudication that the person must pay”).

<sup>149</sup> *See* FERGUSON REPORT, *supra* note 18, at 9–15. Since 2015, the Ferguson court system has been substantially altered as a result of multiple lawsuits, legislative reform, and court orders. *See* Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1205–20 (2017).

its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community.<sup>150</sup>

The Ferguson court was not an outlier. That same year, the *New York Times* editorial board wrote that “the evidence strongly suggests that Ferguson is not even the worst civil rights offender in St. Louis County and that adjacent towns are also systematically targeting poor and minority citizens for street and traffic stops to rake in fines, criminalizing entire communities in the process.”<sup>151</sup> Civil rights lawsuits were filed against nearly a dozen municipal courts in the same St. Louis County for operating in substantially the same fashion.<sup>152</sup>

Those courts, in turn, were part of a state municipal court apparatus that exhibited a high tolerance for conflicts, corruption, and lack of accountability. For example, Missouri permitted its part-time municipal court judges to serve simultaneously as prosecutors, defense attorneys, practicing lawyers in other county courts, and even as judges in other jurisdictions.<sup>153</sup> These multiple roles and relationships created obvious conflicts of interest.<sup>154</sup> The Ferguson judge, in particular, agreed to use his position as the judge in another municipality to fix a speeding ticket issued to a Ferguson police officer.<sup>155</sup> That same judge asked the Ferguson prosecutor, who also served as prosecutor in another city, to dismiss the judge’s own traffic ticket incurred in the other city.<sup>156</sup>

Missouri’s municipal courts historically operated against the backdrop of opacity and lack of centralized oversight. Until 2015, the state itself did not know how many courts were in Missouri. As the National Center for State Courts put it at the time, “no one was quite sure how many municipal courts existed [in Missouri] since cities can abolish and create them at will.”<sup>157</sup> In 2015, in response to national scrutiny, Missouri passed sweeping municipal court reform. Municipal courts lost some, but not all of their criminal jurisdiction; fines and revenues were capped; new conflict rules were created for judges; and local courts came under stronger supervision from the central state judicial administration.<sup>158</sup>

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<sup>150</sup> FERGUSON REPORT, *supra* note 18, at 2.

<sup>151</sup> Editorial, *The Problem Is Bigger than Ferguson*, N.Y. TIMES (Mar. 12, 2015), <https://nyti.ms/1DcjyHl> [<https://perma.cc/84MH-HD32>].

<sup>152</sup> *Id.*

<sup>153</sup> Peter A. Joy, *Lawyers Serving as Judges, Prosecutors, and Defense Lawyers at the Same Time: Legal Ethics and Municipal Courts*, 51 WASH. U. J.L. & POL’Y 23, 23–25 (2016).

<sup>154</sup> *Id.* at 26 (describing widespread judge and attorney conflicts of interest in St. Louis municipal court practice).

<sup>155</sup> *Id.* at 31 (citing FERGUSON REPORT, *supra* note 18, at 74).

<sup>156</sup> *Id.* (citing FERGUSON REPORT, *supra* note 18, at 74).

<sup>157</sup> MISSOURI MUNICIPAL COURTS: BEST PRACTICES, *supra* note 67, at 10.

<sup>158</sup> See MO. REV. STAT. § 479.353 (2019); S.B. No. 5, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015), <https://www.senate.mo.gov/15info/pdf-bill/ta/SB5.pdf> [<https://perma.cc/B37F-2LXE>]; Robert Patrick & Stephen Deere, “Sweeping” Court Reform Comes as Nixon Signs Bill to Cap Cities’ Revenue, *End*

4. *Municipal Court Political Responsiveness.* — This litany of concerns about municipal courts, conflict, and money is hardly new: for over a century local courts have been criticized for their legal informality and provincialism.<sup>159</sup> At the same time, these courts have also been sites of political responsiveness and reform.

During the early twentieth century, for example, Chicago engaged in a “widely copied effort to modernize and ‘socialize’ its municipal court system,” bringing the city “international renown as a model for new approaches to criminal justice and social governance.”<sup>160</sup> Historian Michael Willrich explains that during this period, “at the local level, American courts were the true laboratories of progressive democracy, flexible instruments of public welfare and social governance on a scale not matched again until the New Deal.”<sup>161</sup> Cleveland and other cities likewise engaged in sweeping and high-profile municipal court reforms.<sup>162</sup> In retrospect these reforms were not always successful,<sup>163</sup> or even benign,<sup>164</sup> but they reflected a widely shared understanding of the political possibilities of municipal courts.

Echoes of these responsive reform efforts can be seen in today’s municipal and other local courts. Judge Andra Sparks is the Presiding Municipal Court Judge in Birmingham, Alabama. He describes how the court diverted money from its budget to create a literacy program for defendants because, in his words, “it turns out that the single biggest problem with people getting their licenses fixed is that they can’t read.”<sup>165</sup> In Craighead County, Arkansas, two judges successfully ran for election in 2016 to the local district court on a platform to eliminate

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*Predatory Habits*, ST. LOUIS POST-DISPATCH (July 10, 2015), [https://www.stltoday.com/news/local/crime-and-courts/sweeping-court-reform-comes-as-nixon-signs-bill-to-cap-cities-revenue-end-predatory-habits/article\\_cafffb7e-b24d-5292-b7bb-84ef81c6e81d.html](https://www.stltoday.com/news/local/crime-and-courts/sweeping-court-reform-comes-as-nixon-signs-bill-to-cap-cities-revenue-end-predatory-habits/article_cafffb7e-b24d-5292-b7bb-84ef81c6e81d.html) [https://perma.cc/69CT-C2JM].

<sup>159</sup> See, e.g., EDWARDS, *supra* note 3, at 7–9; PROVINE, *supra* note 3, at 24, 42; John A. Robertson, *Introduction: The Lower Court Problem*, in ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS, at xvii, xvii–xxix (John A. Robertson ed., 1974).

<sup>160</sup> WILLRICH, *supra* note 3, at xxvi.

<sup>161</sup> *Id.*

<sup>162</sup> Kessler, *supra* note 19, at 2966–72 (describing early twentieth century reforms in Cleveland).

<sup>163</sup> Reginald Heber Smith & Herbert Ehrmann, *The Municipal Court of Cleveland*, in ROUGH JUSTICE, *supra* note 159, at 26, 26–27 (describing persistent failures even after reform).

<sup>164</sup> See WILLRICH, *supra* note 3, at xxvii (noting that municipal court reforms “enabled the rise of eugenics and other coercive forms of social governance in America”); Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 L. & HIST. REV. 63, 69 (1998) (noting that “from 1906 to 1930, [Chicago] municipal judges sent tens of thousands of criminal defendants to the laboratory for a psychiatric examination” and sometimes indefinite detention).

<sup>165</sup> Judge Andra Sparks, Public Remarks on Judicial Responsibility for Justice in Criminal Courts (Apr. 6, 2017).

court reliance on extortionist private probation companies.<sup>166</sup> In Harris County, Texas, high-profile controversies over bail reform led to the sweeping ouster of local misdemeanor judges in the 2018 election and resulted in the unprecedented election of nineteen African American women judges.<sup>167</sup>

Where municipalities choose to adopt civil rather than criminal ordinances, municipal courts can serve as a kind of de facto forum for decriminalization.<sup>168</sup> Municipal Court Judge Richard Ginkowski, for example, describes Wisconsin municipal courts as a “model of justice that is both community-based and an alternative to criminal courts.”<sup>169</sup> He argues that because Wisconsin municipal courts adjudicate only civil violations, they effectively operate as a statewide diversion program in which defendants who might face incarceration in state court for the same conduct are subject only to municipal fines.<sup>170</sup>

In sum, municipal courts are potentially fertile sites for criminal justice policy experimentation. In each of these examples, the very same localism and informality that make these criminal tribunals problematic also hold out the possibility of political accountability and reform.<sup>171</sup>

### *B. Mapping the Legal Terrain of Criminal Municipal Courts*

Municipal courts occupy a legal terrain that is at once familiar and strange. On the one hand, these are criminal courts governed by basic rules of due process and criminal procedure. At the same time, over the centuries they have been permitted to retain their own special approaches to judges, appeals, separation of powers, and even the definition of “criminal.” Much municipal court doctrine reflects the ongoing struggle to reconcile these special approaches with basic constitutional norms and constraints. This section maps this complex terrain to tease out how municipal court doctrine at once comports with and violates the rules of many other familiar legal institutions.

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<sup>166</sup> *Just. Network Inc. v. Craighead County*, 931 F.3d 753, 757–58 (8th Cir. 2019). The private probation company unsuccessfully sued the judges. *Id.*

<sup>167</sup> Olivia Exstrum, *Harris County's New Progressive Judges Are Upending the Bail System*, MOTHER JONES (Mar. 15, 2019), <https://www.motherjones.com/politics/2019/03/harris-countys-new-progressive-judges-are-upending-the-bail-system> [<https://perma.cc/V5L9-476P>].

<sup>168</sup> Which can admittedly be a double-edged sword. Natapoff, *Misdemeanor Decriminalization*, *supra* note 27, at 1057, 1059–60 (describing the conversion of criminal offenses into civil infractions as a covert policy vehicle for regressive taxation).

<sup>169</sup> Richard A. Ginkowski, *Beyond Ferguson: Community-Based or Cash-Register Justice?*, CRIM. JUST., Spring 2018, at 14, 17. *But see* PAWASARAT & WALZAK, *supra* note 121, at 12–15 (finding racial and wealth disparities in rates of detention for failure to pay civil infractions in Milwaukee municipal court).

<sup>170</sup> Ginkowski, *supra* note 169, at 17–19.

<sup>171</sup> *See infra* section II.B.3, pp. 1029–35 (discussing tensions between criminal justice localism, democratization, due process, and fairness to defendants).

I. *Where Do Municipal Courts Come From? State Authority to Create and Empower Municipal Courts.* — States have wide powers to create courts and invest them with various kinds of authority. Unlike federal courts, which are substantially constrained by Article III, state courts are limited only by the Fourteenth Amendment’s due process and equal protection requirements, the federal Bill of Rights, the Supremacy Clause, and their own state constitutions.<sup>172</sup> This leaves states with broad authority to define their own judicial power. As the Supreme Court wrote in 1880 regarding the states’ power to establish their own courts:

It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress.<sup>173</sup>

Municipal courts are creatures of state constitutional law and of state statute. In each of the thirty states with municipal courts, a constitutional provision and/or statute authorizes, or sometimes mandates, municipalities to create their own courts.<sup>174</sup> Jurisdiction is typically limited to enforcing local municipal codes, but some municipal courts also have authority over state misdemeanors committed within their territorial boundaries.<sup>175</sup> State law may also specify municipal court subject matter jurisdiction, territorial jurisdiction, and permissible penalties for ordinance violations. The Colorado Constitution, for example, confers upon cities and towns “all . . . powers necessary, requisite or proper . . . to legislate upon, provide, regulate, conduct and control . . . [t]he creation of municipal courts; the definition and regulation of the jurisdiction,

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<sup>172</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 650, 656 (1961) (enforcing against the states provisions of the Bill of Rights that implicate principles of due process and fundamental fairness); see also Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836–38 (2001) (describing how state court authority diverges from and exceeds the federal Article III model).

<sup>173</sup> *Missouri v. Lewis*, 101 U.S. 22, 30 (1880); see also *id.* (“Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government.”).

<sup>174</sup> See, e.g., WASH. REV. CODE § 39.34.180(1) (2020) (“Each county, city, and town is responsible for the prosecution, adjudication, sentencing, and incarceration of misdemeanor and gross misdemeanor offenses committed by adults in their respective jurisdictions . . .”); *City of Spokane v. County of Spokane*, 146 P.3d 893, 898 (Wash. 2006).

<sup>175</sup> See, e.g., *Indiana Trial Court Statistics by County*, PUBLIC.COURTS.IN.GOV, <https://publicaccess.courts.in.gov/ICOR> [<https://perma.cc/TQ6X-T2FW>] (select “2015” from Year dropdown; then select “All Indiana City/Town Courts” from Court dropdown) (accounting for 32,043 state misdemeanor cases filed and 48,190 ordinance violations filed).

powers and duties thereof, and the election or appointment of the officers thereof.”<sup>176</sup> In Ohio, the mayor’s court statute provides that in any city with a population over 200, “the mayor of the municipal corporation has jurisdiction . . . to hear and determine any prosecution for the violation of an ordinance of the municipal corporation.”<sup>177</sup> In Montana, state law provides that “a local government may fix penalties for the violation of an ordinance that do not exceed a fine of \$500 or 6 months’ imprisonment or both.”<sup>178</sup>

In twenty-seven states, stand-alone municipal courts have criminal jurisdiction over locally defined crimes, meaning that they have authority to adjudicate the violation of local criminal ordinances and to impose convictions and criminal punishment.<sup>179</sup> Not all of them have authority to incarcerate. In Texas, the state’s 900 municipal courts have limited jurisdiction restricted to Class C misdemeanors, which are fine-only and therefore do not carry a penalty of incarceration, although state law still deems them criminal.<sup>180</sup> In three other states, municipal courts have limited criminal jurisdiction. All Wisconsin ordinance violations are civil,<sup>181</sup> and Wisconsin municipal courts, in turn, are limited to adjudicating those civil municipal ordinance violations.<sup>182</sup> Indiana municipal ordinances are likewise civil, but municipal courts also have concurrent jurisdiction over state criminal misdemeanors.<sup>183</sup> And in Tennessee, there are fourteen home rule cities that have authority to pass criminal

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<sup>176</sup> COLO. CONST. art. XX, § 6; *see* *Town of Frisco v. Baum*, 90 P.3d 845, 846 (Colo. 2004) (holding that the Colorado Constitution authorized town council of home rule city to vest its municipal court with “exclusive original jurisdiction over all matters arising under [its town] Charter, the ordinances, and other enactments of the Town”).

<sup>177</sup> OHIO REV. CODE § 1905.01(A) (2020).

<sup>178</sup> MONT. CODE ANN. § 7-5-109(1) (2019). *See infra* Appendix for state-by-state penalties.

<sup>179</sup> *See infra* Table 1.

<sup>180</sup> TEX. LOC. GOV’T CODE ANN. § 54.001 (2019) (setting maximum penalties for ordinance violations at \$500 by default; at \$2,000 for municipal ordinance violations concerning “fire safety, zoning, or public health”; and at \$4,000 for violations concerning “the dumping of refuse”); TEX. PENAL CODE ANN. § 12.41(3) (2019) (defining fine-only offenses as “Class C misdemeanor[s]”); TEX. CODE CRIM. PROC. ANN. art. 4.14(a)(1)–(2) (2019) (conferring municipal court jurisdiction over all municipal ordinance violation fine-only “criminal cases”); *see also* STATE OF TEX. JUD. BRANCH, TEXAS COURTS: A DESCRIPTIVE SUMMARY 3 (2014), <http://www.txcourts.gov/media/994672/Court-Overview.pdf> [<https://perma.cc/PQB5-SUPG>]; *City of Houston v. Hill*, 482 U.S. 451, 455 n.3, 466 (1987) (recognizing Houston’s fine-only ordinance as a criminal provision).

<sup>181</sup> *See State ex rel. Keefe v. Schmiede*, 28 N.W.2d 345, 347 (Wis. 1947) (holding that localities lacked authority to create misdemeanors).

<sup>182</sup> WIS. CONST. art. VII, § 14 (granting municipal courts “jurisdiction limited to actions and proceedings arising under ordinances of the municipality in which established”).

<sup>183</sup> IND. CODE § 33-35-2-3 (2020) (granting municipal courts jurisdiction over ordinance violations, misdemeanors, and infractions); *see also Indiana Trial Court Statistics by County, supra* note 175 (showing 32,043 misdemeanor cases and 48,190 ordinance violations filed in municipal courts).



misdeemeanor ordinances,<sup>184</sup> but the vast majority of Tennessee municipalities are limited to fine-only ordinances;<sup>185</sup> for the most part, Tennessee municipal courts have jurisdiction over whatever type of ordinance their respective city is authorized to pass.<sup>186</sup>

Municipal court authority intersects with the special legal status of cities. Cities are not separate sovereigns but rather “political subdivisions of the State” and therefore can only exercise those powers expressly conferred upon them.<sup>187</sup> In the majority of states, cities have been given broad local authority under the aegis of “home rule” in which cities have wide and sometimes preclusive authority to determine matters of local or municipal government.<sup>188</sup> Home rule typically includes the power to create municipal courts and to define their jurisdiction.<sup>189</sup>

Municipal courts are the forum in which cities enforce their own codes and ordinances.<sup>190</sup> Cities, in turn, have broad authority to pass criminal legislation, even where the state has already criminalized the same conduct.<sup>191</sup> This redundancy can be understood as a kind of structural invitation to overcriminalization. Or as Professor Wayne Logan puts it, “local [legislative] aggressiveness . . . augment[s] . . . the already expansive array of state and federal criminal laws at the disposal of government.”<sup>192</sup> Logan also describes the broad array of conduct rendered criminal at the local level:

[I]t often escapes attention that [municipalities] enjoy considerable authority to enact criminal laws pursuant to their expansive home rule and police

<sup>184</sup> See TENN. CODE ANN. § 6-54-306 (2020); Mandy Pellegrin, *How State Policy Shapes Local Governance in Tennessee*, SYCAMORE INST. (May 7, 2020), <https://www.sycamoreinstitutetn.org/how-state-shapes-local-government> [<https://perma.cc/936J-Y5X8>].

<sup>185</sup> See TENN. CODE ANN. § 6-54-308 (2020).

<sup>186</sup> *Id.* § 16-18-302 (granting municipal courts jurisdiction over cases “[f]or violation of” or “[a]rising under the laws and ordinances of the municipality”).

<sup>187</sup> *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

<sup>188</sup> Forty-four states confer some form of constitutional or statutory home rule on cities. 1 ANTIEAU ON LOCAL GOVERNMENT LAW § 21.02 (2d ed. 2020).

<sup>189</sup> See, e.g., *Home Rule Cities Have Authority to Define Municipal Court Jurisdiction*, 22 MCQUILLIN MUN. L. REP. July 2004, at 5. *But see* *Massie v. Brown*, 527 P.2d 476, 477 (Wash. 1974) (holding that home rule charter did not automatically invest city with power to create police court).

<sup>190</sup> To the extent that legal scholars have addressed municipal criminal law at all, the focus has largely been on the interpretation of city ordinances and not on the institution of the courts. See Leib, *Statutory Interpretation*, *supra* note 5, at 900 (local court interpretation of statutes); Logan, *Shadow Law*, *supra* note 5, at 1413 (legislative promulgation of criminal ordinances); Decker, *supra* note 5, at 1940–45 (creation of “local common law” through the interpretation of municipal law). McQuillin devotes an entire 800-page volume to the municipal police power and to ordinances. 6A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 24:1–197.12, Westlaw (database updated Aug. 2020).

<sup>191</sup> See 9A MCQUILLIN, *supra* note 190, § 27:2 (“A district attorney’s authority to prosecute under the state’s criminal statute does not supersede the authority of the city prosecutor to prosecute under the city ordinance proscribing the same conduct.”).

<sup>192</sup> Logan, *Shadow Law*, *supra* note 5, at 1451.

powers. . . . A sample of independent municipal criminal laws includes: pick-pocketing; disturbing the peace; shoplifting; urinating in public; disorderly conduct; disorderly assembly; unlawful restraint; obstruction of public space; harassment over the telephone; resisting arrest; obscenity; nude dancing; lewdness, public indecency, and indecent exposure; prostitution, pimping, or the operation of “bawdy” houses; gambling; graffiti and the materials associated with its inscription; littering; aggressive begging and panhandling; vandalism; trespass; automobile “cruising”; animal control; nuisances; excessive noise; sale or possession of drug paraphernalia; simple drug possession; possession of weapons other than firearms; possession of basic firearms and assault-style firearms; discharge of firearms; sleeping, lying, or camping in public places; driving under the influence of drugs or alcohol; carrying an open container of alcohol; underage drinking; and public drinking and intoxication.<sup>193</sup>

These criminal cases fill municipal courts. They may also comprise a substantial portion of overall state dockets. New Jersey’s municipal courts file more than ninety percent of the cases in the state’s total criminal docket.<sup>194</sup> Municipal court filings represented forty percent of all Alabama misdemeanor filings in 2014.<sup>195</sup> Nationwide, municipal courts generate over one-quarter of the thirteen million criminal misdemeanor cases filed annually.<sup>196</sup>

2. *The Municipal Court Pedigree.* — Municipal courts have long been deemed constitutional. The Supreme Court has upheld their various idiosyncrasies including the lack of jury trials, trials by nonlawyer judges, and convictions imposed by mayors. As city courts, they do not fit neatly into federal jurisprudential categories regarding the separate branches.<sup>197</sup> For example, most courts hold that municipal courts are not subject to separation of powers constraints and therefore their close

<sup>193</sup> *Id.* at 1413–14, 1426–28 (footnotes omitted); *see also id.* at 1425–26 (“[M]unicipalities enjoy enormous power to legislate against social disorder independent of state jurisdiction.”); *infra* section II.C.1, pp. 1037–40 (discussing the quasi-criminal character of some ordinances).

<sup>194</sup> *Court Statistics Project DataViewer, 2017 Criminal Caseloads – Trial Courts*, NAT’L CTR. FOR STATE CTS. (Nov. 20, 2019), [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx) [<https://perma.cc/QYY3-DHDJ>] (select “criminal” then select New Jersey from the menu on the following webpage, set the data year for 2017, and then select “Criminal Incoming Caseloads (by Tier)” under the “Chart/Table” menu heading) (showing 50,539 cases filed in New Jersey’s general jurisdiction courts in 2017 compared to 689,072 cases filed in limited jurisdiction courts).

<sup>195</sup> Claire Greenberg et al., *The Growing and Broad Nature of Legal Financial Obligations: Evidence from Alabama Court Records*, 48 CONN. L. REV. 1079, 1109 (2016).

<sup>196</sup> NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 9, at 40–41 (estimating national misdemeanor docket of thirteen million filings); *see also* Stevenson & Mayson, *supra* note 35 (finding the same); *infra* Table 1 (finding over three million misdemeanors filed in municipal court).

<sup>197</sup> Many other local entities do not either. *See* Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 601–03 (2017) (discussing the local interbranch “blend,” *id.* at 603, and noting that many city councils appoint an executive city manager and that courts often review legislative decisions as “quasi-judicial,” *id.*); *cf.* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1380 (2018) (pointing out that state courts also have a “quasi-legislative role, as drafters of their states’ Rules of Criminal Procedure”).

ties to the executive branch or to city councils are constitutionally unproblematic.<sup>198</sup> Nevertheless, as described below, municipal courts may be treated as part of the state judiciary for purposes of double jeopardy, sovereign immunity, and civil rights claims under section 1983.<sup>199</sup>

Part of this doctrinal flexibility is a matter of historical pedigree: local courts are centuries old and preconstitutional. Professor Stephen Yeazell dates judicial localism back to the founding era, pointing out that:

Unlike the federal judiciary, the desirability of state courts occasioned no political controversy at the nation's founding. The fateful decision of that period, which also seems never to have been debated, was that the state courts should be creatures not of the state governments themselves, but of counties, towns, and cities.<sup>200</sup>

Historian Laura Edwards describes the post-Revolutionary period as dominated by local courts and informal localized justice: centralized state legal systems did not come into their own until the early nineteenth century. Even then, those statewide court systems were relatively elite institutions, addressing themselves primarily to civil, commercial, and appellate matters, leaving lower-status criminal matters to be resolved at the local level.<sup>201</sup>

The legacy of those local, informal courts has exerted a powerful influence on constitutional doctrine. In 1888, the Supreme Court upheld the power of police and summary courts to enforce criminal municipal ordinances without a jury trial and in summary fashion, as long as defendants had the right to appeal, observing that “it has been the constant course of legislation in [England], for centuries past, to confer summary jurisdiction upon justices of the peace for the trial and conviction of parties for minor and statutory police offences.”<sup>202</sup>

The Court also noted that state supreme courts had come to the same conclusion. It quoted the New Jersey Supreme Court approvingly as having written: “Extensive and summary police powers are constantly

<sup>198</sup> See *infra* pp. 1007–09.

<sup>199</sup> See *Waller v. Florida*, 397 U.S. 387, 393, 395 (1970) (holding that Florida municipal courts derived their judicial power from the same source as the state courts for double jeopardy purposes, thereby preventing dual prosecutions in municipal and state court for the same offense); *Just. Network Inc. v. Craighead County*, 931 F.3d 753, 765 (8th Cir. 2019) (finding that local judges were state employees, not city or county employees, as a matter of state law pursuant to new legislation creating state-funded district courts); *Holland v. City of Gary*, No. 10-CV-454, 2011 WL 6782101, at \*3 (N.D. Ind. Dec. 27, 2011) (finding that city court judge and employees were judicial, not executive, officers and therefore not amenable to suit under 42 U.S.C. § 1983), *aff'd*, 533 F. App'x 661 (7th Cir. 2013); *Eggar v. City of Livingston*, 40 F.3d 312, 314 & n.2 (9th Cir. 1994) (holding that Montana municipal judge was “included in the hierarchy of the state judicial system” and therefore not a city policymaker for § 1983 purposes).

<sup>200</sup> Yeazell, *supra* note 8, at 134.

<sup>201</sup> See EDWARDS, *supra* note 3, at 7–10.

<sup>202</sup> *Callan v. Wilson*, 127 U.S. 540, 552 (1888) (quoting *State v. Glenn*, 54 Md. 572, 600 (1880)).

exercised in all the States of the Union for the repression of breaches of the peace and petty offences . . . .”<sup>203</sup> The Court framed the matter not just as a question of constitutional law but also one of municipal governance, relying on “Mr. Dillon in his work on Municipal Corporations” for the proposition that “[v]iolations of municipal by-laws proper, such as fall within the description of municipal police regulations . . . may . . . be prosecuted in a summary manner, by and in the name of the corporation, and need not provide for a trial by jury.”<sup>204</sup>

Six years later, the Court reemphasized the long history of these local low-level courts. “[F]rom time immemorial,” wrote the Court, “the practice has been to try persons charged with petty offences before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the [c]onstitution[al right to a jury trial].”<sup>205</sup>

Much has changed since these early cases were decided. Individual justices of the peace were largely replaced by more formal institutionalized municipal courts.<sup>206</sup> Most states unified their judiciaries during the early twentieth century, assuming supervision over and funding responsibility for some or all local trial courts.<sup>207</sup> Modern criminal procedure has also deeply altered the nature of the U.S. criminal process, creating among other things the misdemeanor right to counsel, an array of discovery and trial rights, and new constitutional recognitions for and constraints on plea bargaining.<sup>208</sup> In many states, these various changes have eliminated municipal courts and/or their characteristic practices altogether.<sup>209</sup> Nevertheless, much of the municipal court phenomenon persists, often in tension with the new modern legal infrastructure. Those persistent features, including nonlawyer judges, special appellate

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<sup>203</sup> *Id.* at 553 (quoting *McGear v. Woodruff*, 33 N.J.L. 213, 217 (1868)); *see also id.* (“This constitutional provision does not prevent the enforcement of the by-laws of a municipal corporation without a jury trial.” (quoting *McGear*, 33 N.J.L. at 217)).

<sup>204</sup> *Id.* (quoting 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 433 (3d ed., rev., enlarged 1881)).

<sup>205</sup> *Lawton v. Steele*, 152 U.S. 133, 141–42 (1894) (comparing constitutionality of summary courts with the summary abatement of nuisances); *see also Tumey v. Ohio*, 273 U.S. 510, 534 (1927) (“It is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him can not be said to violate due process of law.”).

<sup>206</sup> Although many modern municipal courts are in essence still comprised of a single nonlawyer judge and a clerk.

<sup>207</sup> *Yeazell*, *supra* note 8, at 135–36; *see also supra* section I.A.1.g, pp. 980–82 (discussing unification). *See generally* Raftery, *Unification and “Bragency,” supra* note 72 (describing conflicted history of unification).

<sup>208</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (right to counsel in misdemeanor cases); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (discovery rights); *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (extending the right to effective assistance of counsel to plea advice).

<sup>209</sup> *See Raftery, Unification and “Bragency,” supra* note 72, at 345 (describing court consolidations in California, Arkansas, Vermont, and New Hampshire).

processes, mayoral judges, and the concomitant absence of separation of powers, are considered in the sections below.

3. *Nonlawyer Judges*. — Although lay judges and police magistrates are probably more familiar from *Oliver Twist* than from modern criminal jurisprudence, they remain common and the Supreme Court has consistently affirmed their constitutionality.<sup>210</sup> In 1976, in *North v. Russell*,<sup>211</sup> the Court upheld Kentucky's use of nonlawyer judges in the local police courts, as long as defendants retained the right to appeal and obtain a new trial de novo before a lawyer-judge in circuit court.<sup>212</sup> The Court rejected the proposition that inferior court judges must be lawyers, reasoning that judicial qualifications turn on the substantive need for "independent, neutral, and detached judgment," qualities that in the Court's opinion did not require judges to be attorneys.<sup>213</sup> The *Russell* Court borrowed its neutral-and-detached standard from the warrant cases, including *Shadwick v. City of Tampa*,<sup>214</sup> under which municipal court clerks who were not attorneys were permitted to issue warrants for breaches of municipal ordinances.<sup>215</sup>

The Court also distinguished the judicial functions of municipal court judges from those in higher courts based on the minor nature of the offenses being adjudicated. "[T]here is a wide gap," wrote the Court, "between the functions of a judge of a court of general jurisdiction, dealing with complex litigation, and the functions of a local police court judge trying a typical 'drunk' driver case or other traffic violations."<sup>216</sup>

Minor crimes also trigger less complicated processes and less burdensome punishments. "Proceedings in the inferior courts are simple

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<sup>210</sup> CHARLES DICKENS, *OLIVER TWIST* 75–81 (Fred Kaplan ed., W.W. Norton & Co. 1993) (1838) ("Chapter XI. Treats of Mr. Fang the Police Magistrate; and Furnishes a Slight Specimen of His Mode of Administering Justice."). The term "police magistrate" or "police judge" can be misleading: such judges are not themselves police officers but rather "officer[s] of the state, or some municipal division of the state, invested with authority, executive or judicial, relating to the administration of police or municipal laws." 48A C.J.S. *Judges* § 13 (2020).

<sup>211</sup> 427 U.S. 328 (1976).

<sup>212</sup> *Id.* at 339.

<sup>213</sup> *Id.* at 337 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 449–53 (1971)).

<sup>214</sup> 407 U.S. 345 (1972).

<sup>215</sup> *Russell*, 427 U.S. at 337 (citing *Shadwick*, 407 U.S. at 345–46, for its holding that municipal court clerks, who were authorized by city charter to issue warrants for arrest of persons charged with breach of municipal ordinances, qualified as "neutral and detached magistrates" for purposes of the Fourth Amendment); see also *id.* (citing *Coolidge*, 403 U.S. at 449–53, which held that law enforcement officials such as police and prosecutors are too inherently conflicted to issue warrants so that a warrant issued by the Attorney General, who also happened to hold the office of justice of the peace, did not meet the "neutral and detached" requirements of the Fourth Amendment).

<sup>216</sup> *Id.* at 334. In this regard, *Russell* represented a retreat from *Argersinger v. Hamlin*, 407 U.S. 25 (1972), decided just four years earlier, in which the Court acknowledged that misdemeanor cases can be legally sophisticated and wrote that "[w]e are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." *Id.* at 33.

and speedy,” wrote the *Russell* Court, “and . . . the penalty is not characteristically severe.”<sup>217</sup> Where incarceration is available, “the process commands scrutiny,”<sup>218</sup> but even where defendants face incarceration these courts are subject to diminished procedural expectations.<sup>219</sup> Indeed, just four years prior to *Russell*, the Court quoted with approval the Kentucky court’s view that “inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses.”<sup>220</sup>

In this world of reduced legal expectations, the *Russell* Court concluded that de novo appeals cured the due process problems triggered by lay judges. Errors of law and process that arise from nonlawyer judges are sufficiently addressed because de novo appeal and a new trial are available “in all instances.”<sup>221</sup> In the particular case of *Russell* itself, the availability of de novo appeal cured numerous egregious errors committed below. The nonlawyer judge — a coal miner with no legal training — conducted a trial that the court of appeals characterized as an “absurdity”<sup>222</sup>; the judge denied the defendant’s request for a jury trial, although state law entitled him to one, and sentenced him to incarceration, even though state law prohibited such a sentence.<sup>223</sup>

Nonlawyer judges are central to the historical identity of municipal courts. In *Judging Credentials*, political scientist Professor Doris Marie Provine traced that history: Nonlawyer judges were the norm before and after the Revolution, giving way slowly to the lawyer-judge model as the legal profession assumed a larger role in newly centralized state legal systems in the early 1800s.<sup>224</sup> The battle over judicial credentials also mirrored the larger tension between local, informal justice models and the more professionalized, uniform approach to law demanded by centralized systems.<sup>225</sup> Localists argued that lawyers — and their demand for centralized legal rules — were too remote from community norms and relationships to provide substantive justice. Localists also complained that lawyers and formal institutions were expensive and out of reach for many low-resource communities. By contrast, centralizers

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<sup>217</sup> *Russell*, 427 U.S. at 336 (quoting *Colten v. Kentucky*, 407 U.S. 104, 118 (1972)).

<sup>218</sup> *Id.* at 334 (citing *Argersinger*, in which the Court required the appointment of counsel for misdemeanants who receive a sentence of incarceration).

<sup>219</sup> Where incarceration is not available, there is even less due process concern. See 9A MCQUILLIN, *supra* note 190, § 27:4.

<sup>220</sup> *Colten*, 407 U.S. at 117 (quoting *Colten v. Commonwealth*, 467 S.W.2d 374, 379 (Ky. 1971)).

<sup>221</sup> *Russell*, 427 U.S. at 334.

<sup>222</sup> *North v. Russell*, 540 S.W.2d 4, 5 (Ky. 1975).

<sup>223</sup> *Russell*, 427 U.S. at 339, 343 (Stewart, J., dissenting).

<sup>224</sup> PROVINE, *supra* note 3, at 1, 10–11.

<sup>225</sup> *Id.* at 12–15.

maintained that only trained lawyers could meaningfully provide consistent adherence to the rule of law. Many of these longstanding disputes over the role of formality, uniformity, and cost still pepper the modern conversation around the cost of adjudicating misdemeanors,<sup>226</sup> and the nonlawyer judge phenomenon continues to garner substantial criticism.<sup>227</sup>

Nonlawyer judges are part of a larger tolerance for legal informality in misdemeanor courts generally and municipal courts in particular. Fourteen states permit police officers to file and prosecute cases directly in lower courts without an attorney-prosecutor present.<sup>228</sup> Approximately half of these police-prosecutor states also maintain municipal courts, and in at least four (Delaware, New Mexico, New York, and South Carolina), the judge need not be an attorney either.<sup>229</sup> Defense counsel in municipal courts are also rare for a variety of reasons.<sup>230</sup> As a result, in these low-level courts, defendants may be detained, convicted

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<sup>226</sup> See *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (worrying that extending the right to counsel to all misdemeanor defendants would “impose unpredictable, but necessarily substantial, costs on 50 quite diverse States”). Compare Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 466 (2007) (arguing that states should redeploy scarce public defense resources away from misdemeanors and towards felonies), with Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 740–42 (2017) (arguing that defender offices should devote more resources to misdemeanor training and dockets, which are the largest sources of cases and criminalization).

<sup>227</sup> See, e.g., SMITH ET AL., *supra* note 105, at 42; Newton et al., *supra* note 5, at 28; William Glaberson, *How a Reviled Court System Has Outlasted Critics*, N.Y. TIMES (Sept. 27, 2006), <https://www.nytimes.com/2006/09/27/nyregion/27courts.html> [<https://perma.cc/49SE-QXMJ>]; see also Decker, *supra* note 5, at 1951 (describing irregularities in New York town courts, including a “village justice who refused to issue a protective order and later said to a clerk, ‘[e]very woman needs a good pounding every now and again,’ and another judge [who] explained that ‘I just follow my own common sense . . . . And the hell with the law.’” (first alteration and omission in original) (quoting William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES (Sept. 25, 2006), <https://www.nytimes.com/2006/09/25/nyregion/25courts.html> [<https://perma.cc/LN87-L9FC>])). Some states have rejected *Russell*’s reasoning and require judges to be attorneys under their own state constitutions. See, e.g., *City of White House v. Whitley*, 979 S.W.2d 262, 268 (Tenn. 1998) (holding that nonlawyer adjudication of cases punishable by incarceration violated the Tennessee Constitution’s due process clause).

<sup>228</sup> At least seven of these police-direct-file states have municipal courts. Horwitz, *supra* note 15, at 1305, 1331–32, 1343 & n.230 (documenting states that either expressly or implicitly permit the practice, including Delaware, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia); see also PRICE ET AL., *supra* note 40, at 7 (describing criminal courts in which there is not a single lawyer in the courtroom); Alexandra Natapoff, *Opinion, When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html> [<https://perma.cc/C9E9-UB7H>].

<sup>229</sup> See *infra* Table 2.

<sup>230</sup> In fine-only cases, defendants have no right to representation, *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979), and even where defendants are constitutionally entitled to counsel, numerous studies have shown that counsel is often not appointed, e.g., BORUCHOWITZ ET AL., *supra* note 104, at 15; Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1947 (2019) (finding that thirty percent of jailed misdemeanants nationwide reported lack of representation).

of crimes, subjected to heavy fines, and sentenced to jail without a single lawyer in the courtroom.

4. *Special Appellate Processes.* — The nonlawyer municipal judge is twinned with, and rendered constitutional by, special appellate processes. Almost all municipal courts are part of a two-tiered system like the one in *Russell* in which municipal court convictions are appealed to state trial courts that hold new trials de novo.<sup>231</sup> This structure is a response not only to lay judges, but to the many municipal courts that are not courts of record and do not maintain the recordings or transcripts of proceedings necessary for a conventional appeal.

In *Russell*, the Court approved this type of two-tier system, holding not only that it legitimated the use of lay judges, but that the Equal Protection Clause was not violated by the provision of different adjudicative and appellate institutions to different sized cities.<sup>232</sup> That holding built on the Court's decision a few years earlier that defendants could be punished more harshly if they invoked their right to a second trial de novo and lost.<sup>233</sup>

The *Russell* Court also justified the Kentucky two-tiered appellate scheme on practical and cost-efficiency grounds, recognizing the “increasing burdens on state judiciaries’ and the ‘interest of both the defendant and the State, to provide speedier and less costly adjudications.’”<sup>234</sup> Harkening back to the legacy of local lay justices of the peace who made legal redress available to frontier and rural communities, the Court reasoned: “[I]t is a convenience to those charged to be tried in or near their own community, rather than travel to a distant court where a law-trained judge is provided, and to have the option, as here, of a trial after regular business hours.”<sup>235</sup>

De novo appeals are just one of various appellate innovations and limitations in the municipal court arena.<sup>236</sup> Montana has taken the reasoning of *Russell* a step further, making de novo appeal on the record,

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<sup>231</sup> See Table 1 for appellate processes for each state.

<sup>232</sup> *North v. Russell*, 427 U.S. 328, 339 (1976).

<sup>233</sup> *Colten v. Kentucky*, 407 U.S. 104, 118 (1972) (finding it permissible to punish defendant for disorderly conduct conviction more harshly after a second trial de novo where the penalty increased from \$10 to \$50, or approximately \$60 to \$300 in today's dollars, see INFLATION TOOL, <https://www.inflationtool.com/us-dollar/1972-to-present-value?amount=50> [https://perma.cc/N4PM-3EXG]).

<sup>234</sup> *Russell*, 427 U.S. at 336 (quoting *Colten*, 407 U.S. at 114).

<sup>235</sup> *Id.*

<sup>236</sup> *King & Heise*, *supra* note 230, at 1942–47 (describing variety of misdemeanor appellate mechanisms and restrictions).



not a full de novo trial, available to defendants convicted before nonlawyer judges in justice courts.<sup>237</sup> Other states make further appellate review discretionary and not as of right.<sup>238</sup> Some municipal court convictions are not appealable at all. For example, the Delaware Constitution and state law limit appeals from justice of the peace courts to cases involving sentences of more than one month in jail or fines greater than \$100.<sup>239</sup>

The two-tiered system can even affect the authority of the state trial court holding the de novo proceeding. For example, the Kansas Supreme Court held that a state district court (a court of record) was in effect acting as a police magistrate court (not a court of record) when conducting a de novo trial.<sup>240</sup> As a result, the ensuing conviction did not trigger the state's disbarment statute, even though disbarment would have been automatic had the district court issued the conviction in its regular nonappellate, court-of-record capacity.<sup>241</sup> As the court explained:

It is true that the judgment finally entered against the respondent was rendered by the district court on an appeal from the police court. In the district court the case, however, was tried as a violation of a city ordinance, and while that court was trying the case it was acting as a police judge and was required to try the case in the same manner it should have been tried before the police judge. Its sentence as imposed was essentially a judgment of the police judge and cannot be treated as one rendered by a court of record within the meaning of the statute.<sup>242</sup>

The two-tiered system has been both lauded and excoriated. *Russell* held that it is necessary to preserve the constitutionality of municipal court convictions, while advocates in Montana argue that the state has deprived defendants of due process by moving from the full de novo new trial model to a de novo review of a record created by nonlawyer judges.<sup>243</sup> Conversely, commentators have long pointed out that de novo trials insulate municipal court decisions from appellate scrutiny, effectively permitting them to continue misapplying the law.<sup>244</sup>

<sup>237</sup> The Montana Supreme Court upheld the change, *State v. Davis*, 371 P.3d 979, 990 (Mont. 2016) (upholding trial and conviction before a nonlawyer justice of the peace in which only a standard appeal, not a de novo trial, was available); the U.S. Supreme Court denied certiorari, *Davis v. Montana*, 137 S. Ct. 811 (2017).

<sup>238</sup> See, e.g., *State v. Eby*, 244 P.3d 1177, 1178–79 (Ariz. Ct. App. 2011) (confirming right to appeal judgment of justice court to superior court without the right to subsequent appeal to Arizona Court of Appeals, even when superior court appeal is a de novo trial).

<sup>239</sup> DEL. CONST. art. 4, § 28; DEL. CODE ANN. tit. 11, § 5920 (2020) (granting de novo appeal of right only for cases involving sentences of more than one month in jail or fines greater than \$100).

<sup>240</sup> *In re Sanford*, 232 P. 1053, 1054 (Kan. 1925) (holding that an attorney's conviction for violation of a municipal ordinance in police court does not trigger the disbarment statute).

<sup>241</sup> *Id.* at 1053–54.

<sup>242</sup> *Id.* at 1054 (citations omitted).

<sup>243</sup> Petition for a Writ of Certiorari, *Davis v. Montana*, 137 S. Ct. 811 (2017) (No. 16-123).

<sup>244</sup> Robertson, *supra* note 159, at xviii.

Such methodological disagreements aside, the appellate process remains central to legitimating the peculiarities of municipal court — nonlawyer judges, failure to maintain records, and the generally summary nature of the proceedings.<sup>245</sup> That legitimation, however, is almost entirely theoretical since misdemeanor appeals rarely occur. In 2019, Professors Nancy King and Michael Heise conducted the first and only empirical examination of misdemeanor appeals nationwide, both conventional and de novo, and found that misdemeanor appeals are vanishingly rare.<sup>246</sup> Fewer than one in 100 convictions are appealed in two-tiered systems,<sup>247</sup> and only one in 1,250 misdemeanor convictions are appealed to state appellate courts.<sup>248</sup> King and Heise conclude that appeals are rare for a variety of reasons, including the limited appellate procedures, lack of access to counsel, high plea rates, and the typically short duration of incarcerative sentences.<sup>249</sup> Accordingly, *Russell* notwithstanding, the practical reality is that municipal court convictions are largely insulated from error correction and legal scrutiny.

5. *Conflicts of Interest.* — The most robust constitutional restrictions on municipal courts sound in the vein of conflict of interest. Defendants have a due process right to a “disinterested and impartial” adjudicator,<sup>250</sup> which may be threatened by a judge’s pecuniary or institutional interest in the outcome of a case.<sup>251</sup> In three separate decisions, the Supreme Court has outlined the extent to which a mayor or other official

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<sup>245</sup> A legitimating role often played by the appellate process more generally. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 918 (1988) (arguing that “searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient” to validate them under Article III); see also Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 NOTRE DAME L. REV. 297, 302 (2018) (“[T]he due process problem [of administrative adjudication] could arguably be solved simply by providing for de novo judicial review of agency action.”). I am indebted to Richard Re for this elaboration.

<sup>246</sup> King & Heise, *supra* note 230, at 1939–41.

<sup>247</sup> *Id.* at 1943–44.

<sup>248</sup> *Id.* at 1941.

<sup>249</sup> *Id.* at 1944–48; see also Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 337 & n.257 (2011) (arguing that misdemeanor defendants may be unaware or unadvised of their right to appeal); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689–94 (2007) (pointing out that because defendants typically cannot raise ineffective assistance of counsel claims with any practical chance of success until collateral review, “the grim reality is that the performance of trial counsel in almost all misdemeanor and many felony cases is largely unchecked,” *id.* at 694).

<sup>250</sup> *Ward v. Village of Monroeville*, 409 U.S. 57, 58 (1972).

<sup>251</sup> See *id.* at 60; see also *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884–87 (2009) (holding that due process was violated by West Virginia judge’s failure to recuse himself when the party before him had contributed three million dollars to support his election); *id.* at 877 (holding that due process requires recusal when the “probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable” (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975))).

with a potential conflict of interest can directly wield the judicial powers of a municipal court.

In the leading case of *Ward v. Village of Monroeville*,<sup>252</sup> the Supreme Court invalidated an arrangement in which a town mayor held the post of municipal court judge and in that capacity assessed fines and fees that comprised a substantial portion of the town's budget.<sup>253</sup> The due process test, wrote the Court in 1972, "is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.'"<sup>254</sup> The Court found the temptation in *Monroeville* too strong because of the mayor's "wide executive powers" and because "[a] major part of village income is derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court."<sup>255</sup> The arrangement gave rise to the impermissible "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial."<sup>256</sup>

But conflict is a matter of degree. The *Ward* Court simultaneously reaffirmed its 1928 holding in *Dugan v. Ohio*<sup>257</sup> in which it upheld the constitutionality of another Ohio mayor's court.<sup>258</sup> In that case, the mayor was one of five city executives and "had judicial functions but only very limited executive authority."<sup>259</sup> The Court concluded that "the Mayor's relationship to the finances and financial policy of the city was too remote to warrant a presumption of bias."<sup>260</sup>

As *Ward* makes clear, these are functional, not formal conflicts. The due process violation arises not because the judge is the mayor, but because he or she has a specific "partisan" interest in the collection of revenue from particular cases that would interfere with his or her impartial decisionmaking.<sup>261</sup> As the Court wrote in *Tumey v. Ohio*<sup>262</sup> in 1927, "[i]t

<sup>252</sup> 409 U.S. 57.

<sup>253</sup> *Id.* at 58, 61-62.

<sup>254</sup> *Id.* at 60 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

<sup>255</sup> *Id.* at 58.

<sup>256</sup> *Id.* at 60 (quoting *Tumey*, 273 U.S. at 534); see also *Connally v. Georgia*, 429 U.S. 245, 250-51 (1977) (per curiam) (invalidating arrangement where judge's salary depended entirely on how many warrants he issued); *Tumey*, 273 U.S. at 531 (invalidating arrangement where judge received conviction fee in addition to salary).

<sup>257</sup> 277 U.S. 61 (1928).

<sup>258</sup> *Id.* at 65; *Ward*, 409 U.S. at 60.

<sup>259</sup> *Ward*, 409 U.S. at 60 (citing *Dugan*, 277 U.S. 61).

<sup>260</sup> *Id.* at 60-61 (citing *Dugan*, 277 U.S. 61).

<sup>261</sup> *Id.* at 60; see *Tumey*, 273 U.S. at 534. But see *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971) (finding inherent conflict where police and prosecutors who were also justices of the peace issued warrants so that they could not meet the "neutral and detached," *id.* at 453, requirements of the Fourth Amendment).

<sup>262</sup> 273 U.S. 510 (1927).

is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him can not be said to violate due process of law.”<sup>263</sup> In this functional vein, the Sixth Circuit has limited the *Ward* principle to criminal trials. Mayors presiding as judges may accept no-contest and guilty pleas, even where they have a pecuniary interest that would otherwise preclude them from presiding over a trial.<sup>264</sup>

Since the Ferguson Report, local courts have seen a wave of *Ward*-based litigation challenging the judicial collection of fines and fees. These cases typically aim, not at mayoral judges, but at judges whose court resources, salary, tenure, or reappointment may be influenced by their revenue collection. In 2019, the Fifth Circuit held that the New Orleans criminal court magistrate could not constitutionally decide bail cases where the criminal court received a percentage of bail fees to fund various judicial expenses.<sup>265</sup> In Georgia, the U.S. District Court found that the appointed judge of the Doraville Municipal Court potentially suffered from an unconstitutional conflict of interest because the three million dollars raised from court fines and fees comprised between seventeen and thirty percent of the city’s revenue, and because the municipal court judge was dependent for his job on the goodwill of the city council.<sup>266</sup> “The more substantial the percentage of revenues,” reasoned the court, “the more reasonable it is to question the impartiality of the judge, even if that judge has little to no executive authority.”<sup>267</sup>

The conflict cases perform an interbranch policing function that can be understood as a kind of substitute for separation of powers.<sup>268</sup> The Supreme Court has never directly addressed whether municipal courts might be tested against separation of powers principles. *Ward*’s impartiality requirement is rooted in due process; the opinion expressly disavows any notion that the “mere union of the executive power and the judicial power” in a single official violates due process,<sup>269</sup> and the term “separation of powers” does not appear in the opinion.<sup>270</sup> The few state

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<sup>263</sup> *Id.* at 534.

<sup>264</sup> *Micale v. Village of Boston Heights*, No. 95-3284, 1997 WL 225512, at \*4 (6th Cir. May 1, 1997) (“[A] defendant who contests the charges against him is entitled to adjudication by a judge who does not have a pecuniary interest in the case. A guilty plea or a no contest plea, on the other hand, are ministerial functions which a mayor — even one with a pecuniary interest — may carry out.”).

<sup>265</sup> See *Caliste v. Cantrell*, 937 F.3d 525, 531–32 (5th Cir. 2019).

<sup>266</sup> See *Brucker v. City of Doraville*, 391 F. Supp. 3d 1207, 1209, 1215–16 (N.D. Ga. 2019).

<sup>267</sup> *Id.* at 1214; see also *id.* at 1216 (citing additional new cases on financial conflicts).

<sup>268</sup> See, e.g., *Rose v. Village of Peninsula*, 875 F. Supp. 442, 448 (N.D. Ohio 1995) (referring to mayor-judge conflict claim as an allegation that there is “not an adequate separation of powers”).

<sup>269</sup> *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey v. Ohio*, 273 U.S. 510, 534 (1927)).

<sup>270</sup> Scholars, by contrast, often link due process more tightly to separation of powers. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1015 & n.132 (2006)

rulings on the subject, however, are relatively clear: they almost uniformly hold that municipal courts are not subject to separation of powers constraints at all. To state the obvious, this is a necessary predicate for the existence of most versions of the “municipal court,” namely, a judicial entity created, influenced, operated, and sometimes fully controlled by executive officials such as a mayor or a legislative entity like a city council.<sup>271</sup>

Municipal courts are exempt from separation of powers doctrine due to a confluence of federalism and localism.<sup>272</sup> Unlike the federal judiciary, state power to create courts is plenary.<sup>273</sup> In the absence of Article III, state courts are not limited by federal rules of standing, the case-or-controversy requirement, or the prohibition against issuing advisory opinions.<sup>274</sup> The extent to which state courts are constrained by separation of powers and its various operational manifestations thus turns primarily on state law.<sup>275</sup>

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(noting that separation of powers is historically rooted in concerns about judicial conflicts of interest); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516 (1991) (arguing that a central purpose of the separation of powers principle is to protect individual rights and that the principle itself should be understood as a form of due process); Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012) (“The meaning of ‘due process of law’ . . . evolved over a several-hundred-year period, driven, we argue, by the increasing institutional separation of lawmaking from law enforcing and law interpreting.”).

<sup>271</sup> See Davidson, *supra* note 197, at 600–01 (“The prevailing view, at least as a formal matter, is that separation-of-powers principles simply do not apply at the local-government level.”).

<sup>272</sup> See JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 9:7 (2020) (“[U]nless expressly provided by statute, separation of powers principles are normally not applicable to local government units.”); David J. Barron, Commentary, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 378–79 (2001) (complicating the concept of local autonomy in relation to centralized authority).

<sup>273</sup> See *Missouri v. Lewis*, 101 U.S. 22, 31 (1880) (“[T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory.”); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 574–75 (2007) (describing state authority to create more “informal” courts, *id.* at 574).

<sup>274</sup> *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 8 n.2 (1988) (noting that absent the “special limitations” of Article III, “[t]he States are . . . left free as a matter of their own procedural law to determine whether their courts may issue advisory opinions or to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual ‘case’ or ‘controversy’ be presented for resolution”); Hershkoff, *supra* note 172, at 1837–38 (charting the many ways that state courts diverge from the federal judicial model, including the placement of executive officials such as sheriffs in the judicial branch); see also Barkow, *supra* note 270, at 1012–17 (noting that various aspects of federal separation of powers, including provisions of the Bill of Rights, were designed by the Framers to limit the specific dangers of federal, as opposed to state, criminal overreach).

<sup>275</sup> See *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (“Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate . . . is for the determination of the State.”); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1188 (1999) (“[T]he U.S. Constitution fails to dictate a specific form of separation of powers for state governments.”). *But see* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV.

Municipal courts, in turn, are distinguishable from state courts.<sup>276</sup> While state judiciaries are subject to state constitutional separation of powers doctrine, several state supreme courts have held that local courts are not. For example, in *Hubby v. Carpenter*,<sup>277</sup> the West Virginia Supreme Court upheld a criminal conviction resulting from a trial conducted before a mayor-judge.<sup>278</sup> In response to the defendant's argument that his trial violated the West Virginia Constitution's separation of powers clause, the court concluded that "in the absence of special circumstances, the doctrine of the separation of powers is not applicable to municipalities."<sup>279</sup> A Delaware Superior Court has held the same.<sup>280</sup> The Rhode Island Supreme Court has declared that "the separation of powers doctrine is a concept foreign to municipal governance."<sup>281</sup> By contrast, the Supreme Judicial Court of Maine has held that its state constitution's separation of powers clause prohibits municipal officials from simultaneously holding both an executive and judicial position.<sup>282</sup>

Separation of powers, however, is not entirely irrelevant to municipal courts. In other contexts, local courts have been accorded some of the protections that go with being part of a separate judicial branch. A few courts have relied on separation of powers principles in finding that city judges are distinct from city policymakers and thus not amenable to suit under 42 U.S.C. § 1983. One federal district court cited the separation of powers clause of the Indiana Constitution in finding that the municipal court judge was not a city policymaker, reasoning that "[t]he court system is separate from the other branches of the City . . . government,

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51, 54-59 (1998) ("[I]t is something of an overstatement to say that the [federal] principle of separation of powers has *no* application to the states." *Id.* at 54.).

<sup>276</sup> *Cf.* *Waller v. Florida*, 397 U.S. 387, 393 (1970) (noting that while states and the federal government are separate and dual sovereigns, cities are subsidiaries of their sovereign states and thus trigger double jeopardy protections against multiple prosecutions by the same sovereign).

<sup>277</sup> 350 S.E.2d 706 (W. Va. 1986).

<sup>278</sup> *See id.* at 711.

<sup>279</sup> *Id.*; *cf.* W. VA. CONST. art. V, § 1 ("The Legislative, Executive and Judicial Departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time . . .").

<sup>280</sup> *See Poynter v. Walling*, 177 A.2d 641, 645 (Del. Super. Ct. 1962) ("[T]he rule appears to be that the constitutional requirement of separation of the three governmental departments applies to state government and not to the government of municipal corporations and their officers." (citations omitted)); *accord Ghent v. Zoning Comm'n*, 600 A.2d 1010, 1012 (Conn. 1991) ("The constitutional [separation of powers] provision applies to the state and not to municipalities, which are governed by charters and other statutes enacted by the legislature."); *Tendler v. Thompson*, 352 S.E.2d 388, 388 (Ga. 1987) ("[T]he doctrine of separation of powers applies only to the state and not to municipalities or to county governments.").

<sup>281</sup> *Moreau v. Flanders*, 15 A.3d 565, 579 (R.I. 2011) (upholding the collapse of municipal, executive, and legislative authority into a single state-appointed receivership).

<sup>282</sup> *See Howard v. Harrington*, 96 A. 769, 771 (Me. 1916) (holding that the common law doctrine of the incompatibility of offices in conjunction with the separation of powers clause in the Maine Constitution prohibited a justice of the peace from assuming the office of mayor); *see also Lesieur v. Lausier*, 96 A.2d 585, 587 (Me. 1953) (relying on *Howard*).

and the judges, clerk of court, and prosecuting attorneys are not officers of the city government.”<sup>283</sup> This was so even though the city paid the salaries of those officials.<sup>284</sup> Similarly, the Ninth Circuit has written: “Although city judges are defined as officers of Montana cities, city court jurisdiction and powers derive from the state statutes and they are included in the hierarchy of the state judicial system.”<sup>285</sup> In the face of all these variations, municipal court judges themselves appear conflicted with regard to their own branch status. Some perceive themselves as state judicial actors separate from their municipalities, whereas others consider themselves part of local government.<sup>286</sup>

In the absence of separation of powers constraints, the *Ward* line of conflict cases is all the more central to the municipal court legal framework. Freed from conventional interbranch limitations, municipal courts are at greater liberty than most courts to blur the boundaries — institutional, financial, and political — with their parent cities and with executive or legislative officials. Instead of separation of powers, they are regulated by conflict doctrine under *Ward*, *Dugan*, and *Tumey*. Under these cases, the fact that a judge is also a mayor, or might have an institutional or pecuniary interest in the outcome of a case, will not bar that judge from sitting in judgment. Put differently, the substitution of conflict doctrine for separation of powers empowers municipal courts to bend or even evade some of the usual constitutional constraints on criminal adjudication.

## II. AN INSTITUTIONAL FRAMEWORK FOR CRIMINAL MUNICIPAL COURTS

What is a municipal court? Sitting quietly beneath every other tier of judicial institution, tucked away in small towns across America, it is literally the lowest criminal court in the land. Sometimes it behaves like more visible higher-level courts, with lawyers and records and appeals,

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<sup>283</sup> *Holland v. City of Gary*, No. 2:10-CV-454, 2011 WL 6782101, at \*3 (N.D. Ind. Dec. 27, 2011) (citing IND. CONST. art. 3, § 1), *aff'd*, 533 F. App'x 661 (7th Cir. 2013) (mem.). *But see* *Kelly v. Mun. Cts.*, 97 F.3d 902, 908 (7th Cir. 1996) (distinguishing Indiana municipal from city courts).

<sup>284</sup> *See Holland*, 2011 WL 6782101, at \*3.

<sup>285</sup> *Eggar v. City of Livingston*, 40 F.3d 312, 314 n.2 (9th Cir. 1994) (citations omitted). The court held that a Montana municipal court judge was “included in the hierarchy of the state judicial system” and therefore not a city policymaker for § 1983 purposes. *Id.* at 314–15.

<sup>286</sup> *See Leib, Statutory Interpretation*, *supra* note 5, at 924 n.107 (“Most county court judges in Nebraska are unequivocal that they are part of the state judiciary — even though they hear cases under local law. They do not see themselves as local, most likely because of their original appointment by the governor rather than local election (though they stand for retention elections), the local legal culture, and the lack of local home rule. Judges in Ohio, by contrast, tend to think of themselves as part of the local government (with some exceptions). Nevertheless, they recognize the reach of the state into their jurisdictions, especially when they are adjudicating cases under state law.” (citations omitted)).

but often it does not. It is also an institutional hybrid: a criminal court issuing convictions and punishments while also serving as an arm of local governance.

The remainder of this Article offers a framework through which to understand these hybrid institutions: as criminalizers, as courts, as arms of local government, and as jurisprudential influencers. Municipal courts represent an enormous layer of additional penalization, one that redundantly criminalizes conduct that is typically already a state crime, created and enforced by thousands of American cities. Criminal procedure indulges their localism and presumed lack of resources by adjusting constitutional constraints, making it cheaper and easier to convict and punish at the local level. Because of the lack of data and inattention to municipal courts generally, we have not grappled with the fact that the municipal court is such a large contributor to the practice and ethos of mass incarceration.<sup>287</sup>

Nevertheless, municipal courts do more than just criminalize. They are courts, with all the institutional and expressive significance that go with being part of the judiciary. The judges who adjudicate violations of city ordinances, moreover, are local political officials, either elected by city residents or appointed by mayors or city councils. These courts are thus simultaneously local political institutions that make important governance decisions, express local political preferences, and redistribute wealth. As such, they shine new light on the perils and possibilities of criminal justice localism.

Finally, municipal courts have been jurisprudentially influential. The Supreme Court has affirmatively altered the law at the bottom of the penal pyramid as a way of accommodating their low status and the perceived unimportance of their millions of criminal cases. In this sense, they illuminate a larger phenomenon of dismissive accommodation in which law adjusts downward — both formally and informally — in response to low-status institutions. They are not alone in this regard: other low-status tribunals such as juvenile, immigration, and family courts each challenge the formal boundaries of criminal law in similar ways. The next sections deploy these various conceptual lenses to bring America's municipal courts into larger scholarly conversations about courts, cities, and criminal justice.<sup>288</sup>

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<sup>287</sup> See Alexandra Natapoff, *How a Simple Misdemeanor Could Land You in Jail for Months*, N.Y. POST (Feb. 2, 2019, 10:36 AM) <https://nypost.com/2019/02/02/how-a-simple-misdemeanor-could-land-you-in-jail-for-months> [<https://perma.cc/39RH-NJLJ>] (arguing that the misdemeanor system runs its own version of low-level mass incarceration).

<sup>288</sup> Other relevant lenses, not explored here, might include scholarship on the local tax function, see, e.g., Henry Ordower et al., *Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution, and Constitutional Limitations*, 61 HOW. L.J. 113 (2017), drug and other community courts, see, e.g., Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012), and the history of municipal corporations, see, e.g., Joan C.



### A. Testing Judicial Norms

Formally speaking, municipal courts are courts. They are legally defined as courts by state law. The judges who preside over them apply local law to the facts of specific cases and render legally binding judgments. And yet, at the extreme end of the spectrum of structure and practice, municipal courts operate in tension with many conventional understandings of what makes a criminal court a “court.”<sup>289</sup> Municipal court judges are often appointed by mayors or city councils and depend on them for tenure and salary, in violation of independence norms. Judges’ salaries may depend on their ability to collect fines and fees from defendants they convict, in violation of neutrality norms. When judges are not lawyers, they may not know the law, in violation of legality norms. Many courts are not of record<sup>290</sup> and produce no transcript or other record of the proceeding, in violation of publicity and transparency norms.<sup>291</sup> In other words, while such courts have been consistently upheld as constitutional exercises of judicial power, they test the limits of many basic modern judicial tenets.

1. *The Ongoing Due Process Critique.* — To the extent that criminal municipal courts have received institutional criticism as courts, it has been largely in the vein of due process failure. Proceedings are typically fast and lack individuation. Evidence is ignored. Legal issues go unaddressed. Defendants who have the right to counsel often do not get lawyers. Fines and fees are disproportionately punitive, extortionate, and sometimes unconstitutional.<sup>292</sup>

Some of these analyses date back decades in the historical and sociological literature on early low-level courts, a literature which emphasized their speed and informality. As Professors Lawrence Friedman and Robert Percival relate, the nineteenth-century police court in Alameda County, California, disposed of twenty cases “in ten minutes — two cases per minute.”<sup>293</sup> In 1956, Professor Caleb Foote described a

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Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 434 (1985).

<sup>289</sup> This is not a claim that judicial character is singular or inflexible. See Hershkoff, *supra* note 172, 1908–13 (arguing for “[d]eessentializing the [j]udicial [f]unction,” *id.* at 1909, and noting that “there is nothing essential or inherent,” *id.* at 1912, about various forms of judicial decisionmaking).

<sup>290</sup> Black’s Law Dictionary defines “court of record” as “[a] court that is required to keep a record of its proceedings,” or “[a] court that may fine or imprison people for contempt.” *Court of Record*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>291</sup> *Id.*; see also STATE OF TEX. JUD. BRANCH, *supra* note 180, at 3 (“[M]ost municipal courts are not courts of record.”); OKLA. STAT. tit. 11, § 14-111(B), (C) (2019) (describing differing authority of courts of record and courts not of record).

<sup>292</sup> Criticisms of lower courts are typically coextensive with more general criticisms of misdemeanor processing. See, e.g., NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 9, at 55–86 (describing process failures in misdemeanor courts generally, including municipal courts); Roberts, *supra* note 249, at 364, 371; BORUCHOWITZ ET AL., *supra* note 104, at 7.

<sup>293</sup> FRIEDMAN & PERCIVAL, *supra* note 3, at 125.

typical day in Philadelphia vagrancy courts as follows: “Four . . . defendants were tried, found guilty and sentenced in the elapsed time of *seventeen seconds* . . . . In each of these cases the magistrate merely read off the name of the defendant, took one look at him and said, ‘Three months in the House of Correction.’”<sup>294</sup> In 1979, in his seminal work *The Process Is the Punishment*, Professor Malcolm Feeley described a New Haven lower court filled with “casualness and confusion.”<sup>295</sup> Half of all defendants had no lawyer<sup>296</sup> and “[a]rrestees were arraigned in groups and informed of their rights *en masse* . . . . While a few cases took up as much as a minute or two of the court’s time . . . the overwhelming majority of cases took just a few seconds.”<sup>297</sup>

Such criticisms are not unique to municipal courts. Today, they pertain to a wide range of low-level, limited jurisdiction criminal courts maintained by the state in which due process and adversarial norms have eroded.<sup>298</sup> Florida abolished its municipal courts in 1977,<sup>299</sup> but in 2011, former Florida Supreme Court Chief Justice Gerald Kogan lambasted the misdemeanor courts in his state as “mindless conviction mills,”<sup>300</sup> rushing misdemeanor defendants through arraignment and guilty pleas in three minutes, often without counsel.<sup>301</sup> Comparable criticisms have been levied against low-level state courts across the country.<sup>302</sup> Indeed, the U.S. Supreme Court took broad aim at this entire level of quick and dirty judicial processing when it coined the term “assembly-line justice”<sup>303</sup> and wrote generally of low-level courts that “the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”<sup>304</sup>

In many of these low-level state courts, process failure is the result of legal flouting: judges fail to appoint defense counsel, inform defendants of their rights, enforce the rules of evidence, discipline prosecutors,

<sup>294</sup> Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 605 (1956) (emphasis added).

<sup>295</sup> MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN LOWER CRIMINAL COURT* 13 (1992).

<sup>296</sup> *Id.* at 9.

<sup>297</sup> *Id.* at 10–11. Feeley’s description was not necessarily intended as critical. *See id.* at 22–25, 296–97 (arguing that different forms of justice may be appropriate to different social tasks).

<sup>298</sup> The phenomenon is not limited to misdemeanors. *See, e.g.*, AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* 2–3 (2009) (describing similarly rushed and sloppy practices in felony courts).

<sup>299</sup> *Trial Courts - Circuit*, FLA. CTS., <https://www.flcourts.org/Florida-Courts/Trial-Courts-Circuit> [<https://perma.cc/RL3E-F2GM>] (describing Florida’s judicial unification process).

<sup>300</sup> ALISA SMITH & SEAN MADDAN, NAT’L ASS’N OF CRIM. DEF. LAWS., *THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS* 8 (2011).

<sup>301</sup> *See id.* at 7–8.

<sup>302</sup> *See* BORUCHOWITZ ET AL., *supra* note 104, at 7.

<sup>303</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972).

<sup>304</sup> *Id.* at 34. Jon Argersinger was convicted in a state-run county court in Florida. *See id.* at 26.

or otherwise maintain the legal rigor of the proceedings.<sup>305</sup> Municipal courts, however, have been affirmatively excused from some of these legal constraints. Nonlawyer judges and off-the-record courts represent an embrace of informality; by contrast, no state-run criminal court permits its judges to be nonlawyers or convictions to take place off the record.<sup>306</sup> City courts are also permitted to maintain a less rigorous appearance of judicial neutrality and independence through their close nexus to their parent cities, and because of common relationships between local judges, police, prosecutors, and other governmental branch officials. For example, one New Jersey attorney, who subsequently became a judge, concluded that because of close relationships between local judges and law enforcement, “many people believe somewhat cynically that it is nearly impossible to win a municipal court case involving an officer’s word against a private citizen’s word, no matter how many other credible witnesses testify in the defendant’s favor.”<sup>307</sup>

Put differently, state and municipal courts will often violate due process norms in similar ways, the former because they are ignoring legal mandates, the latter because they have been excused from them. The two phenomena are not normatively equivalent: legal mandates such as legality, neutrality, and independence perform their own expressive, legitimating work above and beyond case outcomes. They are integral to the way that we conceptualize courts and judging, and they offer dignitary and democratic respect to vulnerable defendants in principle, even when they are breached in practice. The fact that municipal courts have been formally excused from some of them thus has independent significance.

2. *The Democratic Role of Judging.* — The legal academy has long been preoccupied with the nature of courts and judging.<sup>308</sup> The judiciary’s role is especially important in the criminal area because it stands between an extremely powerful executive branch and the often unpopular, vulnerable individual. As Justice Scalia once wrote:

[Judges’] most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of that popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will.<sup>309</sup>

<sup>305</sup> See *infra* section II.C, pp. 1035–47.

<sup>306</sup> See *Methods of Judicial Selection: Limited Jurisdiction Courts*, *supra* note 30 (with the possible exception of Washington state).

<sup>307</sup> Lawrence R. Jones, *Reassessing and Reforming the Structure of New Jersey’s Municipal Courts*, N.J. LAW. MAG., Feb. 2005, at 40, 41; see also FLATTEN, CITY COURT: MONEY, PRESSURE AND POLITICS, *supra* note 93, at 4 (“City judges being co-opted by political forces is a long-simmering issue, both in Arizona and nationally.”).

<sup>308</sup> See generally, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

<sup>309</sup> Scalia, *supra* note 21, at 1180.

A full engagement with the enormous literature on courts is beyond the scope of this Article. All I want to suggest is that this well-established intellectual framework generates both insight and additional anxieties about the peculiarities of municipal courts and their deviations from conventional judicial ideals.

For example, independence, transparency, and public reasoning are central to definitions of judging. The “classical view of the judicial role,” writes Professor Judith Resnik, is one in which “judges are not supposed to have an involvement or interest in the controversies they adjudicate.”<sup>310</sup> That classical role is intimately connected to governance norms: “Democracies rely on the independence of their judiciaries as a consequence of democratic commitments . . . to the rule of law, the protection of individual liberties and to rights . . . .”<sup>311</sup> Resnik and Professor Dennis Curtis write that “to judge is to ‘speak[] truth to power,’ to seek to hold and, on occasion, to exercise some form of jurisdiction beyond that given by or belonging to the sovereign, so as to have a measure of critical independence from the sovereign.”<sup>312</sup> In these analyses, adjudication has public dimensions; the role of the court is not merely one of dispute resolution, but of public law preservation.<sup>313</sup> Or as Professor Owen Fiss put it, “[a]djudication is the social process by which judges give meaning to our public values.”<sup>314</sup>

Perhaps unsurprisingly, Resnik treats Ferguson as a prime example of court failure, an object lesson regarding the need for judicial independence. Writing in 2017, she says of the Ferguson court’s crass revenue maximization: “[W]e are being given a lesson in the value of independent judges, protected from the wrath of public and private actors and obliged to treat disputants in an equal and dignified manner.”<sup>315</sup>

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<sup>310</sup> Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) (contrasting the classical hands-off judicial ideal with the realities of managerial judging); see also Owen M. Fiss, *Perspective, The Limits of Judicial Independence*, 25 U. MIA. INTER-AM. L. REV. 57, 60 (1993) (noting that federal courts, with their Article III protections and insulation, are “treated as the fullest embodiment of the ideal of judicial independence”).

<sup>311</sup> Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 592 (2005).

<sup>312</sup> Dennis E. Curtis & Judith Resnik, *Essay, Images of Justice*, 96 YALE L.J. 1727, 1739 (1987) (alteration in original) (footnote omitted) (quoting Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 190 (1985)) (describing Professor Robert Cover’s work on judicial independence).

<sup>313</sup> See Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 530 (2006) (describing the public dimensions of adjudication and quoting Jeremy Bentham as saying “[p]ublicity is the very soul of justice”).

<sup>314</sup> Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

<sup>315</sup> Judith Resnik, *Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899, 1942 (2017); see also Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration*,

In practice, of course, courts often deviate from this classical view. Courts encompass a wide variety of dispute resolution practices, informal exercises of authority, and organizational relationships which are more complicated than simple exercises of rule-based judging.<sup>316</sup> The dominance of plea bargaining in criminal cases in particular has shifted authority to prosecutors in ways that have profoundly altered our conception of what judges do.<sup>317</sup> Nevertheless, courts — and the judicial ideals they represent — remain influential legal, social, and cultural institutions that convey powerful messages about the nature and role of law.<sup>318</sup>

In a recent case, *Ortiz v. United States*,<sup>319</sup> the Supreme Court offered a suggestive meditation on the nature of the “judicial character,” noting that not all adjudicators possess it.<sup>320</sup> That character included such features as deciding cases “in strict accordance with . . . law,” “procedural protections,” the issuance of final and binding judgments, and the availability of an appellate process.<sup>321</sup> In deciding what sorts of tribunals count as courts, the *Ortiz* Court looked for the “essential [judicial] character”<sup>322</sup> and features of “historical *court*-likeness”<sup>323</sup> that make a tribunal a truly judicial institution; as examples, it listed territorial courts, the court system of the District of Columbia, and state courts.<sup>324</sup> By contrast, the Court pointed to the Civil War–era military tribunal in *Ex parte Vallandigham*,<sup>325</sup> which was created, staffed, run, and controlled entirely by a military general.<sup>326</sup> That tribunal, wrote the Court, was “more an adjunct to a general than a real court” and thus “lacked

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*the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2816, 2834 (2015) (arguing the court failure in Ferguson “ma[de] vivid the disjuncture between government-empowered judges and just systems,” *id.* at 2816).

<sup>316</sup> See, e.g., Lynn Mather, *Epilogue to EMPIRICAL THEORIES ABOUT COURTS* 244, 245 (Keith O. Boyum & Lynn Mather eds., 1983) (“[F]or the vast majority of civil and criminal cases . . . the traditional model of court as a judge-dominated, formal adversary process of adjudication [does] not hold.”).

<sup>317</sup> William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 840 (2006) (“[P]rosecutors have replaced judges as the system’s key sentencing decisionmakers, exercising their power chiefly through plea bargaining.”); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2542 (2004) (“[J]udges [could assume] a more active role in reviewing plea bargaining.”).

<sup>318</sup> See Marc Galanter, *The Radiating Effects of Courts, in EMPIRICAL THEORIES ABOUT COURTS*, *supra* note 316, at 117, 126 (“Courts produce not only decisions, but messages.” *Id.* at 126.).

<sup>319</sup> 138 S. Ct. 2165, 2172–73 (2018) (holding that the Court of Appeals of the Armed Forces was a non–Article III “court” capable of deciding “cases” for purposes of establishing the Supreme Court’s appellate jurisdiction).

<sup>320</sup> See *id.* at 2179.

<sup>321</sup> *Id.* at 2174.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 2179.

<sup>324</sup> *Id.* at 2178.

<sup>325</sup> 68 U.S. (1 Wall.) 243 (1864).

<sup>326</sup> *Ortiz*, 138 S. Ct. at 2179.

‘judicial character.’”<sup>327</sup> *Ortiz* thus suggests that there might be a transjurisdictional test of judicial character under which tribunals — federal, state, and local — could fairly be evaluated, and which a sufficiently interested or informal tribunal might flunk.

The doctrinal and normative messages sent by the judiciary are especially important for criminal law. As Professor Caleb Nelson remarks, “our vision of the constitutional separation of powers is substantially more formalistic when the government is trying to lock someone up.”<sup>328</sup> Criminal legal scholars have focused in particular on the heightened need for judicial independence. Professor Rachel Barkow, for example, argues that the institutional values protected by separation of powers are threatened by near unilateral prosecutorial control over case outcomes in derogation of independent judicial authority.<sup>329</sup> Others emphasize the importance of a fair and impartial judiciary in promoting procedural justice and the public legitimacy of the criminal process.<sup>330</sup>

In each of these various articulations, the public role of courts as independent, reasoned legal decisionmakers has democratic, expressive, and political significance. Courts do not merely apply rules and decide cases; they assure the public of the state’s commitment to the impartial application of law. In the criminal context, they protect vulnerable defendants from the overreaching power of the penal state and its powerful law enforcement officials. Municipal courts have largely escaped scrutiny through these lenses and against these measures of legitimacy.

3. *Learning from the Administrative Adjudicator Model.* — Not all adjudicators purport to be judicial.<sup>331</sup> The federal administrative state employs several thousand executive branch adjudicators who preside

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<sup>327</sup> *Id.* (quoting *Vallandigham*, 68 U.S. (1 Wall.) at 253).

<sup>328</sup> Nelson, *supra* note 273, at 561.

<sup>329</sup> Barkow, *supra* note 270, at 1025, 1046–48 (“The same prosecutor who investigates a case can make the final determination about what plea to accept. There is therefore no structural separation of adjudicative and executive power . . . .” *Id.* at 1025.). Barkow’s call for a strong judiciary is primarily a response to the scope of federal prosecution, but state and municipal prosecutorial powers are similarly broad. See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 538 (2011) (“[S]tate-level prosecutors are more independent than their federal counterparts.”).

<sup>330</sup> See, e.g., Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J.F. 525, 526–27 (2014) (“[T]he primary factor that people consider when they are deciding whether they feel a decision is legitimate and ought to be accepted is whether or not they believe that the authorities involved made their decision through a fair procedure, irrespective of whether members of the public are evaluating decisions made by the Supreme Court or by local courts.”).

<sup>331</sup> Nelson, *supra* note 273, at 599 (arguing that not all adjudication qualifies as “judicial” and describing historical distinction between the adjudication of public interests and private rights and liberties, only the latter of which requires true judicial authority).

over hundreds of thousands of hearings every year;<sup>332</sup> state administrative agencies employ many thousands more.<sup>333</sup> Although municipalities are not administrative agencies,<sup>334</sup> the judges in their courts bear strong family resemblances to these administrative law judges (ALJs): they too are adjudicative officials paid by, often selected by, and/or beholden to executive or legislative officials who rely on them to enforce local codes, in much the same way that agencies maintain ALJs in order to enforce agency regulations.<sup>335</sup>

More specifically, the independence and neutrality challenges surrounding municipal courts strongly resemble issues of independent agency adjudication that have been thoroughly excavated in the administrative law context. Indeed, administrative law routinely relies on *Ward v. Village of Monroeville* in order to evaluate adjudicator conflicts,<sup>336</sup> and scholars have noted the strong similarities between the two fields.<sup>337</sup>

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<sup>332</sup> Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1652 (2016) (identifying approximately 1,500 federal administrative law judges (ALJs) and 3,000 federal administrative judges (AJs)).

<sup>333</sup> Chris Guthrie et al., *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1478 (2009) (documenting 14,100 state and federal ALJs).

<sup>334</sup> See David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 563–64 (1999) ("A local community is not simply a type of state administrative agency to be shaped at will to serve the need of the central state."). The Model State Administrative Procedure Act also excludes "the Judiciary" from its definition of "Agency." REVISED MODEL STATE ADMIN. PROC. ACT § 102(3) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2010).

<sup>335</sup> Notwithstanding these similarities, municipal governance has generally escaped the attention of administrative law scholarship. See Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L.J. 423, 424–25 (2016) (noting that local government scholars maintain they are not doing administrative law). A few scholars have pushed back against this disciplinary state of affairs. See, e.g., Davidson, *supra* note 197, at 564, 572 (arguing that administrative law scholarship should turn its attention to local administrative entities such as health and zoning boards); Saiger, *supra*, at 425 (proposing that a state's decision to create a local government should be conceptualized as a choice of agency form).

<sup>336</sup> E.g., *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (citing *Ward* in finding that an optometry board was biased and noting that "[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators" (alteration and omission in original) (quoting KENNETH CULP DAVIS, *ADMINISTRATIVE LAW: CASES, TEXT, PROBLEMS* 225 (1960)); *Schweiker v. McClure*, 456 U.S. 188, 195–96 (1982) (finding no disqualifying bias under *Ward* with respect to Medicare Part B hearing officers appointed by private insurance carriers who "serve in a quasi-judicial capacity, similar in many respects to that of administrative law judges," *id.* at 195); cf. *Giles v. City of Prattville*, 556 F. Supp. 612, 616 (M.D. Ala. 1983) (deciding that municipal court judge could not constitutionally serve simultaneously as prosecutor in his own court based in part on Administrative Procedure Act case that found "unfairness of a procedure that commingled the prosecutorial function of the presiding inspector with his decision making function").

<sup>337</sup> Redish & McCall, *supra* note 245, at 319 ("Like the Mayors in *Tumey* and *Ward*, agency commissioners occupy two different positions, one partisan and one judicial."); see also Saiger, *supra* note 335, at 439–40 (noting in passing that local courts enforce municipal ordinances in the same way that agencies enforce their own regulations); Newton et al., *supra* note 5, at 45 ("As organized, Utah justice courts essentially operate as an administrative agency.").

Municipal courts could benefit from the conversation around administrative adjudication. Administrative law has long grappled with the structural risks of bias and undue influence triggered by agencies that select and influence their own adjudicators.<sup>338</sup> Fueled by concerns about ALJ bias and agency interference with adjudication, a large body of law has arisen to emphasize the importance of adjudicator insulation against agency control.<sup>339</sup> The federal Administrative Procedure Act<sup>340</sup> (APA), for example, contains strong protections for ALJ independence against agency influence. Those protections include limitations on agency supervision and removal of ALJs, and prohibitions against ALJ communications with agency investigators or prosecutors.<sup>341</sup>

In practice, municipal judge arrangements often violate these sorts of antibias and anti-influence protections. For example, judges appointed by city councils often do not enjoy meaningful tenure or salary security. Many such judges perceive their salaries and reappointment prospects to be contingent on their performance in collecting fines and fees.<sup>342</sup> Judges commonly communicate with and rely on police and prosecutors: many municipal courts depend on local prosecutors for space, resources, and legal advice, especially when those judges are not themselves attorneys.<sup>343</sup> Some judges serve as prosecutors in other jurisdictions and maintain professional relationships with law enforcement.<sup>344</sup> These practices suggest that *Ward* and the conflict cases do

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<sup>338</sup> See, e.g., Barnett, *supra* note 332, at 1648; see also Benslimane v. Gonzales, 430 F.3d 828, 829–30 (7th Cir. 2005) (surveying numerous examples of immigration judge bias and concluding that “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice,” *id.* at 830).

<sup>339</sup> E.g., Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 151 (2019) (“Congress has sharply limited agency control over the selection, retention, and removal of ALJs, such that ALJs enjoy strong decisional independence.”).

<sup>340</sup> 5 U.S.C. §§ 551, 553–559, 701–706.

<sup>341</sup> *Id.* § 554(d)(2) (stating that ALJs may not “be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency” and that agency investigators and prosecutors may not “participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings”); see also Lucia v. SEC, 138 S. Ct. 2044, 2060 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part) (“The substantial independence that the [APA’s] removal protections provide to administrative law judges is a central part of the Act’s overall scheme.”).

<sup>342</sup> FERGUSON REPORT, *supra* note 18, at 3; see also Brucker v. City of Doraville, 391 F. Supp. 3d 1207, 1214 (N.D. Ga. 2019) (“The more substantial the percentage of revenues, the more reasonable it is to question the impartiality of the judge . . .”); Newton et al., *supra* note 5, at 50 (describing pressures on municipal court judges to raise revenue); FLATTEN, CITY COURT: MONEY, PRESSURE AND POLITICS, *supra* note 93, at 2 (describing judicial dependence on city councils).

<sup>343</sup> See *supra* pp. 985–1016 (describing municipal court informality).

<sup>344</sup> Joy, *supra* note 153, at 23; see also Kimberly Jade Norwood, *Recalibrating the Scales of Municipal Court Justice in Missouri: A Dissenter’s View*, 51 WASH. U. J.L. & POL’Y 121, 130 (2016) (worrying that a “defense lawyer facing a prosecutor s/he knows is his or her judge the next night in a different municipality might be more deferential to the prosecutor than zealous advocacy requires”).



not guarantee adjudicator independence in the robust ways that separation of powers principles require for formal adjudications in the comparable agency context.<sup>345</sup>

The agency adjudication comparison is potentially useful in another way: it highlights the special tensions that arise when municipal courts resemble administrative adjudicators while operating in their criminal capacity. Administrative law adjudicators do not exercise criminal authority. Even when parent agencies have the authority to define “administrative crimes,” violations are adjudicated by courts, not by ALJs.<sup>346</sup> Indeed, most ALJs lack the authority to detain, let alone punish.<sup>347</sup> This is because criminal law and its liberty deprivations trigger unique concerns: the executive power to punish is specially constrained by judicial checks and balances, and criminal defendants are accorded unique constitutional protection against the political branches.<sup>348</sup> As Nelson notes, “the authoritative adjudication of an individual’s core private rights to life or liberty plainly *does* require ‘judicial’ power.”<sup>349</sup> Put differently, as long as municipal courts exercise that special criminal authority, they must be sufficiently judicial to do so.

The comparison between municipal courts and ALJs is admittedly limited. Municipal governments are not administrative agencies.<sup>350</sup> Federal agencies are constrained by separation of powers in ways that do not apply at the local level.<sup>351</sup> Federal ALJ decisions are not final.<sup>352</sup>

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<sup>345</sup> The APA does not fully resolve the ALJ impartiality question either. See Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 816–20 (2013) (summarizing debate over ALJs and how “their limited independence raises impartiality, and thus due process, concerns,” *id.* at 816); see also Guthrie et al., *supra* note 333, at 1480, 1520–21 (finding that like generalist judges, ALJs make decisions based on intuitions, heuristics, and biases).

<sup>346</sup> 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.6(c) (3d ed. 2017) (concluding that legislatures “clearly” cannot delegate to an administrative agency the power of adjudication or the authority to determine guilt or innocence in individual cases).

<sup>347</sup> Immigration judges have the power to detain, 8 U.S.C. § 1226, and Tax Court judges can punish contempt with incarceration, *Lucia v. SEC*, 138 S. Ct. 2044, 2054 (2018).

<sup>348</sup> *United States v. Ward*, 448 U.S. 242, 248 (1980) (“The distinction between a civil penalty and a criminal penalty is of some constitutional import.”).

<sup>349</sup> Nelson, *supra* note 273, at 626; see also *id.* (“[The] authoritative deprivation of an individual’s natural rights to life or physical liberty requires fully ‘judicial’ determination of the individualized adjudicative facts.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (finding that separation of powers “most assuredly envisions a role for all three branches when individual liberties are at stake”).

<sup>350</sup> See Saiger, *supra* note 335, at 425 (admitting that they are not).

<sup>351</sup> See *supra* pp. 1007–10 (discussing inapplicability of separation of powers to local governments).

<sup>352</sup> *Lucia*, 138 S. Ct. at 2054 (describing agency review of ALJ decisions). While municipal judge decisions are final, de novo review and a new trial are typically available to any defendant wishing to challenge their conviction. See *supra* section I.B.4, pp. 1003–05 (discussing appellate processes). But see Jim Rossi, *Final, but Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53, 54 (2004) (describing trend toward ALJ finality under state administrative regimes).

Nevertheless, municipal courts and ALJs both confront the obvious appearance of conflict and bias that arises when an adjudicator has deep institutional connections to a nonjudicial institution seeking enforcement of its own rules. In the administrative law context, ALJ independence is a touchstone, a central reference point relied on by courts and scholars alike that supports the notion that executive branch adjudication can meet basic due process and legitimacy standards. *Ward* and the municipal court conflict cases have come to play an important role in fleshing out that administrative commitment to adjudicator neutrality. Ironically, many actual municipal court practices remain in deep tension with that commitment.

4. *Municipal Courts Going Forward.* — These various explorations of the nature of courts in general and municipal courts in particular could send us in at least two different conceptual directions. We might accept the municipal court phenomenon as a longstanding, legitimate judicial practice that puts new pressure on the ways that we talk about courts and criminal adjudication.<sup>353</sup> Municipal judges are not required to be financially neutral or politically independent.<sup>354</sup> They are not even required to know the law.<sup>355</sup> Their continued existence thus implies that neutrality, independence, and law-bound reasoning are not per se characteristics of criminal courts and of criminal judging. Instead, they suggest that we should expand the discourse around the nature of the judicial function to better accommodate the extent to which so many local courts diverge from the idealized Article III-oriented model of the impartial, independent legal adjudicator.

In the criminal context, however, there are good reasons to double down on neutrality, independence, and legal reasoning as normatively desirable characteristics of courts and judges. For the legally and politically vulnerable defendant, judicial character — and judicially enforced due process — is supposed to be a key protection against executive overreach and popular animus.<sup>356</sup> The need for such protections is especially pressing in the very context at issue in *Ward*, where both the adjudicator and the executive have financial interests in criminal case outcomes. Indeed, the national outrage that followed the Ferguson investigation was driven in large part by the epiphany that Ferguson's judiciary and city officials had conspired against their own vulnerable population in order to make money for the city.<sup>357</sup> In this light, the criminal municipal court

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<sup>353</sup> Hershkoff, *supra* note 172, at 1914 (“No idealized conception of judicial capacity resolves what the shape or content of the judicial function should be in state courts . . .”).

<sup>354</sup> See *supra* section I.B.5, pp. 1005–10.

<sup>355</sup> See *supra* section I.B.3, pp. 1000–03.

<sup>356</sup> See *infra* section II.C.2, pp. 1040–43 (discussing informality in criminal law).

<sup>357</sup> At the time of the Department of Justice's investigation, Ferguson had an elected mayor, an elected six-person city council, and an appointed city manager. The municipal court judge, in turn, was nominated by the city manager and elected by the city council. See FERGUSON REPORT, *supra* note 18, at 7–8.

looks more like a troubling anachronism that has slipped between the jurisprudential cracks, permitted to operate in conflicted ways that erode basic criminal justice norms. This suggests that we should rethink *Ward, North v. Russell*, and the rest of municipal court jurisprudence to be less accommodating of municipal court informality, and to bring these courts into greater compliance with modern practices and understandings.

Such rethinking is not just about tweaking old doctrines or strengthening procedural rules. The challenges posed by municipal courts flow in part from the fact that they are not solely judicial institutions but also integral to local governance and connected to the special role of cities. Understanding their criminal and judicial functions requires institutional context above and beyond classic due process concerns. The next section thus turns to that intellectual landscape.

### B. Local Governance

Local government is a political arrangement central to U.S. history and democracy. Local governments effectuate their own brand of political participation, accountability, and transparency in ways that neither state nor federal power can fully replicate. Given the influence of localism in American democracy, it is surprising how little has been written about municipal courts from a local government perspective.<sup>358</sup> The leading treatise, Professor Eugene McQuillin's *The Law of Municipal Corporations*, for example, which is a nineteen-volume, 13,000-page authority on municipal law, devotes a mere twenty-eight pages to municipal courts: they are contained in the chapter on "Actions to Enforce Police Ordinances."<sup>359</sup> Imagine for a moment the incredulous scholarly response to a treatise that tucked the federal judiciary into a short section entitled "Actions to Enforce Federal Law." Casebooks on local government law tend not to address municipal courts at all.<sup>360</sup> One such casebook, for example, includes a chapter on the separation of powers

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<sup>358</sup> For example, Judge David Barron and Professors Michelle Wilde Anderson, Richard Briffault, Nestor Davidson, Gerald Frug, and Richard Schragger are leading local governance scholars whose work has not addressed municipal courts. See *supra* note 4; see also Leib, *Local Judges*, *supra* note 5, at 708 ("[I]t seems quite rare to see [local government scholarship] focused on . . . the local courts."); cf. Logan, *Shadow Law*, *supra* note 5, at 1436 (discussing local legislative authority to enact criminal laws and noting in passing that "local authority typically entails the use of 'municipal courts,' the summary and 'slap-dash methods' of which have been a source of concern for decades" (footnotes omitted)).

<sup>359</sup> See 9A MCQUILLIN, *supra* note 190, §§ 27:1–4; see also *id.* §§ 27:83–97 (providing an additional fifty pages that cover the appeals process).

<sup>360</sup> See sources cited *supra* note 4.

in which it discusses the legislative and executive branches of city government, but not the judicial branch.<sup>361</sup> Again, picture the chilly academic reception to an article on the separation of powers that never mentioned the courts. Put differently, the absence of local courts in the municipal government literature would be intellectually countercultural in other spheres.

There are at least two major entry points through which municipal courts might be better integrated into the extant local government discourse, one political, one economic. At the same time, municipal courts have much to offer the related, burgeoning conversation around criminal justice localism. As elucidated below, municipal courts might even be seen as a kind of conceptual bridge between the different preoccupations of criminal and local government law.

*I. Political Localism.* — Local government law and scholarship are centrally concerned with community authority and autonomy. City governments in particular are viewed as key vehicles for democratic self-expression. As Professor Nestor Davidson describes it, “[l]ocal participation reinforces bedrock public values as people learn to cooperate to solve problems that face much more significant collective-action challenges at larger scales. As a result, local governments have a distinctive capacity to reflect community needs in polities that foster local voice.”<sup>362</sup>

Through this lens, municipal courts might be appreciated as unique opportunities for and expressions of official responsiveness, local political will, and community-informed substantive criminal justice.<sup>363</sup> This potential responsiveness is in fact central to their historical legacy. Edwards writes that post-Revolutionary local justices of the peace — the precursors to modern municipal courts — represented “not some quaint, folksy exception to a formalized rational body of state law” but rather a profound expression of local democratic impulses and Revolutionary commitments to legal and political accountability.<sup>364</sup> Willrich writes that, a century later, “[p]rogressive legal mandarins such as Roscoe Pound . . . and . . . Louis Brandeis saw the reconstruction of city

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<sup>361</sup> BAKER ET AL., *supra* note 4, at 759–826 (“The central question this chapter asks is whether the familiar institutional design features of the federal government — e.g. separation of powers between a legislature and an executive branch, an executive with administrative law powers that are deferred to by courts — make sense in the context of local governments.” *Id.* at 759.).

<sup>362</sup> Nestor M. Davidson, Essay, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 975 (2019) [hereinafter Davidson, *The Dilemma of Localism*].

<sup>363</sup> See Leib, *Local Judges*, *supra* note 5, at 734–35 (“Local courts are surely designed at least in part to afford citizens justice that makes sense in their communities.” *Id.* at 735.); see also Logan, *Shadow Law*, *supra* note 5, at 1411–16 (connecting the localism debate to municipal authority to enact criminal ordinances).

<sup>364</sup> EDWARDS, *supra* note 3, at 5.

courts as absolutely central to the larger process of making law more responsive to modern social needs.”<sup>365</sup>

Today, New York State maintains over 1,200 town and village courts presided over by elected, mostly nonlawyer judges.<sup>366</sup> The arrangement has withstood decades of criticism: legislative reform, electoral referenda, and judicial challenges have all failed in the face of persistent local and powerful political support for the courts. “You boys from New York City have never seen a justice court,” remarked one state senator and defender of the system in 1959.<sup>367</sup> “These justices are the backbone of honest-to-God human justice in our state.”<sup>368</sup> New York is not alone in its persistence. Missouri faced scathing national and international criticism of its municipal courts in the aftermath of the Ferguson Report. Nevertheless, the work group created by the Missouri Supreme Court declined to recommend their elimination.<sup>369</sup>

Thirty years after Provine’s survey of New York local judges,<sup>370</sup> Professor Ethan Leib went back and interviewed twenty-three New York town and village judges and asked them about their relationship to the state. Their answers revealed strong localist loyalties:

A majority felt primarily “of the locality,” not of the state. Judges said things like the following: “As a local judge, I don’t see the state;” “We aren’t funded by the state, so I am accountable mostly to the locality;” “I don’t think of myself as related to the state; I serve a local community;” “I am part of the town on parking, zoning, and building issues. There I want the town to thrive. I feel for the locals and want the town to thrive in tough economic times;” “I don’t have much concern about ‘the state’ as such. I worry about the kids in our community;” “I do not feel I am an arm of the state or an apparatus of the state. I am an elected official for the village. I don’t identify as a state guy;” “I don’t . . . consider myself a part of the state sys-

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<sup>365</sup> WILLRICH, *supra* note 3, at xxvii; *see also* Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 315 (1912) (celebrating the Chicago Municipal Court “as an example of a thoroughly organized modern court with power to make the law an effective instrument of justice”).

<sup>366</sup> *See* Glaberson, *supra* note 227.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *See* SUP. CT. OF MO. MUN. DIV. WORK GRP., REPORT TO THE SUPREME COURT OF MISSOURI 7–8, 69–72 (Mar. 1, 2016), <https://www.courts.mo.gov/file.jsp?id=98093> [<https://perma.cc/35XY-HY85>] (citing “powerful jurisprudential, political, and practical considerations,” *id.* at 7, against court-ordered consolidation); *cf.* Norwood, *supra* note 344, at 129 (explicating a work group member’s criticism of this decision). Since then, the Missouri Supreme Court and various legislative enactments appear to have encouraged, but not mandated, consolidation. *See* Jeremy Kohler, *Several Municipal Courts in St. Louis County to Consolidate*, ST. LOUIS POST-DISPATCH (Oct. 5, 2016), [https://www.stltoday.com/news/local/crime-and-courts/several-municipal-courts-in-st-louis-county-to-consolidate/article\\_4b657e3b-5399-505a-8boe-89ea4bdcood2.html](https://www.stltoday.com/news/local/crime-and-courts/several-municipal-courts-in-st-louis-county-to-consolidate/article_4b657e3b-5399-505a-8boe-89ea4bdcood2.html) [<https://perma.cc/NZ9H-THP8>].

<sup>370</sup> *See* PROVINE, *supra* note 3.

tem;” “I am of the community and paid by the locality;” “I am ‘totally local;” “I don’t feel integrated into the state system at all.” One judge stated, “The state does not have much say in my life at all.”<sup>371</sup>

These localist loyalties and institutional staying power suggest that municipal courts should be a bigger part of the ongoing conversation about politically responsive judiciaries in general and their methods of selection and retention in particular.<sup>372</sup> In contrast to appointed, life-tenured Article III judges, elected judges are well understood to provide benefits of democratic accountability alongside the risks of politicization and undue influence.<sup>373</sup> Municipal judges further complicate that story because their appointments also can be highly politicized. Approximately half of municipal court judges are elected whereas half are appointed by city officials,<sup>374</sup> which means that all are potentially under some form of local political pressure. We know almost nothing about the effects of appointment versus election: data are scant and the phenomenon is not well understood. A study by *Governing Magazine* identified Arkansas, Georgia, Louisiana, New York, Oklahoma, and Texas as states that are especially reliant on fines and fee revenue.<sup>375</sup> All of these states have municipal courts, but they vary in how they select their judges.<sup>376</sup> Several states have concluded that local appointments processes are particularly risky. A 2017 Arizona report found that

<sup>371</sup> Leib, *Local Judges*, *supra* note 5, at 725–26 (omission in original) (footnotes omitted).

<sup>372</sup> See Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1, 8 (2014) (“[H]ow a judge gains his or her office is nowhere near as important as how he or she can lose it.”). See generally Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995) (asking “how elected/accountable judges can be justified in a regime committed to constitutionalism”); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882–86 (2009) (discussing threat of bias in judicial elections).

<sup>373</sup> A few scholars have explored the impact of judicial electoral pressures on criminal case outcomes. See, e.g., Carlos Berdejó & Naom Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT., 741, 749–50 (2013) (finding that judges sentenced defendants more harshly as elections approached). *But see* Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, AM. ECON. J.: ECON. POL’Y, Feb. 2019, at 160, 173–74 (finding evidence that racial bias in judicial sentencing was associated with the political affiliation of life-tenured judges).

<sup>374</sup> See *infra* Table 2.

<sup>375</sup> See Maciag, *supra* note 101; see also Kopf, *supra* note 101 (identifying cities in Texas (nineteen), Georgia (seventeen), Missouri (twelve), Illinois (nine), Maryland (six), and New York (six) as comprising the majority of the top 100 municipalities most reliant on fines and fees); U.S. COMM’N ON C.R., *supra* note 33, at 21–22 (identifying seventeen cities in Georgia, Illinois, Maryland, Missouri, New York, Tennessee, and Utah that received a larger share of their revenues from fines and fees than Ferguson).

<sup>376</sup> See *infra* Table 2. One unpublished study reports that elected municipal judges rely more heavily on fines and fees than do their appointed municipal counterparts. Siân Mughan, *Fine and Fee Revenues, Local Courts and Judicial Elections: The Role of Financial and Political Institutions in Extractive Revenue Practices in U.S. Cities 22* (May 22, 2019) (Ph.D. dissertation, Indiana University), <https://ssrn.com/abstract=3392412> [<https://perma.cc/9P3S-N2TE>] (finding also that fine and fee collections vary with the racial composition of the municipal electorate).

local elections better insulate municipal court judges from “good-old-boy” pressures emanating from appointment commissions, which exert pressures “to raise revenue through fines, [to] allow questionable practices that are priorities of the [city] council, or to give special treatment to influential city insiders.”<sup>377</sup> Similarly, Utah officials concluded that the state’s municipal court judges were under pressure to raise revenue precisely by virtue of the local judicial appointments process.<sup>378</sup> Utah thus eliminated local appointments and moved to a hybrid system in which municipal court judges are initially recommended by a judicial screening panel, appointed by the mayor, and then stand for local retention reelection.<sup>379</sup> In 2015, when DOJ identified the heavy political pressures on Ferguson judges to raise revenue, Ferguson municipal court judges were being nominated by the city manager and approved by the city council.<sup>380</sup>

In effect, municipal courts represent an enormous, understudied experiment in local political democracy. With closer attention, they could help elucidate the troubled relationship between local criminal dockets and municipal reliance on fines, as well as deep challenges of judicial accountability and independence under local resource constraints. More broadly, these courts could enrich our thinking around political accountability, around methods of judicial selection, and around the meaning and aims of democratic judging.

2. *Economic Localism.* — Municipal courts might also occupy a greater place in the scholarly discourse about cities as sites of economic decisionmaking and wealth redistribution. State fiscal crises, recessions, and instabilities in the housing market have profoundly impacted U.S. cities. Many grapple with lack of resources, service cuts, and even bankruptcy. As Professor Michelle Wilde Anderson explains, the poorest cities have “been struggling with deindustrialization for decades . . . . Widening inequality among individuals has imprinted itself in space, and these cities lie within the lowest strata of cities ranked by property values, crime rates, and educational outcomes.”<sup>381</sup> At the same time, urban decisionmaking exerts broad economic and redistributive influence: nearly thirty years ago, Professor Richard Briffault identified the “close connection between local legal and political autonomy and issues of distributive justice.”<sup>382</sup>

<sup>377</sup> FLATTEN, CITY COURT ELECTIONS, *supra* note 136, at 2.

<sup>378</sup> *See id.* at 7.

<sup>379</sup> *Id.* at 7–8.

<sup>380</sup> *See* FERGUSON REPORT, *supra* note 18, at 8, 14–15. Postreform Missouri law requires the state supreme court to promulgate new conflict rules. MO. REV. STAT. § 479.155 (2019).

<sup>381</sup> Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1128 (2014).

<sup>382</sup> Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990) (addressing education and zoning); *cf.* Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 405 (2001) (arguing that the Chicago gang loitering statute

If there is one arena in which municipal courts have gained recognition, it is in connection with their role in raising local revenue through the imposition of fines and fees. An enormous new wave of litigation, advocacy, and scholarship — much but not all of it post-Ferguson — is devoted to the problem of fines and fees, debtors' prisons, and the incentives of governments, police, and courts to use criminal law enforcement to raise money.<sup>383</sup> As Professor Beth Colgan points out:

[T]he use of economic sanctions — statutory fines, surcharges, administrative fees, and restitution — has exploded in courts across the country. . . . [This modern debtors' prison] crisis has been driven in large part by a desire by lawmakers to use economic sanctions as a tax substitute as well as a form of punishment, leading to the creation of more and greater sanctions, and in some jurisdictions to policing targeted at offenses from which revenue can be generated.<sup>384</sup>

Courts are the quiet centerpiece of this strategy — they are the site in which revenue-generating legislation and extractive policing actually translate into collections.<sup>385</sup> In this sense, the general conversation around municipal courts as local economic actors has implicitly begun.

This Article shows that municipal courts collect at least two billion dollars, and probably much more, in fines and fees each year.<sup>386</sup> In those thirty states that permit municipal courts, cities receive and rely on \$3.1 billion in court fine-and-forfeit revenue. Although more specifics are lacking, this basic accounting reveals municipal courts to be central players in the redistribution of local wealth.

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struck down in *City of Chicago v. Morales*, 527 U.S. 41 (1999), “is a zoning regime”). See generally NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA (2009).

<sup>383</sup> See, e.g., Michael D. Makowsky et al., *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement* 14–16 (Geo. Mason Univ. Working Paper in Econ., Paper No. 16-17, 2018), <https://ssrn.com/abstract=2745000> [<https://perma.cc/D2SC-NRKX>] (finding that drug and DUI arrests increase in counties where local governments are running deficits and where states allow police departments to retain seizure revenues, but only for Black and Hispanic, not White, arrests); Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1093 (2017) (showing that cities' reliance on fines and fees is connected to the size of the Black population and also mediated by the presence of Black city council representation).

<sup>384</sup> Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 6–7, 12 (2018) (footnotes omitted); see also Ordower et al., *supra* note 288, at 130–31 (2017) (arguing that St. Louis municipal courts are improperly using fines and fees as implicit taxes); Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rear View Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 72 (2009) (noting an increase in local ticket issuances following local revenue declines).

<sup>385</sup> See Ordower et al., *supra* note 288, at 117–19; see also All Things Considered, *North Carolina Law Makes It Harder for Judges to Waive Fees and Fines*, NPR (Dec. 4, 2017, 4:41 PM), <https://www.npr.org/2017/12/04/568393477/north-carolina-law-makes-it-harder-for-judges-to-waive-fees-and-fines> [<https://perma.cc/D97N-V23L>] (explaining new state law restricting judges' ability to waive fines and fees).

<sup>386</sup> See *supra* section I.A.1.(h), pp. 982–85; *infra* Table 3.



The Supreme Court recently recognized the fraught quality of the judicial revenue-collection function and its potential threat to the integrity of the criminal system. In *Timbs v. Indiana*,<sup>387</sup> the Court incorporated the Eighth Amendment's prohibition against excessive fines against the states.<sup>388</sup> In explaining why the "[p]rotection against excessive punitive economic sanctions secured by the [Excessive Fines] Clause is . . . 'fundamental to our scheme of ordered liberty,'"<sup>389</sup> the Court observed that "fines are a source of revenue"<sup>390</sup> and thus risk being "employed 'in a measure out of accord with the penal goals of retribution and deterrence.'"<sup>391</sup> Quoting an ACLU amicus brief, the Court noted that the threat is "scarcely hypothetical"<sup>392</sup>: "state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue."<sup>393</sup> The reference to "local governments" is actually to municipal courts — the quoted paragraph in the ACLU brief is devoted to documenting municipalities' heavy reliance on city court-generated revenue:

In 2017, New Jersey municipal courts collected more than \$400 million in fines and fees, with more than half of that amount funneled to the general funds of municipalities and a significant portion directed to state and county governments. Similarly, in 2016, more than half of the \$167 million raised by Arizona municipal courts in fines and fees funded general municipal operations. Among the 100 cities in the United States that generated the highest proportion of municipal revenue from fines and fees in 2012, between 7.2% and 30.4% of total municipal revenue was derived from fine and fee collection.<sup>394</sup>

In these ways, municipal courts turn out to be important vehicles through which local governments respond to state fiscal crises. They can be seen as a low profile but integral part of a larger economic story about the relationship between state and local government. They are also local wealth redistributors in their own right, contributing to the often fraught relationship between local governments and their own disadvantaged residents. These courts' redistributive role is most obvious when they collect fines and fees from low-income residents to fund the criminal system, a policy that has triggered the charge that local courts

<sup>387</sup> 139 S. Ct. 682 (2019).

<sup>388</sup> *Id.* at 689.

<sup>389</sup> *Id.* (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (emphasis omitted)).

<sup>390</sup> *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991)).

<sup>391</sup> *Id.* (quoting *Harmelin*, 501 U.S. at 979 n.9).

<sup>392</sup> *Id.*

<sup>393</sup> *Id.* (quoting Brief of the American Civil Liberties Union, The R Street Institute, The Fines and Fees Justice Center, and The Southern Poverty Law Center as Amici Curiae in Support of Petitioners at 7, *Timbs*, 139 S. Ct. 682 (No. 17-1091)).

<sup>394</sup> Brief of the American Civil Liberties Union, The R Street Institute, The Fines and Fees Justice Center, and The Southern Poverty Law Center as Amici Curiae in Support of Petitioners, *supra* note 393, at 7 (footnotes omitted).

are regressive tax collectors in judicial disguise.<sup>395</sup> But courts also redistribute social capital away from defendants by translating policing decisions into financial burdens. It is courts that convert arrests and prosecutions into criminal convictions, collateral consequences, unemployment, debt, and all the other mechanisms through which the criminal process strips people of their life resources.<sup>396</sup> Because low-level law enforcement is so often racially skewed, municipal courts thus also contribute to and reinforce the racialized criminalization of poverty.<sup>397</sup> These powerful economic effects make municipal courts key players in the localism inequality drama.

3. *Criminal Justice Localism.* — Across the intellectual pond, a related debate is brewing over the role of local democracy in criminal law in general and racialized mass incarceration in particular. In his last book, the criminal law scholar Professor William Stuntz argued that the profound dysfunctions and unfairnesses of the American criminal justice system called for more local democracy.<sup>398</sup> Local communities, he argued, especially poor communities of color, lose out when counties, states, and the federal government dominate crime policy.<sup>399</sup> He thought that mass incarceration and the system's racial skew could be understood in part as failures of local political accountability.<sup>400</sup> "Make criminal justice more locally democratic," he concluded, "and justice will be more moderate, more egalitarian, and more effective at controlling crime."<sup>401</sup>

Stuntz passed away in 2011.<sup>402</sup> Four years later, the U.S. Department of Justice's Ferguson Investigation pulled back the curtain

<sup>395</sup> See NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 9, at 201–10.

<sup>396</sup> See *id.* at 9–10, 117, 147 (arguing that the regressive redistributive influence of the misdemeanor system renders it a powerful socioeconomic institution on par with housing, education, and other welfarist policies).

<sup>397</sup> Criminalization, for example, can reduce mobility because criminal records and debt interfere with employment and housing in ways that prevent residents from exiting the jurisdiction. Municipal court criminalization thus might weaken some localist models of accountability based on mobility. See Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1135 (2008) (describing how public choice theories of local government rely heavily on the exit option: "[T]he threat that people will 'vote with their feet' by moving in search of suitable locales serves as an inherent check on local government behavior"); see also Davidson, *The Dilemma of Localism*, *supra* note 362, at 981 (describing a localism "model [that] suggests that residential and other forms of mobility will serve as a sufficient check on the excesses of local government"). I'm indebted to Michelle Wilde Anderson for this insight.

<sup>398</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 283 (2011).

<sup>399</sup> See *id.* at 38–39.

<sup>400</sup> See *id.* at 39.

<sup>401</sup> *Id.*; see also *id.* at 283 ("Local neighborhoods should exercise more power over the administration of justice within their bounds, as they once did.")

<sup>402</sup> See Douglas Martin, *W.J. Stuntz, Who Stimulated Legal Minds, Dies at 52*, N.Y. TIMES (Mar. 20, 2011), <https://www.nytimes.com/2011/03/21/us/21stuntz.html> [<https://perma.cc/L2ZR-3X55>].

on the local court's inegalitarian practice of using misdemeanor convictions to extract revenue, often through incarceration, from the city's poorest Black residents.<sup>403</sup> Many municipal courts around the country have likewise demonstrated their responsiveness, not to community voices, but to political expedience and financial pressure.<sup>404</sup> Such practices remind us that localism alone cannot be counted on to provide reliable protection for vulnerable criminal defendants.

At the same time, many criminal law scholars continue to call for a stronger role for community responsiveness and local criminal justice decisionmaking. In a 2017 symposium entitled "Democratizing Criminal Law," over a dozen scholars argued for various forms of public participation, local accountability, and community-based adjudication as ways of improving fairness in the criminal process.<sup>405</sup> Nineteen scholars signed onto a "White Paper of Democratic Criminal Justice" containing thirty different reform proposals, many of which revolved around giving the public and the community a stronger voice in criminal justice policy and adjudication.<sup>406</sup> Much like Stuntz, many of these scholars saw various forms of local engagement as methods for pushing back against mass incarceration and the racialization of crime and injecting more democratic responsiveness into the criminal justice process.<sup>407</sup>

This criminal localism debate has mostly ignored municipal courts,<sup>408</sup> but local courts and their locally selected judges are obvious vehicles for a democratizing shift. City residents should, at least in theory, have more access to and influence over local judges than those who are selected and paid at the state level.<sup>409</sup> Those local judges, in turn, have enormous authority over the culture of the criminal process, including their own court operations, public access to information, and the experiences that defendants and their families have when they come

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<sup>403</sup> See generally FERGUSON REPORT, *supra* note 18.

<sup>404</sup> E.g., BANNON ET AL., *supra* note 123, at 1–2 (documenting local court deployment of extortionate private probation practices).

<sup>405</sup> See Symposium, *Democratizing Criminal Justice*, 111 NW. U. L. REV. 1367 (2007).

<sup>406</sup> See Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1697–705 (2017).

<sup>407</sup> E.g., Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1383 (2017) ("[T]here is an important place in the criminal system for governance by lay people in their capacity as citizens; we want to maintain room in criminal law and procedure for prudential, equitable, and individualized moral judgment; and we think criminal justice is often better served by the exercise of value rationality than by instrumental rationality.").

<sup>408</sup> None of the democratizing articles cited *supra* note 405 mention municipal courts. Colgan specifically discusses the Ferguson court. See generally Colgan, *supra* note 149.

<sup>409</sup> See Davidson, *The Dilemma of Localism*, *supra* note 362, at 975 (exploring how local access can promote residents' "local voice").

to court.<sup>410</sup> Most obviously, local judges manage and resolve particular cases, appointing counsel, accepting or rejecting pleas, and presiding over the rare trial. More broadly, like all judges, they are symbolically important high-profile representatives of community norms.<sup>411</sup> Local judges also have enormous discretion over punishment.<sup>412</sup> They decide now-politically fraught matters such as whether to impose bail or whether to use private probation companies.<sup>413</sup> They have the inherent authority, in other words, to push back against many of the prime inequities and dysfunctions of the low-level misdemeanor process.

Local judges also wield indirect influence over local law enforcement and prosecution policies in how they manage their dockets: judicial authority can be used either to resist or promote the shortcuts of so-called “assembly line” justice.<sup>414</sup> Judges, for example, can set schedules in ways that minimize the pressure on defendants to plead guilty.<sup>415</sup> They can appoint counsel, hold pretrial hearings, and otherwise operationalize a more robust adversarial system.<sup>416</sup> Such judicial interventions affect more than individual cases: they raise the institutional costs of bringing so many cases in the first place and can force the executive to internalize more fully the social costs of policing and prosecution.<sup>417</sup> Conversely,

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<sup>410</sup> Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1622 (2017) (“[C]ourts can enforce the First and Sixth Amendment rights of community members to dissent and intervene; court administrators can ensure open courtrooms and allow audience members to participate in proceedings upon request . . . .”); Crespo, *supra* note 8, at 2117 (describing how criminal courts have untapped institutional power to improve the accountability and functioning of myriad players in the criminal system because courts have natural access to “systemic facts, the valuable caches of information that criminal courts collect on a daily basis . . . [that] can reveal essential aspects of the institutional behavior of key criminal justice actors”).

<sup>411</sup> See *supra* section II.A, pp. 1012–22.

<sup>412</sup> See Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 175 (2017) (describing enormous and influential sentencing discretion possessed by misdemeanor judges).

<sup>413</sup> See *supra* note 166 and accompanying text (describing locally elected judges who refused to use private probation companies and were then sued by those companies).

<sup>414</sup> Cf. Resnik, *Managerial Judges*, *supra* note 310, at 380 (surveying broad unregulated authority that accrues to judges in their managerial role and observing that “managerial judging may be redefining *sub silentio* our standards of what constitutes rational, fair, and impartial adjudication”).

<sup>415</sup> See THE BRONX DEFS., NO DAY IN COURT: MARIJUANA POSSESSION CASES AND THE FAILURE OF THE BRONX CRIMINAL COURTS 2–3 (2013), <https://www.bronxdefenders.org/wp-content/uploads/2013/05/No-Day-in-Court-A-Report-by-The-Bronx-Defenders-May-2013.pdf> [<https://perma.cc/2U64-WVZW>].

<sup>416</sup> See generally ANDREA M. MARSH, NAT’L ASS’N OF CRIM. DEF. LAWS., JUDICIAL RESPONSIBILITY FOR JUSTICE IN CRIMINAL COURTS (2017), <https://www.nacdl.org/Document/JudicialResponsibilityforJusticeinCriminalCourts> [<https://perma.cc/DP8N-64ET>] (recommending various judicial interventions based on a two-day conference for “judges, prosecutors, defense attorneys, scholars, and criminal justice policy experts to identify practical reforms to improve the quality of justice in state and local criminal justice systems” with a focus on “the judicial role in high-volume misdemeanor courts,” *id.* at 6).

<sup>417</sup> See Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 191–92 (2017) (criticizing the “correctional free lunch,” *id.* at 191, and arguing that law

when local courts acquiesce to the bloated dockets that result from over-policing and overcharging, they effectively validate those law enforcement choices.<sup>418</sup> When courts impose burdensome fines and fees, or incarcerate individuals for failure to pay them, they operationalize the criminalization of poverty and perpetuate political reliance on such revenue streams. In such cases, local judges are complicit in the local promotion of mass incarceration. For these kinds of reasons, for better or for worse, judges turn out to be highly influential policymakers and thus prime candidates for increased local accountability around criminal justice reform.

This practical reality of local judicial power reignites many large normative questions that swirl around the idea of localist or community-based justice. In particular, the question of whether and when communities should be permitted to define their own parameters of crime, punishment, and justice raises old specters of mob justice and is in profound tension with more formalist notions of rule of law. The problem is as old as Justices of the Peace and municipal courts themselves.<sup>419</sup>

The debate is also ongoing. Twenty years ago, for example, the Supreme Court struck down Chicago's gang loitering ordinance as void for vagueness.<sup>420</sup> While acknowledging that the ordinance was motivated by authentic problems of local public safety,<sup>421</sup> the majority decided that the Chicago City Council could not sacrifice the individual liberty interests of residents and bend due process norms to make anti-gang enforcement easier.<sup>422</sup> Justice Thomas dissented, arguing that law-abiding Chicago residents were being forced to pay too high a price for the constitutional rights of others.<sup>423</sup> That judicial intervention in city politics, in turn, generated a highly contested scholarly literature on whether local communities should have the authority to weaken or forego their own civil liberties — or those of their neighbors — in exchange for the promise of reduced crime. Professors Tracey Meares and Dan Kahan famously argued that courts should defer to the political

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enforcement and local prosecutors overindulge because they are not forced to internalize the full costs of overenforcement).

<sup>418</sup> For an elaboration of this argument, see Alexandra Natapoff, *The High Stakes of Low-Level Justice*, 128 YALE L.J. 1648, 1688, 1697 (2019) (arguing that judicial docket management strategies make possible and therefore implicitly validate high-volume order-maintenance policing and prosecutions).

<sup>419</sup> See EDWARDS, *supra* note 3, at 7–9; PROVINE, *supra* note 3, at xii; see also Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 675 (2018) (arguing that the “much flaunted localism built into the U.S. constitutional tradition” is the source of much of the criminal system's dysfunction).

<sup>420</sup> *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999).

<sup>421</sup> *Id.* at 51.

<sup>422</sup> *Id.* at 53–54, 58.

<sup>423</sup> *Id.* at 114–15 (Thomas, J., dissenting).

calculus of local communities besieged by crime.<sup>424</sup> By contrast, many scholars pushed back hard against the negotiability of constitutional rights, especially for criminal defendants, and especially in already disadvantaged communities.<sup>425</sup> Since then, others have continued to point out that the concept of community itself is a highly politicized, constructed notion that does not necessarily justify localist legal accommodations. As Professor Robert Weisberg wryly put it, “sometimes ‘community’ refers to something very concrete which is actually very bad for justice.”<sup>426</sup>

More recently, scholars continue to express skepticism about the salutary promises of localized criminal justice. Colgan argues in particular that “[t]he experience in Ferguson suggests that Stuntz’s exchange of procedural rules for local control is ill conceived.”<sup>427</sup> Professor John Rappaport similarly challenges some key assumptions in the democratizing debate that localized justice will be less racialized and more lenient.<sup>428</sup> During the post-Ferguson debate over whether to preserve municipal courts in Missouri, Professor Kimberly Norwood pointed out that the municipal court power structures in majority Black communities did not actually reflect those communities: “[T]he municipal court judges and lawyers in the predominately Black municipalities . . . are overwhelmingly White and male — not bastions of black power by any stretch of the imagination.”<sup>429</sup> Wayne Logan has worried more generally about local overcriminalization and the “[s]pecter of [l]ocal [o]ppressiveness” as reasons to be suspicious of local criminal legislative authority.<sup>430</sup>

In all these ways, municipal courts are paradigmatic examples of the tense relationship between criminal justice and local democracy. Their localist legacy has been repeatedly marred by their consistent failure to ensure the lawfulness of convictions, the unseemly political and economic motivations of too many of their judges, and their institutional role in converting punishment into revenue for cash-strapped municipalities. They are, in this sense, an example of “a particularly toxic vein of local parochialism that hardens a range of socioeconomic and racial

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<sup>424</sup> See generally TRACEY L. MEARES & DAN M. KAHAN, *URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES* (1999).

<sup>425</sup> See, e.g., Carol S. Steiker, *More Wrong Than Right*, BOS. REV. (Apr. 1, 1999), <http://bostonreview.net/forum/when-rights-are-wrong/carol-s-steiker-more-wrong-right> [<https://perma.cc/R67P-2JGZ>] (“[S]ome things are too important to be alienated.”).

<sup>426</sup> Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343, 343; see also Schragger, *supra* note 382, at 433 (“As with all essentializing terms, ‘community’ is both over- and underinclusive.”).

<sup>427</sup> Colgan, *supra* note 149, at 1239.

<sup>428</sup> John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 740 (2020).

<sup>429</sup> Norwood, *supra* note 344, at 129 (emphasis omitted).

<sup>430</sup> Logan, *Shadow Law*, *supra* note 5, at 1448; see *id.* at 1448–50.

inequalities.”<sup>431</sup> At the same time, these courts also reflect the persistent allure of local accountability. In the criminal context, that allure is not irrational. It was, as Stuntz pointed out, largely state and federal crime policies that led to our current crisis of racially disparate mass incarceration.<sup>432</sup> Municipal courts might also shine by association with other civic expressions of localism: cities around the country, for example, have recently passed antidiscrimination statutes, global warming ordinances, and other progressive legislation eschewed at the state and national level.<sup>433</sup> Perhaps they could provide enlightened criminal policy leadership too.

In their hybridity, municipal courts thus provide a conceptual bridge between the preoccupations of criminal law and local government and suggest how the two disciplines — too often siloed — might help each other grapple with some perennially tough questions. On the one hand, municipal courts force us to confront the need for the fair, neutral adjudication of criminal cases and the protection of vulnerable defendants while revealing the many ways that local political and economic pressures can erode those commitments. On the other, they also highlight the possibilities for a more responsive, locally accountable criminal process that is particularly attractive against the backdrop of thirty years of state and federal investment in the war on drugs and mass incarceration. On the local and national fronts, the aggregate size and deep reach of municipal courts make them significant to both projects. They have the potential — positive as well as negative — to influence local economic and democratic environments while altering the quality and trajectory of much of our criminal legal system.

### C. *Low-Status Law at the Bottom of the Penal Pyramid*

The final contribution of the municipal court is a conceptual insight into the deep structures of our criminal process. In addition to the many lives and communities they affect, municipal courts have been jurisprudentially influential. Over the decades, judges and other legal officials

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<sup>431</sup> Davidson, *The Dilemma of Localism*, *supra* note 362, at 977.

<sup>432</sup> See STUNTZ, *supra* note 398, at 287–96. The causes of mass incarceration are, to put it mildly, diverse. Compare Carol S. Steiker, *Introduction to Symposium, Mass Incarceration: Causes, Consequences, and Exit Strategies*, 9 OHIO ST. J. CRIM. L. 1 (2011) (surveying range of causes of mass incarceration including race, the war on drugs, and the breakdown of democratic ideology), with ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016) (charting the gradual conversion of federal poverty resources into crime control mechanisms), and JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION — AND HOW TO ACHIEVE REAL REFORM* (2017) (blaming state prosecutorial felony filing rates for mass incarceration).

<sup>433</sup> Davidson, *The Dilemma of Localism*, *supra* note 362, at 958 (describing array of “local policies that advance equity and inclusion[,]” but noting that localism is a “double-edged sword . . . [that] can be used for desirable as well as pernicious ends”).

have adjusted key features of criminal law and procedure to accommodate these low-status environments, both on paper and in practice, changing basic tenets of due process and even the definitional lines surrounding the meaning of criminal liability itself. In this way, municipal courts exert a powerful gravitational pull over the criminal legal ecosystem.

This accommodation is a dynamic of what I have described as the “penal pyramid.”<sup>434</sup> The criminal process is not a monolith: it operates more formally and rigorously in serious or elite types of cases. At the narrow top of the pyramid, where federal jurisdiction, serious crimes, and/or wealthy defendants command resources and attention, the criminal system is typically more rigorous and rule-bound. That is not a claim that it is substantively just: the legality principle only gets us so far.<sup>435</sup> But at the enormous bottom where cases are pettiest and defendants are poorest, even limited principles of legality get lost in the shuffle of informal, sloppy, and speedy case processing.<sup>436</sup> Here, where most misdemeanors are processed, evidence is rarely scrutinized, legal arguments are scarce, and lower courts openly ignore various provisions of the Constitution.

Much of the current critique of misdemeanor processing accuses lower courts at the bottom of the pyramid of flouting the law: so-called “assembly-line” courts are ignoring or breaking the basic rules of criminal adjudication.<sup>437</sup> Municipal courts are also flouters, but as the discussion above reveals, their story is more complicated. In important respects the law itself has adjusted to affirmatively permit greater informality. Since the earliest days of the republic, municipal courts have received special treatment as local, low-resource institutions. As the Supreme Court noted as far back as 1894 and as recently as 1972, municipal courts are subject to lesser standards of independence, due process, and adversarialism.<sup>438</sup> They are exempt from the demands of separation of powers.<sup>439</sup> They need not hold jury trials.<sup>440</sup> Judges need not be lawyers.<sup>441</sup> The Supreme Court constrained the misdemeanor right to counsel in part

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<sup>434</sup> See generally Natapoff, *The Penal Pyramid*, *supra* note 26.

<sup>435</sup> See *infra* text accompanying notes 472–473.

<sup>436</sup> Natapoff, *The Penal Pyramid*, *supra* note 26, at 72.

<sup>437</sup> I have made this argument repeatedly myself. See *supra* section II.A.1, pp. 1012–14. See generally Symposium, *Misdemeanor Machinery: The Hidden Heart of the American Criminal Justice System*, 98 B.U. L. REV. 669 (2018) (nine-article symposium criticizing the misdemeanor machinery).

<sup>438</sup> *Lawton v. Steele*, 152 U.S. 133, 141 (1894) (noting that municipal courts have been excused from the jury trial requirement “from time immemorial”); *Colten v. Kentucky*, 407 U.S. 104, 117 (1972) (“[T]he inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms.” (quoting *Colten v. Commonwealth*, 467 S.W.2d. 374, 379 (Ky. 1971))).

<sup>439</sup> See *supra* text accompanying note 272.

<sup>440</sup> See *supra* text accompanying note 29.

<sup>441</sup> See *supra* section I.B.3, pp. 1000–03.



because it worried that lower courts could not afford it.<sup>442</sup> There is a paradox in this dismissive accommodation: the accommodations are simultaneously a form of deference to local institutions and a dismissiveness regarding the importance of their cases and proceedings.

As a result of these accommodations, many practices that would look outrageous at the top of the pyramid — uncounseled guilty pleas in front of untrained judges resulting in heavy fines and even incarceration — are not merely routine but legal, the product of jurisprudential choices about the inferior pedigrees of these low-level institutions, the minor nature of their cases, and their constrained resources. It is these historical choices, as much as the problem of lawless flouting, that keep municipal courts in tension with more rigorous modern criminal procedural norms.

Local courts thus contribute to a broader phenomenon in which law adopts lower standards or blurs key formal lines in response to low-status or low-resource cases and institutions.<sup>443</sup> Similar dynamics can be seen in other low-status, high-volume arenas from juvenile law to immigration to family law, where the formalism and adversarialism associated with elite adjudication have been relaxed. This last section explores these mechanisms of dismissive accommodation in which municipal courts are permitted to straddle the criminal-civil line and operate in more informal ways than criminal law typically demands. These legal accommodations are not mistakes or deviations from an elite ideal. Rather, they are affirmative legal strategies designed for the bottom in which rules, law, and formalism are seen as overly expensive and potentially unnecessary to the less important work of low-status institutions. The implications of the arrangement are both pragmatic and theoretical. If we want to strengthen the working integrity of municipal courts in practice, it is this dismissiveness and its accompanying accommodations — more than any specific doctrine or rule — that must be reconsidered in theory.

*I. Blurring the Criminal-Civil Line.* — The criminal-civil divide is definitional. It recognizes the exceptional quality of state power when

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<sup>442</sup> *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (worrying that extending the right to counsel to all misdemeanor defendants would “impose unpredictable, but necessarily substantial, costs on 50 quite diverse States”); *see also id.* at 372 (expressing concern over the “social cost or a lack of available lawyers”); *id.* at 384 (Brennan, J., dissenting) (“The apparent reason for the Court’s adoption of the ‘actual imprisonment’ standard for all misdemeanors is concern for the economic burden that an ‘authorized imprisonment’ standard might place on the States.”).

<sup>443</sup> *See, e.g.,* Kessler, *supra* note 19, at 2060 (noting that Progressives engaged in municipal court reform believed that “traditions of common-law-based adversarialism were poorly suited to the new socioeconomic conditions”); Lawrence M. Friedman, *Courts Over Time: A Survey of Theories and Research*, in *EMPIRICAL THEORIES ABOUT COURTS*, *supra* note 316, at 9, 39 (arguing that low-level “ordinary” criminal cases are essentially “administrative” and receive “perfunctory treatment” while “big” and “important” cases receive meticulous care).

the government engages in the coercive, often violent work of criminal enforcement.<sup>444</sup> As reflected in the Bill of Rights itself, we have heightened fears of undemocratic overreach in precisely this context. The criminal-civil line is also a recognition of the special burdens and harms imposed through criminal punishment. In particular, it reflects the moral, stigmatic quality of the criminal conviction that is absent from civil penalties.<sup>445</sup>

Municipal courts blur the criminal-civil line in a variety of ways. Punishments typically come in the form of fines, which on their face could be either civil or criminal. Some courts lack initial sentencing authority to jail and can only incarcerate upon the nonpayment of fines. Formally speaking, ordinance violations are not part of the state criminal code; sometimes they are referred to as “quasi-criminal.”<sup>446</sup> More abstractly, these courts adjudicate many offenses so minor or so regulatory that they do not really seem like *crimes* at all. These features have generated lingering ambiguities over whether and to what extent these courts are fully criminal institutions, and reinforce the intuition that municipal court cases might not mandate the strongest formal protections.

To be clear, the criminal-civil line is not always blurry: a significant percentage of municipal court work is unambiguously criminal in nature. Every year, municipal courts process approximately 3.5 million straightforwardly criminal misdemeanor cases, including drunk driving, theft, and assault. The caseloads documented in Table 1 include only those offenses designated by the city and state as criminal and do not include speeding or other low-level traffic offenses. In these millions of cases, convicted defendants receive criminal records and may face or receive incarceration as punishment. Courts have held that such offenses are criminal — and thus trigger double jeopardy, a (limited) right to counsel, beyond-a-reasonable-doubt standards, and the full panoply

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<sup>444</sup> Compare *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion) (applying the *Mathews v. Eldridge*, 424 U.S. 319 (1976), civil balancing test to assess due process entitlements), with *id.* at 556, 568, 575–76 (Scalia, J., dissenting) (arguing that detention for alleged criminal conduct requires application of criminal due process rights).

<sup>445</sup> Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 785 (1997) (“[T]he traditional conception of criminal law includes not merely the acknowledgement of its public nature and its goal of encouraging socially desirable behavior, but also its concern with fault, choice, and moral desert.”); see also Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 310 (2004) (discussing the politically exceptional nature of punishment).

<sup>446</sup> Cf. *United States v. Ward*, 448 U.S. 242, 252–54 (1980) (surveying doctrinal history of “quasi-criminal,” *id.* at 252, proceedings such as forfeitures that are “so far criminal in their nature,” *id.* at 253, that they trigger the Fifth Amendment privilege against self-incrimination without triggering other criminal procedural rights such as the right to counsel).

of criminal procedural formalities — regardless of whether they are technically labeled “crimes” or “ordinance violations.”<sup>447</sup>

At the same time, municipal courts occupy large gray areas. Those 3.5 million criminal cases are a fraction of overall caseloads: traffic offenses dominate most municipal court dockets. Some like DUI are always criminal; other offenses like running a stop sign usually are not.<sup>448</sup> But twenty-five states define speeding as a criminal misdemeanor, while “serious traffic” offenses such as driving on a suspended license may or may not be defined as criminal misdemeanors in state or local codes.<sup>449</sup> In addition, municipal courts engage in a great deal of noncriminal debt-related incarceration. Even where offenses are technically civil or merely traffic, violations routinely trigger incarceration when defendants fail to pay fines or fees.<sup>450</sup>

State law on the nature of municipal ordinances only complicates the matter. Depending on the available penalties, courts in different jurisdictions define municipal ordinance violations along a spectrum ranging from civil, quasi-civil, quasi-criminal, to criminal. The Tennessee Supreme Court has described ordinance violations as “neither fish nor fowl.”<sup>451</sup> At the far end of the criminal-civil spectrum the analysis is relatively straightforward: if the penalty includes incarceration, or the offense is formally defined as a “misdemeanor,” the ordinance violation is criminal.<sup>452</sup> Many ordinance violations, however, are fine-only: incarceration is triggered by the defendant’s failure to pay. Under such circumstances, according to the leading treatise, “[t]he weight of judicial authority declares that the prosecution is in the nature of a civil action for the recovery of a debt.”<sup>453</sup> But this arrangement is not always considered entirely civil either, and some courts respond to the definitional

<sup>447</sup> See, e.g., *Waller v. Florida*, 397 U.S. 387, 395 (1970) (holding that double jeopardy protection was triggered by conviction for city ordinance violation); *Atwater v. City of Lago Vista*, 532 U.S. 318, 342–43 (2001) (relying on cases upholding custodial arrest for municipal ordinance violations); see also *State v. Chacon*, 273 S.W.3d 375, 377 & n.2 (Tex. App. 2008) (holding that fine-only municipal ordinance violations are criminal cases); 3B C.J.S. *Animals* § 21 (2020) (noting that city ordinances could be criminal and thus require a beyond-a-reasonable-doubt standard).

<sup>448</sup> See NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 9, at 45–46 (describing array of criminalized traffic offenses).

<sup>449</sup> NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., SUMMARY OF STATE SPEED LAWS, at v–ix (11th ed. 2011) (indicating that twenty-five states classify speeding as a criminal misdemeanor with penalties that include jail time).

<sup>450</sup> See, e.g., ACLU OF OHIO, *supra* note 117, at 5; PAWASARAT & WALZAK, *supra* note 121, at 2.

<sup>451</sup> *Mullins v. State*, 380 S.W.2d 201, 202 (Tenn. 1964).

<sup>452</sup> See 9A MCQUILLIN, *supra* note 190, § 27:6.

<sup>453</sup> *Id.*; see also LAFAVE, *supra* note 346, § 1.7(c) (explaining that some ordinance violations may not be “strictly criminal” but instead “constitute[] a civil wrong against the municipality”). Professor Wayne LaFave notes that the modern trend is toward treating such offenses as criminal. *Id.*; see also REYNOLDS, *supra* note 4, § 24.2 (describing “archaic” and “outdated doctrines” that treat municipal ordinance violations as civil).

difficulty by labeling such ordinances “quasi-criminal,” triggering some but not all criminal procedural entitlements.<sup>454</sup>

Municipal courts are not the only low-status institutions that straddle the criminal-civil divide and thereby destabilize our intuitions about the requisite levels of legal process and formality. Drug courts, community courts, and other specialty criminal courts that provide direct welfare services often adopt less adversarial, informal procedures; this can make them look more like direct service welfare institutions than criminal courts, even when the proceeding eventually results in incarceration.<sup>455</sup> Juvenile law is technically noncriminal but is treated in almost all respects as a criminal cognate.<sup>456</sup> Immigration cases are technically civil, but so often result in detention and punitive experiences that the arena is widely recognized as a criminal hybrid.<sup>457</sup> And some low-level civil courts that were formerly criminal still reflect their punitive roots. For example, Professor Elizabeth Katz has described how civil family courts — which currently engage in a large amount of noncriminal incarceration — evolved directly out of criminal nonsupport courts.<sup>458</sup> In each of these spaces, the blurring of the criminal-civil divide permits the state to engage in punitive or coercive activities — including a great deal of incarceration — that would be more stringently regulated were

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<sup>454</sup> See LAFAYE, *supra* note 346, § 1.7(c) (“[V]iolations of the ordinances of local governmental organizations, . . . although resembling crimes, are not strictly criminal.”); see also *People v. Hizhniak*, 579 P.2d 1131, 1132 (Colo. 1978) (authorizing home rule municipality to incarcerate a defendant for speeding under its local ordinance although state speeding law did not permit a jail sentence). Compare *Village of Kildeer v. LaRocco*, 603 N.E.2d 141, 143 (Ill. App. Ct. 1992) (“Where the prosecution for a violation of a municipal ordinance is to recover a fine or a penalty only, although the proceeding is of a quasi-criminal nature, it is civil in form, and the cause is tried and reviewed as a civil proceeding.”), and *Tupper v. City of St. Louis*, 468 S.W.3d 360, 371 (Mo. 2015) (“Prosecutions for municipal ordinance violations are civil proceedings with quasicriminal aspects.”), with *City of Santa Fe v. Baker*, 620 P.2d 892, 895 (N.M. Ct. App. 1980) (“The fine [for a zoning violation] was assessed as a penalty. Prosecution for violation of a municipal ordinance is a quasi-criminal proceeding. Fines are by nature punitive.” (citation omitted)), and *DeKalb County v. Gerard*, 427 S.E.2d 36, 37 (Ga. Ct. App. 1993) (holding that with respect to violation of county soil erosion ordinance, “[a] prosecution for violation of a city or county ordinance is a ‘quasi-criminal’ case having the nature of a criminal case”).

<sup>455</sup> See McLeod, *supra* note 288, at 1612 (describing model of problem-solving courts in which “[t]he entire legal process — in fact, the entire institutional operation of the court as such — is to be reconceived on the therapeutic model”).

<sup>456</sup> See *In re Gault*, 387 U.S. 1, 31–57 (1967) (holding that due process requirements of notice, counsel, and the right against self-incrimination applied to juvenile proceedings); Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1447 (2009) (“The juvenile court has historically been a hybrid institution in terms of its purpose and procedures, incorporating aspects of both the civil and criminal court systems.”).

<sup>457</sup> See, e.g., Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 LAW & SOC’Y REV. 241, 274 (2015) (“‘Crimmigration’ . . . appears to have transformed the criminal process for non-citizens in state and local justice systems in ways that enhance the pain associated with criminal punishment.”).

<sup>458</sup> See Katz, *supra* note 20, at 1245 (“Beginning in the 1930s, lawmakers strategically rebranded criminal nonsupport prosecutions and the courts that heard them as ‘civil.’”).

it deemed conventionally criminal.<sup>459</sup> In so doing, these practices and institutions erode the boundaries between the classic moral blaming functions of criminal law and its more instrumental regulatory incarnations, and destabilize the exceptionalism of “criminal” punishment on which so much law and theory relies.<sup>460</sup>

2. *Informality in Criminal Law.* — Formalism and rule of law play a special role in legitimating criminal law and punishment. The maxim *nulla poena sine lege* (no punishment without law) is aimed at criminal, not civil penalties.<sup>461</sup> Or, as Professor David Cole once wrote, “[f]ormalism, with its commitment to fair procedures, clear rules, and restricted discretion, is a necessary part of any fair system of criminal law.”<sup>462</sup> At the same time, the idea that low-status criminal cases do not warrant full-fledged and expensive process has long been used to justify the summary quality of low-level adjudication in general, and in municipal courts in particular.<sup>463</sup> In reaction to municipal courts’ local status, constricted jurisdiction, and lack of resources, the Supreme Court has ratcheted down basic criminal procedure requirements, permitting summary adjudications in front of nonlawyer judges with no formal record and, often, no defense counsel. More *poena*, less *lege*.

It should be acknowledged that there is an institutional argument for this kind of informal accommodation. Criminal justice localism could theoretically mean that local courts should have some flexibility in the ways that they process low-level cases, especially given municipal resource constraints.<sup>464</sup> This viewpoint is perhaps best captured by the Supreme Court’s 1972 remark that these are supposed to be “courts of

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<sup>459</sup> See *Turner v. Rogers*, 564 U.S. 431, 448 (2011) (holding that an indigent defendant in a civil contempt proceeding facing potential incarceration is not automatically entitled to counsel); see also Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 146 (1996) (“Sometimes, the very use of criminal procedures may be stigmatizing. When the [civil/criminal] label is not explicit, a punitive purpose might be inferred by the use of procedures often associated with criminal punishment.”).

<sup>460</sup> See generally Seidman, *supra* note 459 (discussing the regulatory aspect of criminal law).

<sup>461</sup> See *Rogers v. Tennessee*, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting) (“[T]he maxim *nulla poena sine lege* . . . has been described as one of the most ‘widely held value-judgment[s] in the entire history of human thought.’” (alteration in original) (quoting JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 59 (2d. ed. 1960))).

<sup>462</sup> David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241, 242 (2001).

<sup>463</sup> See Christine Harrington, *Delegalization Reform Movements: A Historical Analysis*, in 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 20, at 51 (describing the creation of informal courts during the Progressive Era, which claimed to provide “social justice” in contrast to “legal justice”).

<sup>464</sup> See, e.g., Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL’Y REV. 137, 143 (2002) (“Regularization . . . sets standards relative to the means available to the regulated, and enables flexible and general compliance, with the goal of progressive improvement rather than immediate, full and universal compliance. Regularization is an alternative regulatory strategy pioneered in the developing world and designed for conditions of extreme economic constraint.”).

convenience.”<sup>465</sup> Drug courts and other specialized courts are premised on a similar, although not identical, belief that informality permits more individuated justice, and that tribunals sensitive to defendant well-being should have more flexibility in providing it. Municipal courts might be those sorts of institutions too, on the theory that such courts are locally accessible, responsive, and well situated to provide individuated, community-sensitive justice.

But in operation, the dangers of such accommodations are on stark display in cities like Ferguson. When municipal courts in low-resource cities are insulated from the formal regulatory requirements and norms embodied in standard criminal procedures (and the transparencies and oversight that accompany them), those courts are vulnerable to becoming crass and sloppy revenue generators. That extractive impulse, in turn, is economically regressive and often racially biased. One researcher concluded that the “cities most likely to exploit residents for fine revenue are those with the most African Americans.”<sup>466</sup> The U.S. Commission on Civil Rights similarly observed that “[m]unicipalities target poor citizens and communities of color for fines and fees.”<sup>467</sup> The theoretical localist argument for greater informality must therefore contend with the demonstrated risk that underregulated municipal courts can be engines of economic and racial inequality.

Structurally speaking, informality poses special dangers to criminal adjudication. The subjects of that adjudication — criminal defendants — are one of the polity’s most socially and politically vulnerable constituencies.<sup>468</sup> Criminal law and procedure tend to be stubbornly formalist in part out of fear of unfettered official decisionmaking in the fraught communal spaces of blame, harm, and social disfavor.<sup>469</sup> Criminal procedure in particular has a strong countermajoritarian streak: it is a barrier intentionally interposed between the political will

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<sup>465</sup> *Colten v. Kentucky*, 407 U.S. 104, 117 (1972) (“[I]nferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses.” (quoting *Colten v. Commonwealth*, 476 S.W.2d 374, 379 (Ky. 1971))).

<sup>466</sup> Kopf, *supra* note 101.

<sup>467</sup> U.S. COMM’N ON C.R., *supra* note 33, at 4.

<sup>468</sup> Cf. Schragger, *supra* note 382, at 386 (describing Madisonian “tradition that views the neighborhood as a threat to individual liberty”).

<sup>469</sup> See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972) (striking down vagrancy statute as conferring unfettered discretion on police); *In re Gault*, 387 U.S. 1, 18 (1967) (“[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”); see also Seidman, *supra* note 459, at 160 (“Criminal law is that portion of our legal system defined by the practice of blaming. That practice, in turn, necessarily entails a formalist world view complete with its emphasis on individualism, freedom of choice, and adjudicatory models of justice.” (emphasis and footnote omitted)).

and criminal law outcomes.<sup>470</sup> Because criminal punishment is exceptional in its harshness, moreover, it requires bright lines of application.<sup>471</sup> The rules of criminal law and procedure — and adherence to rule of law more generally — thus perform a structural policing function that advances the integrity and fairness of criminal justice. Their relaxation in the municipal court context not only contributes to inaccurate and regressive outcomes, but also cements the perception that the cases, people, and punishments that fill this space are not terribly important and do not warrant full legal protection.

To be sure, the benefits of formalism should not be overstated. The legality principle is no cure for substantively unjust rules. And even well-meaning rules are all-too-imperfect protections for the vulnerable. Indeed, one of the hallmarks of social vulnerability is precisely the inability to take advantage of existing rules, in serious and minor cases alike.<sup>472</sup> Criminal procedure formalism, moreover, is well known for creating doctrinal blind spots that obscure or ignore the realities and experiences of vulnerable defendants.<sup>473</sup> Nevertheless, formalism and the legality principle with all their imperfections still play an outsized role in regulating substantive justice, one of the reasons that “[t]he law

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<sup>470</sup> See *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (defending the exclusionary rule even though it admittedly benefits the guilty); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 49 (2000) (“Jim Crow justice . . . provided the occasion for the birth of modern criminal procedure.”); Scalia, *supra* note 21, at 1180 (“[Judges’] most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of [the] popular will . . . .”); cf. Alice Ristroph, *Regulation or Resistance? A Counter-narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1558, 1593–94 (2015) (conceptualizing criminal procedure not only as regulating the state but also as “many individual acts of resistance to state coercion,” *id.* at 1558).

<sup>471</sup> See Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 STAN. L. REV. 987, 996–97 (2014) (“The stigma and hard treatment that flow from criminal culpability are unmatched by even the most serious forms of civil liability. . . . Such solemn legal consequences are appropriately thought to . . . demand ‘that the agencies of official coercion should, to the extent feasible, be guided by rules’ as a means to promote ‘regularity and evenhandedness in the administration of justice and accountability in the use of government power.’” (footnotes omitted) (quoting John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 212 (1985))); see also Cole, *supra* note 462, at 242 (“The sanctions involved in the criminal system are too severe to permit them to be allocated in an open-ended discretionary or regulatory manner.”).

<sup>472</sup> See Stephen B. Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994).

<sup>473</sup> See Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 26, at 111, 116 (criticizing various types of doctrinal formalism that obscure the inhumane treatment of prisoners); Alexandra Natapoff, *A Stop Is Just a Stop: Terry’s Formalism*, 15 OHIO ST. J. CRIM. L. 113, 116–19 (2017) (criticizing the Supreme Court’s formalist approach to *Terry* stops); Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 110 (2011) (criticizing the “empty formalism” of plea colloquies and *Miranda* warnings).

of crime is special.<sup>474</sup> Much of criminal procedure is styled as a constraint on the state's power to punish precisely because the political process — local and state as well as federal — cannot be counted on to protect vulnerable defendants from these harshest of penalties.<sup>475</sup> All this is to say that the local political process alone cannot justify the informality of divesting defendants in municipal courts of legal protection against serious forms of state intrusion.

3. *Reforming the Bottom of the Pyramid.* — The complexities of the municipal court phenomenon make reform challenging, to say the least, and this final section purports only to begin that conversation. Part of municipal court reform involves rethinking the doctrines and rules that govern this space. But for the same reasons that formalism can only ever be a partial answer to substantive injustice, procedural reform is an inherently limited response in low-status and low-resource arenas like municipal courts that are permeated by social disadvantage. Rules tend to have less traction in low-status spaces where legal resources are scarce and flouting is common. Rules matter less here because the institutions and people do not command full systemic attention; tweaking the rules themselves cannot fix that.

Nevertheless, rule changes have expressive and political as well as instrumental value, even when they are not fully enforced. Rules are one of the vehicles through which we collectively acknowledge the importance of institutional and individual interests: in the criminal context, criminal procedure can function as a form of civic respect for criminal defendants' interests. Indeed, we complain of disrespect when it fails to acknowledge those interests.<sup>476</sup> From that perspective, an obvious response to municipal courts' doctrinal deviance is to eliminate their special dispensations and bring them into the criminal procedure mainstream. The legality principle requires that convictions be issued according to law, which means that judges should be legally trained attorneys. It means that proceedings should take place on the record in a fashion that permits correction of legal error after the fact. The adversarial process relies on defendants to invoke their rights and demand

<sup>474</sup> Bowers, *supra* note 471, at 996 (quoting Seidman, *supra* note 459, at 97).

<sup>475</sup> See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 20 (1996) ("A lot of constitutional theory has been shaped by the idea . . . that constitutional law should aim to protect groups that find it hard or impossible to protect themselves through the political process. If ever such a group existed, the universe of criminal suspects is it." (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938))).

<sup>476</sup> See, e.g., Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 151 (2020) (arguing that the Supreme Court's misdemeanor arrest jurisprudence elevates police interests and disregards the dignitary interests of arrestees); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1007–08 (2002) (criticizing Justice O'Connor for recognizing the harms to Gail Atwater, a white mother arrested for a simple misdemeanor crime, but not to James Bostick and other African Americans subject to police coercion).



full legal protections, which means that the right to counsel needs to be fully enforced in cases where it already exists, and potentially extended to cases where incarceration is possible.<sup>477</sup>

None of these arguments are new: critics of municipal courts have argued for such doctrinal reforms for decades.<sup>478</sup> But the arguments are even stronger today in light of the increasingly harsh and lasting consequences of sustaining a misdemeanor case or conviction. The misdemeanor process routinely strips people of their jobs, housing, health, credit, immigration status, and government benefits, in addition to taking their money and their liberty.<sup>479</sup> Brief stints in the local jail can be dangerous or even lethal.<sup>480</sup> Arrest and conviction records trigger job loss and persistent unemployment. For those too poor to pay them, fines and fees can lead to crushing debt, incarceration, and homelessness. These punitive experiences are not minor. Accordingly, the criminal cases that give rise to them should be girded by the same basic protections that we provide in more conventionally serious cases.

The Supreme Court has ratcheted down procedural constraints in municipal courts in part out of respect for their local character. We need not lose sight of those values: constitutional deregulation is not the only way to respect and promote localism. Scholars have identified an array of inclusive mechanisms including greater reliance on juries,<sup>481</sup> court watching,<sup>482</sup> restorative justice,<sup>483</sup> community bail funds,<sup>484</sup> and other

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<sup>477</sup> See, e.g., *Bairefoot v. City of Beaufort*, No. 17-cv-2759, ¶ III.1 (D.S.C. Oct. 7, 2019) (order approving settlement between South Carolina municipalities and ACLU in which municipalities agree to provide counsel to indigent defendants who face potential incarceration), <https://assets.law360news.com/1213000/1213549/settlement.pdf> [<https://perma.cc/4375-L6SW>]; see also Colgan, *supra* note 149, at 1245 (arguing that “individual defense representation functions as a form of political participation” as well as constitutional protection).

<sup>478</sup> See, e.g., Robertson, *supra* note 159, at xix, xxvii–xxviii (criticizing informality of low-level courts).

<sup>479</sup> NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 9, at 3; see also *id.* at 19–38 (describing full impact of misdemeanor cases and convictions).

<sup>480</sup> See *Presumed Innocent, Found Dead.: Counting Jail Deaths in the Year After Sandra Bland's Death*, HUFFINGTON POST, <http://data.huffingtonpost.com/2016/jail-deaths/landing> [<https://perma.cc/8FG8-SH2S>] (“[N]early 1,000 people died in jails each year between 2000 and 2013 . . . .”); *Since Sandra*, HUFFINGTON POST (July 20, 2016, 6:05 PM), <https://data.huffingtonpost.com/2016/jail-deaths> [<https://perma.cc/9JAS-4BP9>] (finding that approximately thirty-seven percent of individuals who died in jails between July 2015 and July 2016 did so during the first week of incarceration).

<sup>481</sup> Laura I Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1420 (2017) (arguing for “inserting the community voice [through juries] into criminal procedures for bail, jail, sentencing, probation, parole, post-release supervision, and criminal justice debt” (footnotes omitted)).

<sup>482</sup> Jocelyn Simonson, *The Criminal Court Audience in a Post-trial World*, 127 HARV. L. REV. 2173, 2174–76 (2014).

<sup>483</sup> John Braithwaite, *Criminal Justice that Revives Republican Democracy*, 111 NW. U. L. REV. 1507, 1520 (2017).

<sup>484</sup> Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 586–88 (2017).

forms of local and lay engagement.<sup>485</sup> The localist potential of municipal courts could thus be affirmed in a variety of ways without sacrificing basic criminal justice protections.

More fundamentally, however, doctrinal reform is an inherently limited response to the challenge of criminal municipal courts. Misdemeanor scholarship reminds us how little formal rules matter in lower courts. Low-level state courts routinely ignore the right to counsel.<sup>486</sup> State-run district courts rely on wealth-stripping fines and fees and maintain debtors' prisons.<sup>487</sup> Ferguson's judges may have been terrible jurists, but they were all attorneys. In other words, even where misdemeanor courts are bound by a full array of criminal procedural rules, it does not guarantee either lawful or substantive justice.

Put differently, criminal procedure can at best mitigate, and at worst exacerbate, the structural, sociological, and political dysfunctions of the low-level criminal system. At the bottom of the penal pyramid, injustices flow not only from the presence or absence of rules and lawyers, but also from the pervasive sense that these are minor cases and unimportant defendants who do not deserve full-fledged legal respect, either on paper or in practice. This dismissiveness can formally alter the rules of the game (as it has in municipal court), or informally permit underenforcement of existing rules (as it has in state court). It is one of the many reasons that the criminal procedure revolution alone has been insufficient to bring substantive fairness to criminal law.<sup>488</sup>

A final challenge of municipal court reform is the uncertainty that stems from the paucity of data, both quantitative and qualitative. We lack basic, reliable information about the number of municipal courts, how many cases they process, and the amount of money they transfer from defendants to cities. We also have only a partial and fragmented picture of municipal court culture. This Article documents many examples of legal deviance and inegalitarian practices and describes how they

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<sup>485</sup> See generally Symposium, *supra* note 405 (describing democratizing mechanisms).

<sup>486</sup> See BORUCHOWITZ ET AL., *supra* note 104, at 15.

<sup>487</sup> See, e.g., ALEX BENDER ET AL., LAWS' COMM. FOR C.R. OF THE S.F. BAY AREA, NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 6–7 (2015), <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf> [<https://perma.cc/JAQ6-GCZ9>]; REBEKAH DILLER, BRENNAN CTR. FOR JUST., THE HIDDEN COSTS OF FLORIDA'S CRIMINAL JUSTICE FEES 1 (2010), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_The%20Hidden-Costs-Florida%27s-Criminal-Justice-Fees.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_The%20Hidden-Costs-Florida%27s-Criminal-Justice-Fees.pdf) [<https://perma.cc/UVA3-FTL3>]; ACLU, IN FOR A PENNY, *supra* note 113, at 31–40 (describing debtors' prison practices throughout Michigan district courts).

<sup>488</sup> Compare Paul D. Butler, Essay, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2191 (2013) (arguing that criminal procedure has failed to protect poor people and that “protecting defendants’ rights is quite different from protecting defendants”), with William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997) (arguing that criminal procedure “raise[s] the cost of criminal investigation and prosecution” and that therefore “underfunding, overcriminalization, and oversentencing have increased as criminal procedure has expanded”).

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flow predictably from longstanding municipal court features. But it also describes municipal courts that are working towards more accountability and substantive justice, and a few that are exemplary. It may even be that success stories are structurally less visible since they generate neither the litigation nor the investigations that have thrust Ferguson-type courts into the public eye.

Furthermore, we lack comparative data. Table 2 documents the varying legal approaches taken by thirty different states in their municipal courts, but we do not know the effects of such choices on law enforcement practices, case outcomes, or defendant experiences. Given the comparable problems of state-run misdemeanor courts, it is hard to tell whether or to what extent municipal courts are demonstrably worse. While it is tempting to conclude that the pathologies of municipal courts outweigh their redeeming qualities, it is too soon — and the empirical record too thin — to give up on these 7,500 courts to which the majority of American states have remained committed for over a century.

This Article is motivated by the premise that the fullest response to municipal court dysfunction is to raise its institutional profile and status: to bring these courts into longstanding conversations about courts, cities, and criminal justice, and to dispel the fiction that they are minor, unimportant, or uninfluential. Fully appreciated, these courts should command not only more robust doctrinal and scholarly treatment, but also more careful attention from the officials charged with running them and greater resources from the cities and states that pay for them. With deeper appreciation for these institutions and cases, we should expect more scrutiny and the accompanying salutary effects of public engagement and debate. Practically speaking, if these courts are ever to realize their innate potential for local accountability, local communities will need to understand them and how they work. In other words, to improve municipal courts, first and foremost we have to care about them.

#### CONCLUSION

Over forty years ago, Malcolm Feeley instructed us to pay closer attention to lower courts. “Whatever majesty there is in the law,” he warned, “may depend heavily on these [lower court] encounters.”<sup>489</sup> Since then, the legal academy has not fully contended with the lowest municipal tier of the American judiciary. But actors on the ground are well aware of its significance. Chief Justice Rabner of the New Jersey Supreme Court writes that “[m]illions of people who come into contact with the municipal courts each year form their impressions of the justice

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<sup>489</sup> FEELEY, *supra* note 295, at 5; *see also* Robertson, *supra* note 159, at xx (“For the millions of people who pass annually through the lower courts . . . these courts *are* the justice system, and in a real sense represent the power and majesty of the law.”).

system based primarily on those interactions.”<sup>490</sup> Judge Sparks in Birmingham calls municipal courts “the front porch of the judicial system,” a missed opportunity to engage, educate, and help millions of Americans in their initial and often only encounters with the judiciary.<sup>491</sup> These local institutions also continue to play dramatic roles in American history. It was municipal court corruption, after all, that helped trigger one of the most influential criminal justice events of the past decade: the 2014 unrest in Ferguson, Missouri, and the subsequent explosion of the Black Lives Matter movement.

Such insights from the front lines of the justice system deserve to be taken seriously. These age-old courts have special legal and democratic import. They provide new insights into the history and nature of American courts, the relationships between criminal law and localism, and the complex socio-legal dynamics at the bottom of the penal pyramid. Notwithstanding their historical identity as low-status, low-resource institutions, their influence remains profound: these courts are annually responsible for millions of criminal cases and represent the primary, perhaps only experience that millions of Americans will have with the criminal system. They are also troubling institutions. They reflect our perennially weak commitment to protecting misdemeanor defendants, and they erode legal principles in ways that consistently disadvantage the vulnerable. It is time that the municipal court took its rightful place in the modern scholarly conversation so that it may be fully appreciated and held to account.

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<sup>490</sup> N.J. CTS., *supra* note 114, at 1.

<sup>491</sup> MARSH, *supra* note 416, at 46.

APPENDIX<sup>†</sup>

Table 1: Scale of U.S. Municipal Courts

| State               | Total Number of Municipal Courts | Criminal Cases Filed (2015) | Maximum Penalties for City Ordinance Violations |
|---------------------|----------------------------------|-----------------------------|---|
| AL                  | 278 <sup>492</sup>               | 95,507 <sup>493</sup>       | 6 mos./\$500 <sup>494</sup>                     |
| AZ                  | 82 <sup>495</sup>                | 271,319 <sup>496</sup>      | 6 mos./\$2,500 <sup>497</sup>                   |
| AR<br>(city courts) | 89 <sup>498</sup>                | Unknown <sup>499</sup>      | Same as state penalties <sup>500</sup>          |

<sup>†</sup> The *Harvard Law Review* is publishing this appendix to accompany Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 945 (2021). This appendix has been only lightly edited, and the *Harvard Law Review* has not independently reviewed the data and analyses herein.

<sup>492</sup> See ALA. ADMIN. OFF. OF CTS., *supra* note 78, at 3.

<sup>493</sup> See *id.* at 160–63. Total number of criminal cases filed is calculated here as total DUI cases filed plus total nontraffic cases filed.

<sup>494</sup> ALA. CODE § 11-45-9(b) (2020); see also *id.* § 12-14-1 (authorizing creation of municipal courts).

<sup>495</sup> FLATTEN, CITY COURT: MONEY, PRESSURE AND POLITICS, *supra* note 93, at 6.

<sup>496</sup> See ARIZ. JUD. BRANCH, MUNICIPAL COURTS 1, <https://www.azcourts.gov/Portals/39/2018DR/MNIntro.pdf?ver=2019-06-25-131811-087#page=3> [<https://perma.cc/X7KG-MDNU>] (including the total “DUI,” “Other Criminal Traffic,” “Other Misdemeanor[],” and “Serious Criminal Traffic” cases filed in fiscal year 2015).

<sup>497</sup> ARIZ. REV. STAT. ANN. § 9-240(B)(28)(b) (2020) (limiting the maximum fine for civil or criminal penalties); see also *id.* § 22-402 (mandating creation of a municipal court in each city or town).

<sup>498</sup> *City Courts*, ARK. JUDICIARY, <https://www.arkcourts.gov/content/city-courts> [<https://perma.cc/D2FC-JXFD>].

<sup>499</sup> Since 2012, Arkansas city courts have been going through a multiyear process of consolidating with state district courts and being re-designated as “departments” of those district courts. ARK. CODE ANN. § 16-17-1202 (2020) (effective Jan. 1, 2012); *id.* § 16-17-1113 (effective Jan. 1, 2021). Once consolidated, they are referred to as local district courts. See *Lonoke County v. City of Lonoke*, 430 S.W.3d 669, 670 (Ark. 2013) (referring to a municipal court as “Lonoke District Court”). The state’s annual caseload report does not distinguish between state and local district courts. See ADMIN. OFF. OF THE CTS., ARK. JUDICIARY, ANNUAL REPORT 2016, at 89 (2017) (reporting total district court criminal caseload of 570,299, not including ordinance violations). The Arkansas AOC provided the following data for 2015, which also does not distinguish between municipal and state district courts: total misdemeanor filings, 365,425; total local ordinance filings, 38,576. See Spreadsheet from Diane Robinson, Dir., Off. of Rsch. & Just. Stat., Arkansas Judiciary (on file with the Harvard Law School Library).

<sup>500</sup> ARK. CODE ANN. § 14-55-502; see also *Wright v. Burton*, 648 S.W.2d 794, 796 (Ark. 1983) (declaring fine-only city ordinance invalid because state statute for the same offense authorized incarceration as a penalty and municipality lacked authority to set penalties lower than state law).

| State                                    | Total Number of Municipal Courts | Criminal Cases Filed (2015) | Maximum Penalties for City Ordinance Violations |
|--|----------------------------------|-----------------------------|---|
| CO                                       | 277 <sup>501</sup>               | Unknown <sup>502</sup>      | 364 days/\$2,650 <sup>503</sup>                 |
| DE<br>(alderman's courts) <sup>504</sup> | 6 <sup>505</sup>                 | Unknown <sup>506</sup>      | 1 year/\$500 <sup>507</sup>                     |
| GA<br>(municipal)                        | 387 <sup>508</sup>               | 94,640 <sup>509</sup>       | 6 mos./\$1,000 <sup>510</sup>                   |

<sup>501</sup> *Colorado Municipal Courts*, COLO. MUN. JUDGES ASS'N, <https://www.coloradomunicipalcourts.org/courtsincolorado> [<https://perma.cc/MXK2-FCNK>] (listing 277 individual municipal courts); *see also* CURRY & WALLACE, *supra* note 118, at 4 (stating that there were approximately 225 municipal courts as of the report's publication in 2017).

<sup>502</sup> No centralized repository; not included in state data; caseloads not included on most municipal court websites.

<sup>503</sup> COLO. REV. STAT. § 13-10-113(1) (2020); *see also* CURRY & WALLACE, *supra* note 118, at 4 & n.6 (explaining that the limitations on municipal court fines are adjusted for inflation, such that the actual maximum penalty was \$2,827 as of 2017).

<sup>504</sup> *See* ADMIN. OFF. OF THE CTS., DEL. CTS., *supra* note 86, at 2.

<sup>505</sup> *Id.*

<sup>506</sup> *See id.* The 2018 annual report lists a caseload of 26,365, but this includes traffic cases and does not distinguish criminal cases. Additionally, one of the six courts did not report any filings for 2018.

<sup>507</sup> NEWARK, DEL., CODE OF ORDINANCES § 1-9 (2020); *see also* *Dunn v. Mayor of Wilmington*, 219 A.2d 153, 155 (Del. 1966) (“The time-honored rule is that the legislature may validly delegate to a municipal government . . . the power to enact ordinances, consistent with State law, which create crimes and impose the punishment of imprisonment.”); *State v. Murray*, No. 1406007495, 2016 WL 561180, at \*2 (Del. Super. Ct. Feb. 9, 2016) (confirming that the Newark Alderman’s Court has “‘original jurisdiction’ to hear only cited violations of the Newark Municipal Code,” including those that carry incarceration).

<sup>508</sup> Email from Matthew Bishop, Ga. Admin. Off. of the Cts., Jud. Council of Ga., to author (Oct. 21, 2019, 4:01 PM EST) (on file with the Harvard Law School Library).

<sup>509</sup> *Id.* (providing 2015 aggregate municipal court misdemeanor filings including DUI for 345 reporting courts); *see also* ADMIN. OFF. OF THE CTS., JUD. COUNCIL OF GA., ANNUAL REPORT: FY 2016, at 21–22 (2016), <https://georgiacourts.gov/wp-content/uploads/2019/12/FY-16.pdf> [<https://perma.cc/CZ4P-8A2L>] (stating that municipal courts represented thirty-eight percent of all state case filings).

<sup>510</sup> *See* GA. CODE ANN. § 36-35-6(a)(2) (2020); *see also id.* § 36-30-8 (authorizing additional incarceration or forced labor for no more than thirty days “in addition” to any other penalties); *City of Albany v. Key*, 183 S.E.2d 20, 22 (Ga. Ct. App. 1971) (“[The city’s] authority to inflict or impose punishment and penalties has, since 1923, at least, included the power to impose a fine *or* imprisonment, *or both*, *or* to impose them in the alternative . . .”).

| State                                       | Total Number of Municipal Courts                     | Criminal Cases Filed (2015)                      | Maximum Penalties for City Ordinance Violations                                       |
|---|--|--|---|
| IN (city and town courts)                   | 70, approx. (43–47 city; 22–28 town) <sup>511</sup>  | 32,043 state misdemeanors <sup>512</sup>         | Ordinances are fine-only but courts also adjudicate state misdemeanors <sup>513</sup> |
| KS  | 391 <sup>514</sup>                                   | 71,561 <sup>515</sup>                            | 1 year/\$2,500 <sup>516</sup>   |
| LA (city and mayor's courts) <sup>517</sup> | 300, approx. (City: 49; Mayor's: 250) <sup>518</sup> | City: 130,450 <sup>519</sup><br>Mayor's: Unknown | 6 mos./\$1,000 <sup>520</sup>   |

<sup>511</sup> See *Indiana Trial Courts: Types of Court*, *supra* note 44 (counting forty-seven city courts and twenty-eight town courts); *Organizational Chart of the Indiana Judicial System*, *supra* note 44 (counting forty-three city courts and twenty-two town courts in 2016).

<sup>512</sup> *Indiana Trial Court Statistics by County*, *supra* note 175 (counting 32,043 misdemeanor cases filed and 48,190 ordinance violations filed); see also IND. CODE § 36-1-3-8(a)(8) to (g) (2020) (specifically withholding from cities “[t]he power to prescribe a penalty of imprisonment for an ordinance violation,” *id.* § 36-1-3-8(a)(9)); *Boss v. State*, 944 N.E.2d 16, 21–22 (Ind. Ct. App. 2011) (explaining that municipal ordinances are civil in nature for purposes of Double Jeopardy because the “[Indiana] General Assembly [has] denied local government units ‘the power to prescribe a penalty of imprisonment for an ordinance violation,’” *id.* at 22 (quoting IND. CODE § 36-1-3-8)). *But see* *Gates v. City of Indianapolis*, 991 N.E.2d 592, 594 (Ind. Ct. App. 2013) (holding that fine-only “speeding infractions remain quasi-criminal in nature” and therefore trigger the right to a jury trial (quoting *Cunningham v. State*, 835 N.E.2d 1075, 1079 (Ind. Ct. App. 2005))).

<sup>513</sup> IND. CODE § 33-35-2-3(1) to (2) (conferring municipal court jurisdiction over ordinance violations, misdemeanors, and infractions).

<sup>514</sup> See OFF. OF JUD. ADMIN., KAN. SUP. CT., *supra* note 76.

<sup>515</sup> See *id.* at 12 (including DUI but not cases filed for reckless driving, fleeing an officer, other traffic, and tobacco infringements).

<sup>516</sup> The maximum penalty for a repeat traffic offense is a Class A misdemeanor. KAN. STAT. ANN. § 8-2116 (2019). Such misdemeanors are punishable by one year in jail, *id.* § 21-6602, and/or a \$2,500 fine, *id.* § 21-6611.

<sup>517</sup> SUP. CT. OF LA., 2015 ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE SUPREME COURT 16 (2015), [https://www.lasc.org/press\\_room/annual\\_reports/reports/2015\\_Annual\\_Report.pdf](https://www.lasc.org/press_room/annual_reports/reports/2015_Annual_Report.pdf) [<https://perma.cc/4AEC-XA9W>]. There are also 390 justices of the peace with very limited criminal jurisdiction that are not included here. *Court Structure*, LA. STATE BAR ASS’N, <https://www.lsb.org/Public/CourtStructure.aspx> [<https://perma.cc/W9GS-J53T>].

<sup>518</sup> SUP. CT. OF LA., *supra* note 517, at 16.

<sup>519</sup> *Id.* at 29.

<sup>520</sup> LA. STAT. ANN. § 33:1243(A) (2019) (establishing the maximum penalty for East Baton Rouge; for other parishes, the statutory maximum is thirty days and \$500). *But see id.* § 33:1234(B) (establishing a higher maximum penalty of \$5,000 for violations of any ordinance prohibiting inappropriate disposal of waste).

| State                                   | Total Number of Municipal Courts | Criminal Cases Filed (2015) | Maximum Penalties for City Ordinance Violations           |
|---|----------------------------------|-----------------------------|---|
| MI                                      | 4 <sup>521</sup>                 | 1,779 <sup>522</sup>        | 90 days/\$500 <sup>523</sup>                              |
| MS<br>(municipal and justice courts)    | 319                              | 324,097 <sup>524</sup>      | 90 days/\$1,000 <sup>525</sup>                            |
| MO <sup>526</sup>                       | 473                              | 298,588 <sup>527</sup>      | \$450 for most nondrug nonviolent offenses <sup>528</sup> |
| MT<br>(municipal, city, justice courts) | 159                              | 69,551 <sup>529</sup>       | 6 mos./\$500 <sup>530</sup>                               |

<sup>521</sup> See *Michigan Trial Courts*, MICH. CTS., <https://courts.michigan.gov/courts/trialcourts/pages/default.aspx> [<https://perma.cc/4KV5-6Q5Q>] (identifying four municipal courts).

<sup>522</sup> See 2015 Data: Wayne County, MICH. CTS., <https://courts.michigan.gov/education/stats/Caseload/Pages/2015%20Caseload/Wayne.aspx> [<https://perma.cc/YG88-U4KT>] (including new filings for nontraffic misdemeanors, traffic misdemeanors, and OUIL/OUI cases).

<sup>523</sup> See, e.g., MICH. COMP. LAWS § 117.4i(k) (2020); CITY OF GROSSE POINTE, MICH., CODE OF ORDINANCES § 1-13(a) (2020).

<sup>524</sup> NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 9, at 257 tbl.A.1.

<sup>525</sup> MISS. CODE ANN. § 21-13-1 (2019).

<sup>526</sup> Missouri municipal courts underwent significant municipal court reform after Ferguson. See sources cited *supra* note 158. See generally MISSOURI MUNICIPAL COURTS: BEST PRACTICES, *supra* note 67.

<sup>527</sup> MO. CTS., MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2015, at 285 (2015) <http://www.courts.mo.gov/file.jsp?id=83240> [<https://perma.cc/29WL-5RZ6>] (including DUI and nontraffic ordinance violations).

<sup>528</sup> MO. REV. STAT. § 479.353 (2020) (“The [municipal] court shall not sentence a person to confinement, except the court may sentence a person to confinement for any violation involving alcohol or controlled substances, violations endangering the health or welfare of others, or eluding or giving false information to a law enforcement officer.”); see also MO. CONST. art. V, § 23 (establishing municipal judges to hear violations of municipal ordinances).

<sup>529</sup> OFF. OF THE CT. ADM’R, MONT. JUD. BRANCH, MONTANA COURTS OF LIMITED JURISDICTION: CRIMINAL VIOLATIONS FILED (2015), <http://courts.mt.gov/Portals/189/lcourt/stats/2015/CrimViolations.pdf> [<https://perma.cc/N35Z-MNFH>] (including criminal filings (53,181) and local ordinance filings (16,370), but not traffic filings, in all Montana courts of limited jurisdiction); see also *Courts of Limited Jurisdiction*, MONT. JUD. BRANCH, <https://courts.mt.gov/courts/lcourt> [<https://perma.cc/N883-U73V>] (describing Montana courts of limited jurisdiction).

<sup>530</sup> MONT. CODE ANN. § 7-5-109 (2019). *But see id.* (providing for penalties of up to \$1,000 per day per violation, or six months’ imprisonment, for violations “relating to local or federal wastewater pretreatment standards implementing the Federal Water Pollution Control Act”).



| State             | Total Number of Municipal Courts | Criminal Cases Filed (2015) | Maximum Penalties for City Ordinance Violations |
|-------------------|----------------------------------|-----------------------------|---|
| NV                | 17 <sup>531</sup>                | 47,842 <sup>532</sup>       | 6 mos./\$1,000 <sup>533</sup>                   |
| NJ                | 515 <sup>534</sup>               | 683,091 <sup>535</sup>      | 90 days/\$2,000 <sup>536</sup>                  |
| NM <sup>537</sup> | 81 <sup>538</sup>                | Unknown <sup>539</sup>      | 90 days/\$500 <sup>540</sup>                    |
| NY                | 1,300, approx. <sup>541</sup>    | Unknown <sup>542</sup>      | 364 days/\$1,000 <sup>543</sup>                 |

<sup>531</sup> ADMIN. OFF. OF THE CTS., NEV. JUDICIARY, ANNUAL REPORT OF THE NEVADA JUDICIARY: FISCAL YEAR 2015, at 41 (2015), [http://nvcourts.gov/Supreme/Reports/Annual\\_Reports/2015\\_Annual\\_Report](http://nvcourts.gov/Supreme/Reports/Annual_Reports/2015_Annual_Report) [<https://perma.cc/9Y5Q-PVBB>]. There are also forty-two justice courts that operate at the county level although judges are elected by townships. *Id.* at 36.

<sup>532</sup> *Id.* at 37 tbl.12, 42 tbl.14 (Justice Court filings: 72,231, Municipal Court filings: 47,842); *see also* ADMIN. OFF. OF THE CTS., NEV. JUDICIARY, ANNUAL REPORT OF THE NEVADA JUDICIARY: FISCAL YEAR 2015 APPENDIX TABLES at tbls.A2-1, A6-1, A6-2, A8-1 & A8-2, [http://nvcourts.gov/Supreme/Reports/Annual\\_Reports/2015\\_Annual\\_Report](http://nvcourts.gov/Supreme/Reports/Annual_Reports/2015_Annual_Report) [<https://perma.cc/9Y5Q-PVBB>] (providing court-by-court statistical breakdown of cases).

<sup>533</sup> NEV. REV. STAT. § 193.150 (2019) (defining misdemeanor penalties); *see also id.* § 5.050 (giving municipal courts jurisdiction over misdemeanors committed in violation of city ordinances).

<sup>534</sup> N.J. CTS., *supra* note 114, at 9.

<sup>535</sup> N.J. JUDICIARY, *supra* note 76, at 27 (counting indictable, disorderly persons, and DWI offenses, but not including traffic and other noncriminal).

<sup>536</sup> N.J. STAT. ANN. § 40:49-5 (2020).

<sup>537</sup> The New Mexico courts have published a guide to help citizens navigate the court system. *See* N.M. CTS., A CITIZEN'S GUIDE TO MUNICIPAL COURTS (2008), <https://municipal.nmcourts.gov/publication-.aspx> [<https://perma.cc/9UH3-9VY3>]; Memorandum from Randy Van Vleck, Gen. Couns., N.M. Mun. League, to Municipal Courts Judges (Mar. 24, 2020) (on file with the Harvard Law School Library).

<sup>538</sup> N.M. CTS., DIRECTORY OF NEW MEXICO MUNICIPAL COURTS, <https://municipal.nmcourts.gov/court-resources.aspx> [<https://perma.cc/P688-W5M7>]; *About the Courts*, N.M. CTS., <https://www.nmcourts.gov/about-the-courts.aspx> [<https://perma.cc/J64W-VLFQ>].

<sup>539</sup> *See* Letter from Barry Massey, *supra* note 48 (“[N]o municipal court reports its data to the Judiciary’s central state data repository.”).

<sup>540</sup> N.M. STAT. ANN. § 3-17-1(a) (2020); *see also* N.M. CONST. art. X, § 6 (municipal ordinance may not impose a “penalty greater than the penalty provided for a petty misdemeanor”). *But see* N.M. STAT. ANN. § 3-17-1(b) to (c) (providing for heightened penalties for certain DUI and wastewater-pretreatment violations).

<sup>541</sup> *See City, Town & Village Courts*, *supra* note 46 (stating that New York has “close to 1300” justice courts); KRONSTADT & STARR, *supra* note 46, at 5 (stating that New York has “approximately 1,300 justice courts”).

<sup>542</sup> Over two million cases are filed in these courts, but state statistics do not distinguish between civil and criminal filings. *See, e.g.*, KRONSTADT & STARR, *supra* note 46, at 2 (citing aggregated state statistics).

<sup>543</sup> N.Y. PENAL LAW §§ 70.15, 80.05 (McKinney 2020); *see* N.Y. GEN. CITY LAW § 20(22) (McKinney 2020) (authorizing incarceration as punishment for municipal ordinance violation); N.Y. TOWN LAW § 135 (McKinney 2020) (defining ordinance violation as misdemeanor punishable by imprisonment); N.Y. CRIM. PROC. LAW § 10.30 (McKinney 2020) (conferring misdemeanor jurisdiction on local criminal courts).

| State                              | Total Number of Municipal Courts | Criminal Cases Filed (2015)    | Maximum Penalties for City Ordinance Violations   |
|------------------------------------|----------------------------------|--------------------------------|---|
| ND                                 | 90 <sup>544</sup>                | At least 67,812 <sup>545</sup> | 30 days/\$1,500 <sup>546</sup>  |
| OH (mayor's courts) <sup>547</sup> | 301 <sup>548</sup>               | 33,567 <sup>549</sup>          | 6 mos./\$500 <sup>550</sup>   |
| OK <sup>551</sup>                  | 342 <sup>552</sup>               | Unknown                        | 60 days/\$750 (court not of record) <sup>553</sup><br>6 mos./\$1,200 (court of record) <sup>554</sup> |
| OR                                 | 146 <sup>555</sup>               | Unknown <sup>556</sup>         | 364 days/\$6,250 <sup>557</sup>   |

<sup>544</sup> *Municipal Courts*, N.D. CTS., <https://www.ndcourts.gov/other-courts/municipal-courts> [<https://perma.cc/A5EN-A4AB>].

<sup>545</sup> Spreadsheet from Sally Holewa, *supra* note 47. The data represent caseloads from only sixteen out of ninety North Dakota municipal courts; they are the only ones to report their caseloads to the state central authority. See Letter from Sally Holewa, *supra* note 47 (“16 municipal courts . . . have voluntarily chosen to use the district court’s case management system.”).

<sup>546</sup> N.D. CENT. CODE § 40-05-06(1) (2020).

<sup>547</sup> See THE SUP. CT. OF OHIO, MAYOR’S COURTS SUMMARY 2015, at 1 (2015), <http://www.supremecourt.ohio.gov/Publications/mayorscourt/mayorscourtreport15.pdf> [<https://perma.cc/UGM7-G2FZ>]. Ohio also has municipal courts, but they operate county-wide and are created by the state legislature, not by individual cities. See *Judicial System Structure*, *supra* note 41.

<sup>548</sup> THE SUP. CT. OF OHIO, *supra* note 547, at 1.

<sup>549</sup> *Id.* at 7.

<sup>550</sup> OHIO REV. CODE ANN. § 715.67 (West 2020) (allowing municipal corporations to make an ordinance violation a misdemeanor).

<sup>551</sup> OKLA. CONST. art. VII, § 1 (“Municipal Courts in cities or incorporated towns . . . shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns . . .”).

<sup>552</sup> See Lesli E. McCollum, *The Oklahoma Judiciary*, in THE ALMANAC OF OKLAHOMA POLITICS 15, 16 (Gary W. Copeland et al. eds., 1998) (indicating that Oklahoma has 342 municipal courts); see also THE LEAGUE OF WOMEN VOTERS OF OKLA. CITIZEN EDUC. FUND, A RESOURCE GUIDE TO OKLAHOMA COURTS 29–30 (1994) (same).

<sup>553</sup> OKLA. STAT. tit. 11, § 14-111(C) (2020).

<sup>554</sup> *Id.* § 14-111(B).

<sup>555</sup> See *Oregon Justice/Municipal Court Registry*, *supra* note 39. Oregon also has thirty-three justice courts that are county-level courts, elected within their districts or counties, which are also not accountable to the state judiciary. See *Justice Courts*, *supra* note 39.

<sup>556</sup> The Oregon AOC does not collect caseload data from municipal and justice courts. Telephone Interview with Tim Lewis, *supra* note 49.

<sup>557</sup> See OR. REV. STAT. § 161.615, .635 (2019) (setting misdemeanor incarceration and fines); see also *City of Portland v. Dollarhide*, 714 P.2d 220, 227 (Or. 1986) (recognizing that a city may not impose criminal penalty greater than that provided by state law for same offense).

| State             | Total Number of Municipal Courts | Criminal Cases Filed (2015)                              | Maximum Penalties for City Ordinance Violations  |
|-------------------|----------------------------------|--|--|
| RI <sup>558</sup> | 23 <sup>559</sup>                | Unknown <sup>560</sup>                                   | 30 days/\$500 <sup>561</sup>   |
| SC                | 200 <sup>562</sup>               | 88,039 <sup>563</sup>                                    | 30 days/\$500 <sup>564</sup>   |
| TN                | 250, approx. <sup>565</sup>      | Noncriminal (except for home rule cities) <sup>566</sup> | Home rule (14 cities): 30 days/\$500 <sup>567</sup><br>Non-home rule (> 400 cities): Fine only, \$500 <sup>568</sup> |
| TX                | 928 <sup>569</sup>               | 941,238 <sup>570</sup>                                   | Criminal fine-only Class C misdemeanor <sup>571</sup>  |

<sup>558</sup> OFF. OF LOC. GOV'T ASSISTANCE, R.I. DEP'T OF ADMIN., MUNICIPAL COURTS IN RHODE ISLAND (2008), <http://www.municipalfinance.ri.gov/documents/resources/Municipal%20Courts%202008.pdf> [<https://perma.cc/3C5U-AW6Q>]. The NCSC does not list Rhode Island as having municipal courts.

<sup>559</sup> *Id.* at 3.

<sup>560</sup> PAUL A. SUTTELL & J. JOSEPH BAXTER, JR., RHODE ISLAND JUDICIARY ANNUAL REPORT (2015) (excluding municipal courts from its update on Rhode Island courts).

<sup>561</sup> 45 R.I. GEN. LAWS ANN. § 45-6-2 (2019).

<sup>562</sup> PRICE ET AL., *supra* note 40, at 9. South Carolina also has 200 county magistrate courts that operate much like municipal courts. *Id.*

<sup>563</sup> SMITH ET AL., *supra* note 105, at 10.

<sup>564</sup> S.C. CODE § 5-7-30 (2019).

<sup>565</sup> GREGORY D. SMITH, TENN. MUN. JUDGES CONF., TENNESSEE MUNICIPAL JUDGES BENCHBOOK 19 (2014).

<sup>566</sup> TENN. CODE ANN. § 6-2-201(28)(A) (2020) (allowing ordinances to be enforced by “fines, forfeitures and penalties”); *Metro. Gov’t of Nashville & Davidson Cnty. v. Allen*, 529 S.W.2d 699, 707 (Tenn. 1975) (holding that city ordinance violations are “civil in nature”); REX BARTON, MELISSA ASHBURN & KAREN BEYKE, MUNICIPAL COURTS MANUAL 1 (2012), [https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1161&context=utk\\_mtaspubs](https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1161&context=utk_mtaspubs) [<https://perma.cc/8G82-K6K7>]; SIDNEY D. HEMSLEY, MUNICIPAL COURTS IN TENNESSEE — A CONSTITUTIONAL AND STATUTORY PRIMER 7 (1988), [https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1295&context=utk\\_mtaspubs](https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1295&context=utk_mtaspubs) [<https://perma.cc/Z7YJ-8GXP>].

<sup>567</sup> TENN. CODE ANN. § 6-54-306(a) (outlining penalties for home rule municipalities).

<sup>568</sup> *Id.* § 6-54-308 (defining the non-home rule with a maximum penalty of \$500).

<sup>569</sup> OFF. OF CT. ADMIN., STATE OF TEX. JUD. BRANCH, *supra* note 37, at xiii. Texas designates both municipal and justice courts as “[l]ocal [t]rial [c]ourts of [l]imited [j]urisdiction.” *Id.* at vi. Another 807 local justice courts operate at the county level and are not included in these totals. *Id.*

<sup>570</sup> Spreadsheet from Texas Adm’r of Cts. (on file with the Harvard Law School Library) (Municipal: 941,238 new nontraffic cases filed; Justice: 315,782 new nontraffic cases filed); *see also* OFF. OF CT. ADMIN., STATE OF TEX. JUD. BRANCH, *supra* note 37, at Detail-46 (reporting 979,532 criminal filings in municipal courts).

<sup>571</sup> TEX. LOC. GOV’T CODE ANN. § 54.001 (2019) (\$500 default max but \$2,000 max for municipal ordinance violation concerning “public health”); TEX. PENAL CODE ANN. § 12.41 (2019) (defining fine-only offenses as “Class C misdemeanor”); *see also* TEX. PENAL CODE ANN. § 12.03(b)-(c) (2019) (“An offense designated a misdemeanor in this code without specification as to

| State                  | Total Number of Municipal Courts | Criminal Cases Filed (2015)                            | Maximum Penalties for City Ordinance Violations |
|------------------------|----------------------------------|--|---|
| UT<br>(justice courts) | 108 <sup>572</sup>               | 72,835 <sup>573</sup>                                  | 6 mos./\$1,000 <sup>574</sup>                   |
| WA                     | 92                               | 91,858 <sup>575</sup>                                  | 364 days/\$5,000 <sup>576</sup>                 |
| WV                     | 122 <sup>577</sup>               | Unknown <sup>578</sup>                                 | 30 days <sup>579</sup>                          |
| WI                     | 237 <sup>580</sup>               | None, all ordinances are civil [87,822] <sup>581</sup> | Fine only                                       |

punishment or category is a Class C misdemeanor [and conviction of a Class C misdemeanor does not impose any legal disability or disadvantage.]). Texas law deems Class C misdemeanors criminal. *See* TEX. CODE CRIM. PROC. ANN. art. 4.14(a)(1)–(2) (2019) (conferring municipal courts jurisdiction over all municipal ordinance violation fine-only “criminal cases”); *State v. Chacon*, 273 S.W.3d 375, 377 (Tex. App. 2008) (municipal ordinance violations are criminal cases); *see also* *Reese v. City of Hunter’s Creek Village*, 95 S.W.3d 389, 391 (Tex. App. 2002) (holding that fine-only ordinance was a “penal statute” and therefore civil district court lacked jurisdiction to address its validity).

<sup>572</sup> The Judicial Directory lists 108 justice courts. *Utah State Court Directory*, UTAH CTS. (July 16, 2020), <https://www.utcourts.gov/directory> [<https://perma.cc/FXZ3-DH3Y>]. In response to a records request, the AOC provided a spreadsheet listing 127 justice courts in 2015. Spreadsheet on file with the Harvard Law School Library.

<sup>573</sup> UTAH CTS., JUSTICE COURT CASE FILINGS: FY2015, at 4 (2015), <https://www.utcourts.gov/stats/files/2015FY/justice/o-Statewide.pdf> [<https://perma.cc/G2PM-TFVE>].

<sup>574</sup> UTAH CODE ANN. §§ 10-3-703, 76-3-301(1)(d) (West 2020).

<sup>575</sup> WASH. CTS., COURTS OF LIMITED JURISDICTION: 2015 ANNUAL REPORT 17, <http://www.courts.wa.gov/caseload/content/archive/clj/Annual/2015.pdf> [<https://perma.cc/8MM3-XBLM>] (tallying DUI, other traffic, and nontraffic misdemeanors).

<sup>576</sup> WASH. REV. CODE § 35.22.280(35) (2020) (defining maximum penalties for first-class cities); *id.* § 35.27.370(14) (defining maximum penalties for towns); *see also id.* § 35.20.030 (establishing municipal court jurisdiction with the same limits).

<sup>577</sup> This number is likely out of date. Smith, *supra* note 45 (citing Brisbin, *supra* note 45); *see also* Offutt, *supra* note 45, at 4 (referencing “122 municipal courts”). Magistrate courts operate at the county level. *See* Smith, *supra* note 45.

<sup>578</sup> Email from Tabetha D. Blevins, *supra* note 51 (“Municipal Courts do not report to the Administrative Office.”).

<sup>579</sup> W. VA. CODE § 8-11-1(a)(2) (2020) (setting maximum penalty at thirty days). An exception is made for DUI, which must carry the same penalty as the state offense. *See State ex rel. Crank v. City of Logan*, 363 S.E.2d 135, 138 (W. Va. 1987) (upholding six-month DUI ordinance penalty as consistent with state DUI penalty).

<sup>580</sup> As of 2014, there were 237 courts. *See Municipal Courts*, WIS. CT. SYS. (Sept. 25, 2020), <https://www.wicourts.gov/courts/municipal/index.htm> [<https://perma.cc/K4P6-NJQ8>].

<sup>581</sup> WIS. STAT. § 66.0114(1)(a) (2020) (ordinance enforcement is a “civil action”); *cf.* WIS. CT. SYS., MUNICIPAL STATISTICS SUMMARY (2015), <https://www.wicourts.gov/publications/statistics/municipal/docs/caseload15.pdf> [<https://perma.cc/HBW6-VSHL>] (documenting 87,822 civil ordinance cases disposed).

| State | Total Number of Municipal Courts | Criminal Cases Filed (2015) | Maximum Penalties for City Ordinance Violations |
|-------|----------------------------------|-----------------------------|---|
| WY    | 82                               | Unknown <sup>582</sup>      | 6 mos./\$750 <sup>583</sup>                     |
| TOTAL | 7,669                            | 3,415,817                   |   |

Table 2: Legal Characteristics of U.S. Municipal Courts

| State            | Method of Judicial Selection <sup>584</sup> | Lawyer Judges Required <sup>585</sup> | Appellate Structure: Two-Tier Review <sup>586</sup> | Legally Unified State Judiciary <sup>587</sup> |
|------------------|---|---------------------------------------|---|--|
| AL               | Appointed                                   | Yes                                   | De novo   | Yes <sup>588</sup>                             |
| AZ               | Appointed                                   | Varies                                | De novo (if no record) <sup>589</sup>               | Yes  |
| AR (city courts) | Election                                    | Mayor or lawyer <sup>590</sup>        | De novo   | No   |
| CO               | Appointed                                   | Varies <sup>591</sup>                 | De novo   | No   |

<sup>582</sup> Letter from Lily Sharpe, *supra* note 52.

<sup>583</sup> WYO. STAT. ANN. § 15-1-103(a)(xli) (2020); *see also* *About Municipal Courts*, WYO. JUD. BRANCH, <https://www.courts.state.wy.us/municipal-courts/about-municipal-courts> [<https://perma.cc/4Q2T-JHHN>] (listing the maximum penalties that municipal courts can assess).

<sup>584</sup> *See Methods of Judicial Selection: Limited Jurisdiction Courts*, *supra* note 30.

<sup>585</sup> *See id.* (describing the qualifications required of each municipal court judge).

<sup>586</sup> *See* CT. STAT. PROJECT, NAT'L CTR. FOR STATE CTS., *supra* note 68; *see also* *Petition for a Writ of Certiorari*, *supra* note 243, at 10a–15a (describing state-by-state appellate review mechanisms for nonlawyer municipal court judges).

<sup>587</sup> *See* Raftery, *Unification and “Bragency,” supra* note 72, at 344 tbl.1. This column indicates whether state constitutions and/or state supreme court doctrine characterize the judiciary as “unified.” The legal definition, however, does not always capture actual practices of municipal courts, which may or may not report data to the AOC even in purportedly unified states. *See* Raftery, *Efficiency, supra* note 73, at 54–56 (using a thirty-one-factor test to evaluate widely varying levels of unification in twenty-four states).

<sup>588</sup> *But see* U.S. ATT’Y S. DIST. OF ALA., U.S. DEP’T OF JUST., *supra* note 79, at 2 (describing municipal courts as separate from the unified judiciary).

<sup>589</sup> *See also* *State v. Eby*, 244 P.3d 1177, 1178–79 (Ariz. Ct. App. 2011) (confirming right to appeal judgment of justice court to superior court but no right to a subsequent appeal to the Arizona Court of Appeals, even when the superior court conducted a de novo trial on appeal).

<sup>590</sup> *See* ARK. CODE ANN. § 16-18-112(e)(1) (2020).

<sup>591</sup> *Town of Frisco v. Baum*, 90 P.3d 845, 847 (Colo. 2004) (explaining that a judge must be an attorney only if the municipal court is a court of record).

| State                             | Method of Judicial Selection <sup>584</sup> | Lawyer Judges Required <sup>585</sup>  | Appellate Structure: Two-Tier Review <sup>586</sup> | Legally Unified State Judiciary <sup>587</sup> |
|-----------------------------------|---|--|---|--|
| DE (alderman's courts)            | Appointed                                   | Varies   | De novo   | No <sup>592</sup>                              |
| GA (municipal)                    | Varies                                      | No   | De novo   | Yes  |
| IN (city and town courts)         | Election                                    | Varies   | De novo   | No   |
| KS                                | Appointed                                   | Varies <sup>593</sup>  | De novo <sup>594</sup>                              | Yes  |
| LA (city and mayor's courts)      | City: election<br>Mayor's: varies           | City: yes<br>Mayor's: no   | De novo   | No   |
| MI                                | Election                                    | Yes  | De novo   | Yes  |
| MS (municipal and justice courts) | Muni: appointed<br>Justice: election        | Muni: no, except in cities with populations greater than 10,000<br>Justice: no | De novo   | No   |
| MO                                | Varies <sup>595</sup>                       | Varies <sup>596</sup>  | De novo   | Yes  |

<sup>592</sup> See ADMIN. OFF. OF THE CTS., DEL. CTS., *supra* note 86, at 2 (“Alderman’s Courts are not part of the Delaware court system. They are independent entities within their respective Municipalities.”). At least one aldermanic court website describes itself, however, as follows: “The Alderman Court falls under the Jurisdiction of the State of Delaware Chief Justice. The Alderman is nominated by the Governor and confirmed by [the] State Senate . . .” *Alderman Court 37, supra* note 87.

<sup>593</sup> See KAN. STAT. ANN. § 12-4114 (2019) (establishing a training program for nonlawyer municipal court judges in non-first-class cities); *id.* § 12-4105(c)(2) (establishing that municipal court judges in first-class cities must be attorneys).

<sup>594</sup> See *id.* § 22-3609 (providing that such appeals are to district court); *id.* § 22-3610 (providing that appeals heard in district court are de novo).

<sup>595</sup> MO. CONST. art. V, § 23; MO. REV. STAT. § 479.020 (2019) (providing that each municipality may choose its method of selecting municipal judges).

<sup>596</sup> MO. REV. STAT. § 479.020.

| State                                       | Method of Judicial Selection <sup>584</sup> | Lawyer Judges Required <sup>585</sup> | Appellate Structure: Two-Tier Review <sup>586</sup>                                 | Legally Unified State Judiciary <sup>587</sup> |
|---|---|---------------------------------------|---|--|
| MT<br>(municipal, city, and justice courts) | Election                                    | Muni: yes<br>City and justice: no     | De novo (nonrecord courts); de novo on the record (courts of record) <sup>597</sup> | No   |
| NV  | Mostly election <sup>598</sup>              | Muni: yes<br>Justice: no              | De novo   | No   |
| NJ  | Appointed                                   | Yes                                   | De novo on the record <sup>599</sup>  | Yes  |
| NM  | Election                                    | No                                    | De novo   | No <sup>600</sup>                              |
| NY  | Election                                    | No                                    | On the record   | Yes <sup>601</sup>                             |
| ND  | Election                                    | No                                    | De novo   | Yes <sup>602</sup>                             |
| OH<br>(mayor's courts)                      | Election                                    | No                                    | De novo   | No <sup>603</sup>                              |

<sup>597</sup> See *State v. Davis*, 371 P.3d 979, 988–89 (Mont. 2016); see also *Petition for a Writ of Certiorari*, *supra* note 243, at 9–13 (describing Montana system).

<sup>598</sup> With some appointments. ADMIN. OFF. OF THE CTS., NEV. JUDICIARY, *supra* note 531, at 41.

<sup>599</sup> N.J. CT. R. 3:23-8 (requiring appellate court to conduct retrial on the record created by the municipal court below).

<sup>600</sup> ADMIN. OFF. OF THE CTS., NEW MEXICO JUDICIARY ANNUAL REPORT 2019, at 9 (2019), <https://www.nmcourts.gov/reports-and-policies.aspx> [<https://perma.cc/WM5L-BXQW>] (“The Supreme Court determines the rules of practice and procedure for the state bar and all state courts. It exercises supervisory control over state courts in New Mexico, including municipal and probate courts. Local governments fund municipal and probate courts, which are not part of the Judiciary’s unified budget process and are not overseen by the Administrative Office of the Courts.”).

<sup>601</sup> N.Y. CONST. art. VI, § 1, cl. a (“There shall be a unified court system for the state.”).

<sup>602</sup> A U.S. Commission on Civil Rights report lists North Dakota as unified, see U.S. COMM’N ON C.R., *supra* note 33, at 27, as does Raftery, see Raftery, *Unification and “Bragency,” supra* note 72, at 344. *But see* Letter from Sally Holewa, *supra* note 47 (noting that only sixteen out of ninety courts report data to AOC).

<sup>603</sup> See *Judicial System Structure*, *supra* note 41 (“Mayor’s courts are not a part of the judicial branch of Ohio government and are not courts of record.”).

| State               | Method of Judicial Selection <sup>584</sup> | Lawyer Judges Required <sup>585</sup>                             | Appellate Structure: Two-Tier Review <sup>586</sup> | Legally Unified State Judiciary <sup>587</sup> |
|---------------------|---|---|---|--|
| OK                  | Appointed <sup>604</sup>                    | Yes   | De novo <sup>605</sup>                              | Yes  |
| OR                  | Varies                                      | No <sup>606</sup>   | De novo <sup>607</sup>                              | No <sup>608</sup>                              |
| RI                  | Appointed <sup>609</sup>                    | Yes <sup>610</sup>  | De novo   | Yes  |
| SC                  | Appointed <sup>611</sup>                    | No <sup>612</sup>   | De novo on the record <sup>613</sup>                | Yes <sup>614</sup>                             |
| TN                  | Varies <sup>615</sup>                       | Yes   | De novo   | No   |
| TX                  | Varies                                      | Not in municipalities with fewer than 5,000 people <sup>616</sup> | De novo <sup>617</sup>                              | No   |
| UT (justice courts) | Appointed                                   | No  | De novo   | No   |

<sup>604</sup> Daniel R. Deja, *How Judges Are Selected — A Survey of the Judicial Selection Process in the United States*, 75 MICH. BAR J. 904, 907 (1996) (“Oklahoma, Oregon, South Carolina, Washington and Wyoming select municipal court judges by mayoral appointment or appointment of the governing body of the municipality.”).

<sup>605</sup> OKLA. STAT. ANN. tit. 11, § 27-129 (2019) (allowing de novo appeal from municipal courts not of record if fine is greater than \$500); OKLA. CRIM. APP. R. 1.2 (recognizing that standard appeal is available for judgments from municipal courts of record).

<sup>606</sup> OR. REV. STAT. ANN. § 221.142(b) (2019).

<sup>607</sup> For courts not of record, see *id.* § 221.359, .390. For courts of record, see *id.* § 138.057.

<sup>608</sup> *Other Courts*, OR. JUD. DEP’T, <https://www.courts.oregon.gov/courts/Pages/other-courts.aspx> [<https://perma.cc/3RMC-J4E4>] (“[S]tate court system has no administrative control over local courts . . .”).

<sup>609</sup> 45 R.I. GEN. LAWS ANN. § 45-2-12 to -14, -19, -21, -24 to -27, -29, -30, -32, -34, -37, -38, -44 to -52, -55, -56, -58, -59, -61 to -63 (2019) (establishing individual municipalities’ authority to create municipal courts with power to appoint judges).

<sup>610</sup> See, e.g., BURRILLVILLE, R.I., REV. GEN. ORDINANCES § 11-7 (2020) (requiring that municipal court judge be an attorney); CENTRAL FALLS, R.I., REV. ORDINANCES § 14-47 (2020) (same); COVENTRY, R.I., CODE § 22-3 (2020) (same).

<sup>611</sup> See S.C. CODE § 14-25-15(A) (2019).

<sup>612</sup> See *id.* § 14-25-15(D)(1).

<sup>613</sup> *Id.* § 14-25-105.

<sup>614</sup> But see SMITH ET AL., *supra* note 105, at 14 (documenting the difficulty researchers had locating putatively public information on summary court dockets).

<sup>615</sup> See *Municipal Courts*, TENN. STATE CTS., <http://www.tsc.state.tn.us/courts/municipal-courts> [<https://perma.cc/6QJB-XEHK>] (noting that municipal court judges may be appointed or elected).

<sup>616</sup> For municipal courts of record, judges must be “licensed attorney[s] in good standing” with at least two years of experience practicing in the state. TEX. GOV’T CODE ANN. § 30.0006(c) (2019).

<sup>617</sup> Unless municipal court is of record. *Id.* § 30.00014(b).



| State | Method of Judicial Selection <sup>584</sup> | Lawyer Judges Required <sup>585</sup> | Appellate Structure: Two-Tier Review <sup>586</sup> | Legally Unified State Judiciary <sup>587</sup> |
|-------|---|---------------------------------------|---|--|
| WA    | Varies                                      | No                                    | De novo   | No   |
| WV    | Varies <sup>618</sup>                       | No                                    | De novo <sup>619</sup>                              | No   |
| WI    | Election                                    | No                                    | De novo <sup>620</sup>                              | Yes  |
| WY    | Appointed                                   | No                                    | De novo on the record <sup>621</sup>                | No <sup>622</sup>                              |

Table 3: Municipal Fines and Forfeits Revenues and Collections

| State | Total Number Municipal Courts <sup>623</sup> | 2018 Census Data: City Fines and Forfeits Revenues <sup>624</sup> | Municipal Court Collections (Various Sources)   |
|-------|--|---|---|
| AL    | 278  | \$47.5 million  | \$23.8 million (state Traffic Center collections); <sup>625</sup><br>\$160 million (circuit and district but not municipal courts) <sup>626</sup> |

<sup>618</sup> See Smith, *supra* note 45 (noting that municipal judges are chosen in elections or by appointment).

<sup>619</sup> W. VA. CODE § 8-34-1(e) (2020) (requiring appeals be de novo if the defendant is tried originally without a jury).

<sup>620</sup> WIS. STAT. § 800.14 (2020).

<sup>621</sup> See *Canaday v. State*, 687 P.2d 897, 898, 900 (Wyo. 1984).

<sup>622</sup> Letter from Lily Sharpe, *supra* note 52.

<sup>623</sup> See *supra* Table 1.

<sup>624</sup> With the assistance of Michelle Pearse of the Harvard Law School Library, state totals were generated by combining the Public Use Files available at <https://www.census.gov/data/datasets/2018/econ/local/public-use-datasets.html> [<https://perma.cc/D3JX-JA3E>]. Item code U30 (Miscellaneous Fines and Forfeits) and other data points were extracted from files 18statetypepu.txt and 2018FinEstDAT\_08202020modp\_pu.txt (originally downloaded Sept. 23, 2020). These were combined with Fin\_GID\_2018.txt (downloaded Oct. 1, 2020) filtered for only type 2 (city/municipality) units to give a sense of totals for individual jurisdictions. These city/municipality units were then totaled for each state. See 2018 S&L Public Use Files Technical Documentation.pdf, as well as 2018 SandL Public Use Files Disclaimer.pdf for coding and other information about the original files. Many thanks to Census staff who provided invaluable assistance and advice regarding the files and their use.

<sup>625</sup> ALA. ADMIN. OFF. OF CTS., *supra* note 78, at 52.

<sup>626</sup> PUB. AFFS. RSCH. COUNCIL OF ALA., PARCA COURT COST STUDY 13 (2014), <https://www.alabar.org/assets/2019/02/PARCA-Court-Cost-Study-FINAL-3-5-15.pdf> [<https://perma.cc/L5VD-Q2GG>] (reporting annual court collections between 2009 and 2013 from circuit and district courts but not including municipal court collections).

| State                        | Total Number Municipal Courts <sup>623</sup> | 2018 Census Data: City Fines and Forfeits Revenues <sup>624</sup> | Municipal Court Collections (Various Sources)                        |
|------------------------------|--|---|--|
| AZ                           | 82   | \$80.0 million  | \$167 million (municipal courts) <sup>627</sup>                      |
| AR (city courts)             | 89   | \$34.7 million  | \$103 million (all misdemeanor fines from all courts) <sup>628</sup> |
| CO                           | 277  | \$106.7 million   | Unknown <sup>629</sup>   |
| DE (alderman's courts)       | 6  | \$13.2 million  | Unknown <sup>630</sup>   |
| GA (municipal)               | 387  | \$78.4 million  | \$183.3 million (municipal courts) <sup>631</sup>                    |
| IN (city and town courts)    | 70, approx.                                  | \$30.8 million  | Unknown <sup>632</sup>   |
| KS                           | 391  | \$55.6 million  | Unknown <sup>633</sup>   |
| LA (city and mayor's courts) | 300, approx.                                 | \$116.0 million   | Unknown <sup>634</sup>   |
| MI                           | 4  | \$136.0 million   | Unknown <sup>635</sup>   |

<sup>627</sup> FLATTEN, CITY COURT: MONEY, PRESSURE AND POLITICS, *supra* note 93, at 6 (\$167 million). See generally ARIZ. TASK FORCE ON FAIR JUST. FOR ALL, JUSTICE FOR ALL: COURT-ORDERED FINES, PENALTIES, FEES, AND PRETRIAL RELEASE POLICIES (2016), [https://www.azcourts.gov/Portals/74/TFFAIR/Reports/FINAL%20FairJustice%20Aug%2012-final%20formatted%20versionRED%20\(002\).pdf](https://www.azcourts.gov/Portals/74/TFFAIR/Reports/FINAL%20FairJustice%20Aug%2012-final%20formatted%20versionRED%20(002).pdf) [<https://perma.cc/VN4P-76GG>].

<sup>628</sup> Total fines and costs assessed for misdemeanors and local ordinance violations in 2015 by all courts. Spreadsheet from Arkansas Adm'r of Cts. (on file with the Harvard Law School Library).

<sup>629</sup> No data on court website; no response from AOC; no other reports found.

<sup>630</sup> No data on court website; no response from AOC; no other reports found. See, e.g., ADMIN. OFF. OF THE CTS., DEL. CTS., *supra* note 86 (providing no data relevant to fines and fees).

<sup>631</sup> The Georgia Superior Court Clerks' Cooperative Authority (GSCCCA) maintains the CourtTRAX database that reports on municipal court annual fines and fees. GA. SUPERIOR CT. CLERKS' COOP. AUTH., REMITTANCES BY COURT TYPE (2017), <https://www.courttrax.org/reports/canned/FY17/dailyremittanceByCourt.pdf> [<https://perma.cc/5544-XDLQ>] (showing \$26,424,060.40 in remittances to municipal courts through June 30, 2017 for FY 2017); GA. SUPERIOR CT. CLERKS' COOP. AUTH., REPORTABLE FUNDS BY COURT TYPE (2017), <https://www.courttrax.org/reports/canned/FY17/DailyReportablesByCourt.pdf> [<https://perma.cc/E24N-UZZD>] (showing \$156,881,979.61 in reportable funds for municipal courts through June 30, 2017 for FY 2017).

<sup>632</sup> No data on court website; no response from AOC; no other reports found.

<sup>633</sup> No data on court website; no response from AOC; no other reports found. See, e.g., AD HOC COMMITTEE REPORT ON BONDING PRACTICES, FINES AND FEES IN MUNICIPAL COURTS (2018), <https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/AdHocCommitteeMunicipalCourtsReport.pdf> [<https://perma.cc/D68V-T3A3>] (providing no totals).

<sup>634</sup> No data on court website; no response from AOC; no other reports found. See, e.g., SUP. CT. OF LA., *supra* note 517, at 16.

<sup>635</sup> No data on court website; no response from AOC; no other reports found.

| State                                    | Total Number Municipal Courts <sup>623</sup> | 2018 Census Data: City Fines and Forfeits Revenues <sup>624</sup> | Municipal Court Collections (Various Sources)                                 |
|--|--|---|---|
| MS (municipal and justice courts)        | 319  | \$33.6 million  | Unknown <sup>636</sup>  |
| MO                                       | 473  | \$55.4 million  | \$121.9 million (municipal courts) <sup>637</sup>                             |
| MT (municipal, city, and justice courts) | 159  | \$10.1 million  | Unknown <sup>638</sup>  |
| NV                                       | 17   | \$38.8 million  | \$24 million (municipal courts) <sup>639</sup>                                |
| NJ                                       | 515  | \$98.8 million  | \$400 million (municipal courts) <sup>640</sup>                               |
| NM                                       | 81   | \$9.7 million   | Unknown <sup>641</sup>  |
| NY                                       | 1,300, approx.                               | \$1,125 million   | \$250 million (justice courts) <sup>642</sup>                                 |
| ND                                       | 90   | \$8.0 million   | \$14.3 million (misdemeanor court collections from all courts) <sup>643</sup> |

<sup>636</sup> No data on court website; no response from AOC; no other reports found.

<sup>637</sup> MO. CTS., *supra* note 527, at 306 (\$99.9 million in fines and another \$22.04 million in court costs and surcharges); *see also* BETTER TOGETHER, PUBLIC SAFETY — MUNICIPAL COURTS 2 (2014), [https://www.heartland.org/\\_template-assets/documents/publications/bt-municipal-courts-report-full-report1.pdf](https://www.heartland.org/_template-assets/documents/publications/bt-municipal-courts-report-full-report1.pdf) [<https://perma.cc/2PQY-TS5G>] (\$132 million in total municipal court collections in 2013).

<sup>638</sup> No data on court website; no response from AOC; no other reports found.

<sup>639</sup> SUP. CT. OF NEV. CT. FUNDING COMM'N, *supra* note 94, at 37 tbl.9; *see also* Advisory Memorandum from Nev. Advisory Comm. to U.S. Comm'n on C.R. 8 (June 13, 2017) (discussing racial disparities in the collection of fines and fees and noting that the 2003 report was the first and only report on fines and fees to be conducted by the state).

<sup>640</sup> N.J. CTS., *supra* note 97, at 20.

<sup>641</sup> No data on court website; no response from AOC; no other reports found. *See, e.g.*, Letter from Barry Massey, *supra* note 48 (“[N]o municipal court reports its data to the Judiciary’s central state data repository.”).

<sup>642</sup> KRONSTADT & STARR, *supra* note 46 (“In 2017, New York’s justice courts collected nearly \$250 million in revenues through fines, fees and other exactions.”).

<sup>643</sup> Criminal Fines Spreadsheet from Sally Holewa, *supra* note 99 (including Fines, Bond Forfeiture, Indigent Recoupment, Criminal Administration, Indigent Defense Application, Indigent Defense/Facility, Community Service Supervision, and Victim Witness fees collected statewide from all courts, not solely municipal courts).

| State               | Total Number Municipal Courts <sup>623</sup> | 2018 Census Data: City Fines and Forfeits Revenues <sup>624</sup> | Municipal Court Collections (Various Sources)   |
|---------------------|--|---|---|
| OH (mayor's courts) | 301  | \$191.0 million   | Unknown <sup>644</sup>  |
| OK                  | 342  | \$65.0 million  | Unknown <sup>645</sup>  |
| OR                  | 146  | \$41.6 million  | \$22.7 million (judicial fines and fees distributed to cities) <sup>646</sup><br>Collections: \$119 million (state court collections only) <sup>647</sup> |
| RI                  | 23   | \$9.7 million   | \$20.3 million (district and superior court collections but not municipal courts) <sup>648</sup>  |
| SC                  | 200  | \$29.5 million  | \$20 million (city revenue from municipal courts) <sup>649</sup>  |

<sup>644</sup> No data on court website; no response from AOC; no other reports found. *See, e.g.*, THE SUP. CT. OF OHIO, REPORT AND RECOMMENDATIONS OF THE SUPREME COURT OF OHIO TASK FORCE ON THE FUNDING OF OHIO COURTS 18 (2015), <https://www.supremecourt.ohio.gov/Boards/courtFunding/Report.pdf> [<https://perma.cc/Q7XY-UWE6>] (“[T]he Task Force was unable to ascertain the specific total amount of court fees and costs levied by Ohio courts.”).

<sup>645</sup> No data on court website; no response from AOC; no other reports found. *See, e.g.*, *Prisoners of Debt: Justice System Imposes Steep Fines, Fees*, OKLA. WATCH (Jan. 31, 2015), <https://oklahomawatch.org/2015/01/31/justice-system-steeps-many-offenders-in-debt> [<https://perma.cc/9AR5-YD32>] (“The Supreme Court does not report how much in fines and fees is collected in criminal cases each year. A 2014 study by the court found that from 2007 to 2014, \$1.2 billion was collected in both civil filing fees and criminal fines.”).

<sup>646</sup> OR. JUD. BRANCH, 2015 ANNUAL REPORT 60 (2015), [https://www.courts.oregon.gov/about/Documents/2015\\_AnnualReport%20\(6\).pdf](https://www.courts.oregon.gov/about/Documents/2015_AnnualReport%20(6).pdf) [<https://perma.cc/Z6DK-RS8Y>] (financial statistics).

<sup>647</sup> NAT’L CTR. FOR STATE CTS., *supra* note 100, at 44 (documenting state but not municipal court collections).

<sup>648</sup> No AOC response; 2015 Annual Report does not include municipal courts. *See* R.I. FAM. LIFE CTR., COURT DEBT AND RELATED INCARCERATION IN RHODE ISLAND FROM 2005 THROUGH 2007, at 10 (2008), <http://www.opendoorsri.org/sites/default/files/CourtDebt.pdf> [<https://perma.cc/4N7D-ER84>] (including district and superior courts but not municipal courts).

<sup>649</sup> PRICE ET AL., *supra* note 40, at 10 (“[M]unicipalities retained over \$20 million in assessed fines in 2013.”).

| State               | Total Number Municipal Courts <sup>623</sup> | 2018 Census Data: City Fines and Forfeits Revenues <sup>624</sup> | Municipal Court Collections (Various Sources)     |
|---------------------|--|---|---|
| TN                  | 250, approx.                                 | \$90.3 million  | Unknown <sup>650</sup>                            |
| TX                  | 928  | \$353.5 million   | \$697.4 million (municipal courts) <sup>651</sup> |
| UT (justice courts) | 108  | \$41.0 million  | \$49.7 million (justice courts) <sup>652</sup>    |
| WA                  | 92   | \$106.0 million   | \$43.9 million (municipal courts) <sup>653</sup>  |
| WV                  | 122  | \$10.8 million  | Unknown <sup>654</sup>                            |
| WI                  | 237  | \$46.3 million  | Unknown <sup>655</sup>                            |
| WY                  | 82   | \$6.7 million   | Unknown <sup>656</sup>                            |

<sup>650</sup> No data on court website; no response from AOC; no other reports found. See JENNIFER BARRIE ET AL., TENN. ADVISORY COMM'N ON INTERGOVERNMENTAL RELS., TENNESSEE'S COURT FEES AND TAXES: FUNDING THE COURTS FAIRLY 35 (2017) [https://www.tn.gov/content/dam/tn/tacir/documents/2017\\_CourtFees.pdf](https://www.tn.gov/content/dam/tn/tacir/documents/2017_CourtFees.pdf) [<https://perma.cc/ALH9-CD4N>] ("Reliable statewide collections data is not available.")

<sup>651</sup> Spreadsheet on file with the Harvard Law School Library (2015 data).

<sup>652</sup> Spreadsheet from Utah Adm'r of Cts. (on file with the Harvard Law School Library) (aggregating total fines collected by 127 justice courts).

<sup>653</sup> WASH. CTS., COURTS OF LIMITED JURISDICTION 2015 ANNUAL REPORT: ANNUAL CASELOAD REPORT 48 (2015), <https://www.courts.wa.gov/caseload/content/archive/clj/Annual/2015.pdf> [<https://perma.cc/JU8S-PJHC>] (citing \$34,301,985 in Infractions; \$7,511,888 in Traffic Misdemeanors; and \$2,168,522 in Non-traffic Misdemeanors, not including parking revenues).

<sup>654</sup> No data on court website; no response from AOC; no other reports found. See Email from Tabetha D. Blevins, *supra* note 51 ("Municipal Courts do not report to the Administrative Office.")

<sup>655</sup> No data on court website; no response from AOC. See WIS. SUP. CT.'S PLAN. & POL'Y ADVISORY COMM., FINES, FORFEITURES & SURCHARGES app. A (2002), <https://www.wicourts.gov/courts/committees/docs/ppacfeesrpt.pdf> [<https://perma.cc/4P6P-XS8C>] (\$125.6 million collected by all courts in fines, fees, and surcharges in 2001 but does not break out municipal courts).

<sup>656</sup> Letter from Lily Sharpe, *supra* note 52 ("We do not maintain reports for municipal courts.")

| State | Total Number Municipal Courts <sup>623</sup> | 2018 Census Data: City Fines and Forfeits Revenues <sup>624</sup>   | Municipal Court Collections (Various Sources)   |
|-------|--|---|---|
| TOTAL | 7,669  | <p>Fines and forfeits revenues for all cities in thirty states with municipal courts: \$3.1 billion</p> <p>Fines and forfeits revenues for all cities in all fifty states: \$4.7 billion</p> <p>Fines and forfeits revenues for all state and local governments: \$14.8 billion</p> | Municipal and justice court collections documented here: \$1.9 billion <sup>657</sup> |

<sup>657</sup> In millions: AZ (\$167), GA (\$183.3), MO (\$121.9), NV (\$24), NJ (\$400), NY (\$250), SC (\$20), TX (\$697.4), UT (\$49.7), WA (\$43.9).