

THE FALSE PROMISE OF CRIMINAL JUSTICE EXPERTISE

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INTRODUCTION

Brenner Fissell's latest article, "Local Offenses,"¹ focuses its lens on the vast network of municipal code that regulates every American city, town, and village, taking a careful look at the substantive criminal law which governs such local code. One of the first articles to examine the drafting of municipal criminal code and to analogize its enforcement to the long-neglected topic of criminal misdemeanors, Fissell's article makes an important contribution to the scholarly conversation rethinking the criminal justice system in the twenty-first century. Fissell additionally brings a rigorous eye to the effects of local criminal law and, more generally, the "dilemma of localism."² Finally, Fissell makes the critical point that we must scrutinize not only the "what" of what type of conduct is being locally criminalized, but also the "how" of how it is done.³

Throughout his study of local offense drafting, Fissell strongly cautions against the dangers of participatory democracy in the criminal justice system, focusing on a potential "harmful asymmetry" between well-drafted state criminal laws and poorly or inexpertly drafted local or municipal criminal laws.⁴ In this claim he echoes Wayne Logan, who, twenty years ago, focused on the problematic "role of local governments, municipalities in particular, in legislating against crime."⁵ Logan correctly contends that local governments enjoy a wide range of latitude in promulgating criminal law, particularly those offenses involving public disorder and "quality of life" offenses.⁶ The local power to criminalize has been available since colonial times and is nothing new, but, as Logan argues, the new focus on local

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1. *See generally* Brenner M. Fissell, 89 *FORDHAM L. REV.* 837 (2020).
2. *Id.* at 839 (quoting Nestor Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 *YALE L.J.* 954 *passim* (2019)).
3. *See id.* at 840.
4. *Id.* at 842, 844.
5. Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 *OHIO ST. L.J.* 1409, 1413 (2001) (internal footnotes omitted).
6. *Id.* at 1414.

criminal lawmaking has created a “shadow criminal law” which has criminalized a new range of behaviors.⁷

Fissell takes Logan’s point further in his own analysis, which is primarily concerned about the form of local offenses.⁸ Specifically, Fissell argues that harmful asymmetry may thwart the superior expert criminal law drafting done at the state level, either from reduced institutional competence of city councils and town boards or from deliberate choice.⁹ He contends that the standard aspects of local governance such as smaller populations, fewer attorneys, limited legislative staff, and few outside experts often result in the institutional incompetence of both city councils and town boards.¹⁰ Fissell next argues that in certain cases, incompetence is not the problem; instead, the problem is “deliberate overbreadth,” where the locality purposefully overreaches to ensure that the targeted conduct is chilled.¹¹ He ties these two potential issues back to the larger division between bureaucratic expertise and democratic localism in the criminal justice system, landing squarely on the side of expert bureaucracy.¹²

Fissell’s deep dive into local criminal lawmaking is carefully crafted and overall a welcome addition to the scholarship. His determination that local lawmaking equals incompetent or haphazard lawmaking, however, is contestable. Equally troubling is his larger point regarding the supposed follies and foibles of democratizing criminal justice, which Fissell views as highly suspect.¹³ Fissell’s argument that local, democratic criminal lawmaking inevitably results in either “‘stupid’ and ‘uninformed’”¹⁴ or “‘violent’ and ‘vengeful’”¹⁵ laws, because of the so-called “lay public’s” participation is not only incorrect but can also read as condescending and elitist. By challenging the criminal justice democratization movement,¹⁶ which broadly attempts to “make criminal justice more community-focused and responsive to lay influences,”¹⁷ Fissell ends up attacking the competence and ethical probity of the hardworking local citizens who comprise small-town city councils often laboring for little pay and recognition.

My critique of Fissell’s piece proceeds in three parts. First, I examine Fissell’s argument that local, democratic criminal law drafting is truly inept by looking at specific small-town codes and contrasting them to their relevant

7. *Id.* at 1416.

8. Fissell, *supra* note 1, at 840.

9. *Id.* at 842.

10. *Id.* at 843.

11. *Id.* (emphasis omitted).

12. *Id.* at 844.

13. *Id.* at 880 (quoting Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1376 (2017)).

14. *Id.* at 881 (quoting Kleinfeld, *supra* note 13, at 1376).

15. *Id.* (quoting Kleinfeld, *supra* note 13, at 1376).

16. Fissell specifically singles out Joshua Kleinfeld’s “Manifesto of Democratic Criminal Justice,” *supra* note 13, as his argumentative straw man. In full disclosure, I was one of the signatories of Joshua Kleinfeld et al., *Policy Proposals: White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017), and I have written frequently about the need for more community participation in the criminal justice process.

17. Kleinfeld et al., *supra* note 16, at 1694.

state parallels. Second, I investigate whether the lay city council and local attorneys who promulgate and review most municipal code are indeed motivated by violence and vengeance. I then compare their work to that of the presumably expert drafting process at the state legislative level. I conclude by explaining why local participation in drafting local offenses is important and how bureaucratic expertise, while outwardly enticing, can alienate the community from the criminal justice process.

I. LOCAL LAWMAKING AND DEMOCRATIZATION

As part of his review on the formation of local offenses, Fissell locates a major problem lurking within the distance between properly drafted state law (in Fissell's view, best based on the Model Penal Code (MPC)), and the local, municipal code created by the smaller communities within those states.¹⁸ Fissell specifically warns his readers about the dangers of local laws promulgated by smaller jurisdictions, claiming that the code passed is often antidemocratic, violent, and stupid.¹⁹

To begin testing out Fissell's contention, I selected a small Oregon town. Oregon is a "model" MPC-influenced state with multiple small towns and villages that all have their own municipal code. Stayton, Oregon is one such small town, located in the Willamette Valley with an estimated population of 8295 in 2019,²⁰ and it has an easily accessible online municipal code.²¹ Stayton's code proves quite robust, including a multiplicity of civil and criminal offenses. Below I examine both civil²² and criminal offenses as codified by Stayton to test whether Fissell's theory proves correct in application.

Let's begin with Stayton's civil code. In 2016, Stayton passed a residential property maintenance ordinance aimed at negligent landlords who allowed gross code violations on their properties.²³ The ordinance was "designed to give the city more teeth when . . . cracking down on landlords who neglect vital repairs of rental housing."²⁴ When one particular landlord continuously failed to fix the "gross code violations" at his property, the tenants

18. Fissell, *supra* note 1, at 848.

19. *Id.* at 881.

20. *QuickFacts: Stayton City, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/staytoncityoregon,US/PST045219> [<https://perma.cc/N3AF-DB9M>] (last visited May 28, 2021).

21. *See generally* STAYTON, OR., CODE (2021).

22. As Fissell rightly points out, sometimes offenses classified as civil have a criminal aspect to them, particularly in punishment: "Some localities promulgate freestanding, locally invented offenses that are placed ad hoc throughout the local code and are not delimited within the more recognizable chapter of 'offenses.' These local offenses are recognizable as criminal in nature because of their sanctions, not their labelling." Fissell, *supra* note 1, at 860.

23. *See* STAYTON, OR., CODE §§ 15.06.010–120; Justin Much, *Stayton City Council Hears More Tenant Concerns*, STATESMAN J. (Dec. 16, 2016, 10:42 AM), <https://www.statesmanjournal.com/story/news/local/stayton/2016/12/16/stayton-city-council-hears-more-tenant-concerns/95160840/> [<https://perma.cc/T4XY-7AVP>].

24. Much, *supra* note 23.

complained at a town meeting.²⁵ In response, the city councilors and the town's mayor all worked together to try to devise a solution which did not involve condemning the property—which would have led to forced evictions and potential homelessness for the tenants.²⁶ As part of the response to this problem, the city council drafted a revised code provision to make it easier to file complaints against landlords who did not keep their rental properties up to code, and the provision provided for a substantial fine against any landlord who refused to comply with required repairs or take corrective action.²⁷ At least in this instance, the city councilors worked carefully with the local community (particularly those individuals living in lower-rent housing) to create a better, more workable solution to repeated and dangerous building code violations than simply condemnation. This seems like local democratic lawmaking at its best.

Turning to local criminal law municipal codes, Stayton offers a special peer court for juveniles—another particular benefit of localism in this small town. According to Stayton's website,

Peer Court is a court system where juveniles who have committed misdemeanor crimes and violations are judged by a group of their peers. The judges, clerks, bailiffs, and jury members are volunteers between the ages of 12 to 20 years of age. The defendants have admitted guilt and are standing trial to be sentenced by their peers.²⁸

Santiam Peer Court is a group effort by local volunteers, the local police department, and the community at large.²⁹ There is no state parallel for juvenile adjudication—indeed, mandatory sentencing for juveniles in Oregon is notably harsh and inflexible.³⁰

What about comparisons between state law and local law, especially where the two might diverge? Recall Fissell argues that harmful asymmetry can mean that “when the lay public is left to its own devices [in drafting municipal codes], uninformed or unrestrained by expert influence,” the resulting law is worse than state law.³¹

Consider, for example, publicly heeding the call of nature. Section 9.20.010 of Stayton's municipal code holds that “[n]o person shall, while in a public place or in view of a public place, perform an act of urination or defecation, except in enclosed toilets provided for that purpose.”³² This law parallels the law of Oregon's largest city, Portland, which holds:

25. *Id.*

26. *See id.*

27. *See* STAYTON, OR., CODE §§ 15.06.010–120.

28. *Stayton Police Resources and Events*, CITY OF STAYTON, OR., http://www.staytonoregon.gov/page/police_resources [<https://perma.cc/9U78-VY3T>] (last visited May 28, 2021) (select “Santiam Peer Court”).

29. *Id.*

30. *See, e.g.*, OR. REV. STAT. § 137.700 (2019) (listing offenses carrying mandatory minimum sentences). *But see id.* §§ 137.709, 137.712 (creating exceptions to § 137.700).

31. Fissell, *supra* note 1, at 881.

32. STAYTON, OR., CODE, § 9.20.010.

No person shall urinate or defecate in any park except in a convenience station designed for that purpose; or blow, spread, or place any nasal or other bodily discharge; or spit, urinate, or defecate on the floors, walls, partitions, furniture, fittings, or on any portion of any public convenience station or in any place in such station, excepting directly into the particular fixture provided for that purpose; or place any bottle, can, cloth, rag, or metal, wood, or stone substance in any of the plumbing fixtures in any such station.³³

In contrast, section 164.805 of the Oregon Revised Statutes classifies such conduct under the Class C misdemeanor of offensive littering, holding that public urination or defecation would fall under “creat[ing] an objectionable stench or degrad[ing] the beauty or appearance of property or detract[ing] from the natural cleanliness or safety of property by intentionally [d]iscarding or depositing any rubbish, trash, garbage, debris or other refuse upon the land of another.”³⁴

In 2018, however, the Oregon Court of Appeals held that section 164.805 of the Oregon Revised Statutes does not prohibit relieving oneself in public and reversed a defendant’s misdemeanor conviction for doing so.³⁵ Thus, the state offensive littering law, which presumably experts carefully drafted, cannot be used to prosecute public urination³⁶ because the words of the statute do not include “urine”—a problem absent from the local city and town ordinances. This is despite the fact that local laypeople, possibly even nonlawyers, likely drafted the Stayton municipal criminal code. Thus, in this instance, relying on the local community resulted in a properly drafted criminal ordinance that prohibits a specific type of conduct, but relying on the experts failed to prohibit that conduct. This seems to contradict one of Fissell’s main contentions: that

[a]t the level of a local government—normally a more “democratic” level of government—criminal law is drafted in a manner that ignores modern methods and has harmful effects. Meanwhile, the states, influenced by

33. PORTLAND, OR., CODE, § 20.12.030 (2021).

34. OR. REV. STAT. § 164.805(1)(a).

35. See *State v. Corcilus*, 430 P.3d 169, 175 (Or. Ct. App. 2018) (“Urine—the immediate product of defendant’s conduct—does not fit within any of the ordinary meanings of the terms ‘rubbish, trash, garbage, debris, or other refuse.’”); see also Aimee Green, *Is Peeing in Public a Crime?: Not Under State Law, Oregon Court of Appeals Says*, THE OREGONIAN: OREGONLIVE (Jan. 29, 2019), https://www.oregonlive.com/portland/2018/09/is_peeing_in_public_a_crime_no.html [<https://perma.cc/DAW2-5EDE>].

36. Like in many West Coast states, the recent surge of homelessness has caused great concern over public urination and defecation in Oregon, especially in the Portland Metro area. See Kellee Azar, *Going to the Bathroom in Public in Portland is Illegal?*, KATU (Sept. 27, 2019), <https://katu.com/news/local/going-to-the-bathroom-in-public-in-portland-is-legal> [<https://perma.cc/33DQ-CVX6>]; see also Rachel Monahan, *One Day with the Squad that Removes Needles and Feces from Downtown Portland Streets*, WILLAMETTE WEEK (May 18, 2019), <https://www.wweek.com/news/city/2019/05/08/one-day-with-the-squad-that-removes-needles-and-feces-from-downtown-portland-streets/> [<https://perma.cc/JNW5-XE3Q>].

experts such as the [American Law Institute] and the professoriate, draft offenses in a superior manner.³⁷

It is this characterization of bureaucratic expertise as “superior” which I ultimately challenge.

Fissell similarly contends that “[f]or democratization, the phenomenon of harmful asymmetry pushes back against the attack on expertise and the defense of lay values.”³⁸ But what happens when the lay values—guided by legal experts or not—are either better or more reflective of the community’s values? In other words, are we so invested in the idea of expertise, the myth of the super-educated elite lawyer, that we cannot at least entertain the possibility that the nonlegal expert is able to read community values just as well as, if not better than, the distant legislator and legal counsel? The underlying assumption here is that local, untrained community members—lawyers or not—are stupid and incompetent. This assumption is not only insulting and condescending to local lawyers, but it is also not necessarily true.

Let’s look at the state of New York for another example, as Fissell does.³⁹ Once again, I chose a small town to study: Arcade, New York. Arcade is a small village of approximately 1933 near Buffalo, nestled in the similarly named, larger town of Arcade and located in Wyoming County.⁴⁰ Like many small towns, Arcade has fairly strict dog control laws. Its municipal code specifies that, regarding dogs running at large:

It shall be a violation of this chapter to permit or allow any dog in the Village of Arcade to:

1. Be at large off the owner’s premises except when such dog is restrained by an adequate collar and leash.

....

6. Chase or otherwise harass any person in such a manner as reasonably to cause intimidation or to put such person in reasonable apprehension of bodily harm or injury.⁴¹

Like in the small town of Cobleskill, New York, from which Fissell hails, this law is drafted as a strict liability offense⁴²—the owner does not need intent to commit such a violation, although there are some reasonability requirements. Fissell claims that Cobleskill enacted their loose dog law in response to pressure to punish bad owners,⁴³ which may be true. But what if the reality is that most small towns and villages just want dogs to be leashed

37. Fissell, *supra* note 1, at 877.

38. *Id.*

39. *See id.* at 875–76.

40. *City and Town Population Totals: 2010–2019*, U.S. CENSUS BUREAU (May 21, 2020), <https://www.census.gov/data/datasets/time-series/demo/popest/2010s-total-cities-and-towns.html> [<https://perma.cc/5MJM-UEVU>] (select “New York” under “Incorporated Places: 2010 to 2019”).

41. ARCADE, N.Y., CODE § 13-3(A) (2021).

42. *See* Fissell, *supra* note 1, at 875–76.

43. *Id.* at 876.

outside of their owner's property? If, as Fissell points out, New York state law has no such anti-dog-roaming law, isn't it precisely the place of the local community to tailor one as they see fit?

Overall, Fissell's article contains considerable fear of and disdain for the role of the small local community and its perceived trespasses or failures in promulgating and implementing new law or codes. So, for contrast, let's look at Buffalo, New York's dog leashing law. According to Fissell's thesis, larger cities should have more expertly drafted laws because they have far more sophisticated legislatures as well as the help of the professoriate.⁴⁴ Given that Buffalo has the well-known Buffalo Law School right in its midst, plus surely a plethora of sophisticated local lawyers, if Fissell's thesis holds true, then Buffalo should have drafted a better-crafted and narrower dog roaming law.

Buffalo's General Code on Animals includes several rules on off-leash dogs. Section 78-18(A) holds that "[e]ach owner of a dog shall restrain such dog so as to prevent it from leaving the premises of such owner The owner of a dog shall be held liable for a violation of this subsection whenever any unlicensed dog is found at large."⁴⁵ Further, section 78-19, titled "Restraint on Premises," holds that "each owner of a dog which is kept on the premises, unless such dog is in his or her immediate custody, shall keep it muzzled, securely fastened or otherwise restrained in such manner as to prevent such dog from biting any person lawfully entering upon or leaving such premises."⁴⁶ In other words, when comparing Buffalo's laws to dog leash laws from both Arcade and Cobleskill, there seem to be few important differences.

What can we conclude from this tour of local dog leash laws in New York State? For one, the dog leash laws in Buffalo, New York—a community full of legal and academic experts—are not much different than the laws in Cobleskill or Arcade. All three dog control laws have strict liability; all three laws are broad, covering almost any dog-related incident; and all three place the onus on the owner. Indeed, the Buffalo laws—those theoretically born of expertise—are actually the least detailed and broadest statutes, covering far more ground than those of the two smaller towns. Perhaps when we let the experts get involved, we get needlessly complicated and overbroad law, as opposed to the more restrained draftsmanship of the lay citizenry.

II. IS LOCAL DEMOCRATIC LAWMAKING REALLY VIOLENT AND VENGEFUL?

So much for presumed incompetence. But what about Fissell's second prong of attack on democratization, where he argues that deliberate overbroadening created by local democracy can be "violent" and

44. *See id.* at 871–74.

45. BUFFALO, N.Y., CODE § 78-18(A) (2021).

46. *Id.* § 78-19.

“vengeful”?⁴⁷ Is this a fair criticism of the call for more local democratic decision-making in criminal justice?

Unlike Joshua Kleinfeld, my response here is not in any way a “manifesto,”⁴⁸ nor does it speak for any scholar’s views but my own. But as a participant in the *Northwestern University Law Review*’s “Democratizing Criminal Law” symposium,⁴⁹ as well as someone whose own work has consistently argued for the voice of the community, particularly through the mechanism of the jury,⁵⁰ I contend that Fissell’s characterization of how local democracy actually works in smaller communities is both incorrect and overdetermined.

To quote Fissell precisely, he contends that “[t]he lay public, at the smaller institutional level where lay influences are most influential, seems to be ‘stupid’ or ‘vengeful’—claims rejected by the democratizers.”⁵¹ This democratizer certainly rejects that claim. Fissell’s narrative, that expertise is the answer for drafting criminal law and that local democracy leads only to violence and reprisal, seems a bit selective in its scope. It is easy enough to find local laws which are not as well drafted as an analogous state law and claim expertise as the winner. But it is just as simple to find local laws that are very well tailored to the needs of the specific community and claim local democracy as the winner.

To provide some actual proof of my last statement, I return to the state of Oregon, looking at not only Stayton but also adding Aumsville, Oregon, to the mix. Like Stayton, Aumsville also has an easily accessible municipal code.

First, turning back to Stayton, we see that even a relatively small community still follows democratic governance when debating any changes to its laws and code. Let’s return momentarily to the 2016 proposed residential property maintenance ordinance, as discussed above.⁵² Because the then-current municipal code did not cover levels of habitability in rental property, the Stayton city planner brought to the Stayton City Council a proposed addition addressing precisely that.⁵³ The city councilors and the mayor vigorously debated the proposed change in code and they directed further investigation into the topic, which was tabled to be debated again during the next meeting.⁵⁴

If this much thought, time, and effort was placed into a change in the existing civil municipal code, how much more would a change in the criminal

47. Fissell, *supra* note 1, at 881 (quoting Kleinfeld, *supra* note 13, at 1376).

48. *See generally* Kleinfeld, *supra* note 13.

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

50. *See generally* LAURA I APPLEMAN, *DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION* (2015).

51. Fissell, *supra* note 1, at 885.

52. *See supra* notes 24–27 and accompanying text.

53. *See* Justin Much, *Exploring a Code to Protect Stayton Renters*, STATESMAN J. (July 27, 2016, 11:02 AM), <https://www.statesmanjournal.com/story/news/local/stayton/2016/07/27/exploring-code-protect-stayton-renters/87459732/> [<https://perma.cc/WGR5-PTV8>].

54. *Id.*

municipal code stimulate? Fissell's assumption that these misdemeanor and violation laws are hastily and carelessly drafted, simply because they are promulgated in small towns,⁵⁵ does not seem to be fully substantiated.

Likewise, the town's discussion about potentially reanimating their dog licensing program (which, at that point, Stayton had outsourced to the larger county) also saw a careful examination of the pros and cons, especially since it overlapped with animal complaints and emergency violations.⁵⁶ As opposed to Fissell's example of dog control ordinances in Cobleskill, New York,⁵⁷ the Stayton City Council (a more expert body) carefully deliberated every possible change in this small town and invited the lay public to participate. In each city council meeting, the lay public had an opportunity on the record to opine, give comment, or oppose any measure proposed, no matter how large or small.⁵⁸

For another example of positive small-town community governance, let us look at Aumsville, Oregon. A town of approximately 4000 located in Marion County,⁵⁹ Aumsville has a rigorous vetting and discussion system for any updates to the local Aumsville municipal code, including any changes to the criminal code. Take, for example, the Aumsville City Council's meeting agenda for November 23, 2020.⁶⁰ Even though the meeting took place on Zoom, it dedicated a substantial amount of time to a public hearing about municipal code revisions, including the proposed ordinance updates from the city administrator, questions from the city council, and a designated time to receive public comments.⁶¹ Even minor changes to ordinances were fully presented and discussed; any new ordinances or proposed repeals of existing ordinances were clearly designated as "[f]irst" readings, implying that each one would be deliberated more than once before passage or rejection.⁶² These ordinances included proposed Ordinance No. 688, "An Ordinance Creating a Juvenile Curfew Within Aumsville's City Limits; Establishing Parental /Guardian Responsibility and Repealing Ordinance No. 410,"⁶³ as well as proposed Ordinance No. 694, "An Ordinance Repealing Ordinance

55. See Fissell, *supra* note 1, at 871–73.

56. Much, *supra* note 53.

57. See Fissell, *supra* note 1, at 875–76.

58. See, e.g., *City Council Meeting Action Minutes July 18, 2016*, CITY OF STAYTON, OR., http://www.staytonoregon.gov/page/gov_cc_agendas_minutes [https://perma.cc/ZF4Q-QCQ2] (last visited Apr. 21, 2021) (select "Minutes," then "2016," then "July 18 2016.pdf").

59. *City and Town Population Totals: 2010–2019*, *supra* note 40 (select "Oregon" under "Incorporated Places: 2010 to 2019"). See also *Aumsville*, DATA COMMONS, <https://datacommons.org/place/geoId/4103250> [https://perma.cc/Y6UR-J4KN] (last visited May 28, 2021).

60. See *Aumsville City Council Meeting Monday, November 23, 2020: Agenda*, CITY OF AUMSVILLE (Nov. 23, 2020), https://www.aumsville.us/sites/default/files/fileattachments/city_council/meeting/6911/acc.11.23.20.pdf [https://perma.cc/9F9W-J3C3].

61. *Id.* at 1.

62. *Id.* at 1–2; see also *Aumsville City Council Minutes – November 23, 2020*, CITY OF AUMSVILLE (Nov. 23, 2020), https://www.aumsville.us/sites/default/files/fileattachments/city_council/meeting/6911/nov.23.2020_web_minutes_.pdf [https://perma.cc/P3S3-Y6HF].

63. *Aumsville City Council Meeting Monday, November 23, 2020: Agenda*, *supra* note 60, at 2.

No. 564, an Ordinance Concerning Registration of Residents Convicted of a Sex Crime.”⁶⁴

Looking specifically at the minutes from the November 23, 2020 city council meeting, we find there is much sophisticated work going on within this small community. First, the city administrator made a statement regarding the city ordinances, noting that “staff have been engaged in an effort for about a year and half to do an overview of all City ordinances and bring them into compliance with current case law, Oregon Revised Statutes (ORS), and/or standard operating procedures that have changed.”⁶⁵ So even in a small city of only 4000 people, the city administrator and city council staff took the time to review *all* city ordinances to make sure they harmonized with state law. This is almost precisely the opposite of the scenario Fissell hypothesizes.⁶⁶ Indeed, much of the Aumsville city administrator’s work involved repealing ordinances that were no longer relevant.⁶⁷ During the open meeting, the city administrator went through each ordinance explaining the changes that were recommended.⁶⁸

For example, the city administrator explained that the Aumsville City Council was considering repealing their sex registration statute, which “required residents to register with the Aumsville Police Department if convicted of a sex crime as defined by State Law.”⁶⁹ The official recommendation was to repeal the Aumsville-specific ordinance, as the town was using “the state police registry when needed . . . [which] manage[s] the database within current [Oregon Revised Statutes] guidelines.”⁷⁰ Likewise, with Ordinance No. 688 regarding a juvenile curfew, the minutes show that the city administrator recommended potential repeal, and he also suggested that there might be a new ordinance proposed at a later date.⁷¹ So, far from overstepping state guidance, or taking the opportunity to expand criminal law powers, this small town voluntarily limited the orbit of its criminal law on its own initiative.

After the city administrator presented the ordinances, both city council members and members of the public had a chance to ask questions, which were carefully answered.⁷² Then the members of the city council voted on the ordinances, which were mostly for the first reading—even after presentation and discussion, no ordinance would be changed, repealed, or adopted without further deliberation.⁷³ Again, this was no hasty, ill-advised passage of criminal law, but rather careful consideration of any ordinance change in any fashion.

64. *Id.*

65. *Aumsville City Council Minutes – November 23, 2020*, *supra* note 62, at 1.

66. *See* Fissell, *supra* note 1, at 871–74.

67. *See Aumsville City Council Minutes – November 23, 2020*, *supra* note 62, at 2. The pagination for these minutes designates every page following the first page as page “2”.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.*

73. *Id.*

Although it is a small city, Aumsville also has a designated city attorney. Even in such a small town, the role of city attorney is taken quite seriously, contrary to Fissell's claim of sloppy or lazy lawmaking. In 2018, for example, City Administrator Ron Harding noted the need for more specialized legal counsel in Aumsville, and he suggested soliciting proposals from several law firms to see who would be best suited to serve.⁷⁴

Ultimately, the seriousness with which Aumsville, Oregon considers its municipal codes and local criminal law undermines Fissell's claim that local criminal lawmaking is vastly inferior to state criminal lawmaking and that a local community is undemocratic and incapable of drafting and creating substantive criminal law.⁷⁵

III. SUBSTANCE V. PROCEDURE IN THE CRIMINAL LAW

Turning away from the intricacies of Oregon small town governance, let's return to New York State and one of the positive measures that can come from allowing the local community—which is not always part and parcel of the local government—to take charge. Logan and other scholars have discussed how there are many recent examples of localized law enforcement manifesting in not just local criminal laws, but also in “community’-oriented courts, prosecution, and policing.”⁷⁶

These community efforts to expand the role of local courts and prosecution have been largely positive in nature. Take, for example, the Red Hook Community Justice Center in Brooklyn, New York (the “Community Justice Center”). The Red Hook community court system was the first neighborhood multijurisdictional community court, and it has been in operation for almost thirty years.⁷⁷ Comprising of a courtroom where a single judge hears civil, criminal, and housing cases, the Community Justice Center allows the court to use community restitution projects, short-term psychoeducational groups, and long-term treatment for sentencing, instead of only fines or incarceration.⁷⁸ The Community Justice Center specifically handles “misdemeanors, summonses for non-traffic violations, and juvenile delinquency cases that originate in Red Hook and several surrounding neighborhoods,” along with landlord-tenant cases involving residents of public housing projects in Red Hook.⁷⁹ Because of this limited special

74. *Aumsville City Council Meeting Minutes — November 12, 2018*, CITY OF AUMSVILLE 3 (Nov. 12, 2018), https://www.aumsville.us/sites/default/files/fileattachments/city_council/meeting/3081/11.12.18_minutes.pdf [<https://perma.cc/ZDU4-77RQ>].

75. See Fissell, *supra* note 1, at 868–74.

76. Logan, *supra* note 5, at 1418 (citation omitted).

77. See CYNTHIA G. LEE ET AL., NAT'L CTR. FOR STATE CTS., A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER 1 (2013), https://www.courtinnovation.org/sites/default/files/media/document/2017/RH_Report_ES.pdf [<https://perma.cc/DUP6-PZDE>].

78. *Red Hook Community Justice Center*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/red-hook-community-justice-center> [<https://perma.cc/44QC-B8AL>] (last visited Apr. 21, 2021).

79. LEE ET AL., *supra* note 77, at 2.

jurisdiction, it is the perfect exemplar of how local community governance in criminal law can go very right.

The Community Justice Center has been extremely beneficial for the community: three out of four defendants receive social services in lieu of correctional control or fines; recidivism has dropped by 20 percent among juvenile defendants and by 10 percent among adults; its youth court allows juveniles to be heard and sentenced by their peers; and the Community Justice Center has strengthened the local public's confidence in justice.⁸⁰ Equally important, the Community Justice Center has provided true procedural justice for its clients. By implementing a decision-making process perceived as procedurally just, individuals involved in the criminal justice system are far more voluntarily compliant with the end result. Moreover, the Community Justice Center provides its clients an experience that "accords them respect, is neutral, offers an opportunity to participate, and has trustworthy motives."⁸¹

Community courts like the Red Hook Community Justice Center not only rehabilitate offenders, but also "enhance public confidence in law-enforcement authorities, strengthen the sense of procedural justice among individuals, and improve the welfare of communities that suffer from high levels of crime."⁸² Allowing the community to craft and choose the mechanisms of their local criminal justice system, then, is an important aspect of democratizing criminal justice. This is true whether the crafting is for community courts or the local municipal laws applicable to the particular community.

More broadly, although substantive criminal lawmaking may be important to ensure a fair and just criminal system, it is only one part. The role of procedural justice is just as important to the individuals involved, if not more so. The procedural fairness sought by so many individuals caught up in the criminal justice system cannot merely be met by rigid adherence to MPC-guided criminal law drafting. The process matters as much as the substance in criminal law, particularly when we are talking about sentencing and mass incarceration. It is especially here, in procedural justice, where the role of the local community is so important.

Tracey Meares, among others, has argued that local community efforts in responding to crime should not be foreclosed when they are the product of local democratic deliberations.⁸³ And this applies whether the local effort is a procedural innovation, such as a peer or community court, or tailoring the municipal codes to fit the community's needs. Fissell argues that one problem with local municipal codes is that the laws tend to be drafted by

80. *Red Hook Community Justice Center*, *supra* note 78.

81. LEE ET AL., *supra* note 77, at 3.

82. See Tali Gal & Hadar Dancig-Rosenberg, *Characterizing Multi-Door Criminal Justice: A Comparative Analysis of Three Criminal Justice Mechanisms*, 23 NEW CRIM. L. REV. 139, 145 (2020).

83. See Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 410–13 (2000) (using loitering statutes to illustrate the importance of involving the community in devising effective law enforcement strategies to enhance legitimacy).

inexpert community members, and sometimes the laws are even created by a single individual.⁸⁴ But the latter is highly unlikely given that even very small towns tend to debate each addition or change to the municipal code before adoption.⁸⁵ And given the proliferation of state criminal laws in the recent decades,⁸⁶ it is doubtful that a local community's municipal code truly varies that much from the state criminal code.

In sum, the American criminal justice system has had over forty years of expertise and bureaucracy guiding our criminal law drafting and sentencing. What has this expertise produced? Among other things, it has created a structurally racist system of mass incarceration and correctional control created and controlled by experts of the highest degree. In contrast, local participation in the criminal justice system, whether through community courts or through municipal codes passed by democratically elected city councils, allows our current criminal process to be visible to the average citizen and gives the community both “involvement and input into the criminal justice process.”⁸⁷

Far from making criminal justice worse, allowing the local community to see the workings of the criminal system helps shed light on the process, diminishing the stark differential between the criminal justice system's insiders and outsiders. Some frustration with the criminal justice system can be blamed on the community's current role as an outsider.⁸⁸ As Judge Stephanos Bibas has persuasively argued, criminal justice insiders, such as prosecutors, defense counsel, and judges, possess power and knowledge, while outsiders, such as crime victims, bystanders, and the general public, frequently feel excluded and confused.⁸⁹ Fissell's call for local laws to be promulgated solely by experts and state legislatures relies only on these same expert insiders—doing this would exacerbate the divide and hinder the public's faith in law's legitimacy.⁹⁰

Another problem with Fissell's reliance on experts is that these experts, to borrow from Jocelyn Simonson, whether legislatures, American Law Institute members, law professors, or state bureaucracies, rarely “represent, or at least are [rarely] capable of adequately representing, the interests of a local ‘community.’”⁹¹ Contrast this to local governments, especially small

84. Fissell, *supra* note 1, at 871–74.

85. *See supra* notes 61–73 and accompanying text.

86. Some, like Douglas Husak, argue that there are too many criminal laws and that the proliferation of local municipal codes on top of state criminal codes simply results in overcriminalization and, thus, ultimately more punishment. *See* DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 11–12 (2008). But this is not Fissell's complaint—he seems fine with a multiplicity of criminal laws, as long as they are promulgated by experts.

87. *See* Appleman, *supra* note 49, at 1422.

88. *Id.* at 1423.

89. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912–13 (2006).

90. *See* Appleman, *supra* note 49, at 1423.

91. *See* Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 253 (2019).

local governments. Although not guaranteed to be more equitable, it is certainly simpler to serve on a local governmental committee or run for town council—or even simply testify about the ramifications of a law or code change—than doing so on the state level. Indeed, as William Stuntz argued regarding imprisoning criminal defendants, “voters with the largest stake . . . chiefly African American residents of high-crime city neighborhoods [have] had the smallest voice in the relevant decisions.”⁹² At a minimum, local lawmaking allows local citizens to participate in the legislative process.

Perhaps local governments promulgating local law provide one of the best chances at participatory democracy in criminal justice. Because privileged insiders run and maintain the broader system, communal input into any form of criminal justice has largely disappeared.⁹³ But in local criminal lawmaking, particularly in the smaller towns and villages, we see something quite unique. R A Duff argues that “especially in the context of criminal law, it is important that lay citizens also have active roles to play in the law’s enterprise.”⁹⁴ What easier way to give these lay citizens an active role than by involving them in the crafting of municipal criminal code, the very law that will likely most affect them? As Duff suggests, lay citizens’ participation in this particular type of democracy is key, since the voice of criminal law is a collective one that elucidates community values.⁹⁵

Duff then specifically addresses the function of the lay public in enacting criminal laws in the role of legislator.⁹⁶ He rightly points out that this is one of the critical civic roles that citizens can take on, “each of which involves a distinctive set of rights and responsibilities, and each of which makes a distinct contribution to the enterprise of the criminal law.”⁹⁷ In the most idealized sense, lay citizen involvement in enacting substantive criminal law creates a true common law of the polity.⁹⁸

Local citizens are more likely to think that the criminal justice system is fair if they have had a direct part to play in its process.⁹⁹ One way this is easily achieved is having the community help draft municipal criminal law. Continuing this process also helps inculcate public preference directly into the local criminal code,¹⁰⁰ particularly regarding violations and misdemeanors—the area of law with which most citizens interact.

92. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 255 (2011).

93. See Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1610 (2017).

94. R A Duff, *A Criminal Law We Can Call Our Own?*, 111 NW. U. L. REV. 1491, 1503 (2017).

95. *Id.*

96. *Id.* at 1504.

97. *Id.*

98. *Id.* at 1505.

99. Appleman, *supra* note 49, at 1424.

100. *Id.*

CONCLUSION

Local, democratic criminal justice is not the magic eraser for all criminal justice woes. But neither is it a terrible misstep permitting the supposedly “vulgar” and “violent” into an already contested arena. The bureaucratic professionalism that Fissell champions, inserting the role of the experts into even the smallest realms of local community justice, sees the democratic lay public as the problem.¹⁰¹ I argue instead that it is the solution.

101. See Fissell, *supra* note 1, at 885.