

## MUNICIPAL EXCLUSION

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### INTRODUCTION

Criminal law is part of a process of public governance that punishes individuals or groups for committing legally designated offenses. The legislature designates certain offenses as criminal. The police distribute their efforts to enforce those offenses selectively. The prosecutor charges those offenders the police choose to arrest. And finally, the judiciary sentences those found guilty to some sort of penalty.

This process is political: criminal law is part of a system of governance that decides how to manage certain types of public goods. Federal, state, and municipal legislatures enact criminal laws that tell the public how to behave. Overlapping and sometimes competing groups of officials in the various branches of government then administer these rules.

We should be careful, however, in giving too much credit to the idea that there is a tightly integrated, consistent, and coherent system at play here. Instead, criminal policy is developed through a complex interplay of these different, and sometimes competing, offices and officials. As John Pfaff writes: “In fact, there is no single ‘criminal justice system,’ but instead a vast patchwork of systems that vary in almost every conceivable way . . . . Punishment is highly localized in the United States, and state and county officials have tremendous discretion over who gets punished and how severely.”<sup>1</sup>

Matters become confusing rather quickly. The legislative power to create criminal law exists jointly at the national, state, and municipal levels. Each legislature may create mutually overlapping laws that apply different rules to the same conduct. In that case, the law fails to provide notice—the public must try to work out which source of laws to follow and which source the police, prosecutor, and court will enforce and apply. Depending on the size and number of the municipalities contained within a relatively small geographic area, such as a county, the applicable laws can vary considerably over a relatively small distance.

Almost all the attention of criminal law doctrine and theory is devoted to federal and state regulations. However, county and municipal governments

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1. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 13–14 (2017).

may enact criminal laws as well. These laws can have significant impacts on the residents of these localities and on their status as members of the polity. Brenner Fissell's wonderful article "Local Offenses"<sup>2</sup> provides a much-needed corrective to this oversight. Fissell highlights the existence of the local criminal lawmaking power and two distinctive tendencies in local lawmaking: first, to adopt a more common-law approach, or as Fissell calls it, a more "archaic" mode of regulation; and second, to dispense with mental elements, creating primarily crimes in which the offender is to some extent aware of the wrongness of their actions.<sup>3</sup>

Criminal process localism is not limited to legislatures: the executive officials charged with enforcing the law are primarily local city and county officials too—city police or county sheriffs, along with city and county prosecutors. Even courts are local institutions: some states have county-level courts,<sup>4</sup> and many states also have municipal courts that serve individual cities.<sup>5</sup> A major consequence of criminal process localism is that the polity, with its three branches of government, exists not simply at the federal and state levels, but at the county and city levels too. Each of these semisovereign systems of government overlap, creating different polities on whose behalf the criminal law is supposed to speak.

If we think of the criminal law as the condemnatory voice of the community, then the different levels of government—national, state, county, and municipal—speak on behalf of ever more specific political communities when creating the criminal law. There is a certain value in this subsidiarity principle. Local microsovereigns criminalize conduct that might appear trivial on a national or state level. Accordingly, one feature Fissell identifies—the penny-ante content of many local criminal ordinances—should not surprise us.<sup>6</sup> Some of these may fill a gap that larger geographic entities overlook.

There is, however, a danger to these ordinances. Many of these localities regard themselves as homogenous communities—and have been encouraged to do so by some influential criminal law theorists. To preserve their homogeneity, they have been encouraged to target not simply low-level crimes but people and acts which contribute to community fragmentation and blight. The result is a criminal law of insiders and outsiders, superiors and subordinates, organized around the criminalization of nuisance and occurring against a background of the economic collapse of certain suburbs.<sup>7</sup>

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2. See generally Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837 (2020).

3. *Id.* at 861–62.

4. See, e.g., N.Y. CONST., art. VI, § 1 (establishing county courts).

5. See, e.g., Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 974–93 (2021) (describing modern municipal courts); Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 221–25 (2021) (critiquing Natapoff and arguing that municipal courts are inherently antidemocratic).

6. See Fissell, *supra* note 2, at 860 (citing NEWPORT NEWS, VA., CODE § 28.5 (2021) ("If any person beyond the seventh grade of school or over twelve (12) years of age shall engage in . . . 'trick or treat' . . . such person shall be guilty of a . . . misdemeanor.")).

7. See INST. ON METRO. OPPORTUNITY, AMERICAN NEIGHBORHOOD CHANGE IN THE 21ST CENTURY 24 (2019), <https://www.law.umn.edu/sites/law.umn.edu/files/metro->

There are two types of nuisance at play. The first is a nuisance of public welfare, which regards some members of the community as a contagion to be exterminated. The second is a nuisance of incivility, which regards some members of the community as unruly upstarts who do not know their place. In each case, the response is to criminalize status—to enact, in other words, the sorts of archaic, culpability-independent criminal statutes that are characteristic of the localities Fissell studies.<sup>8</sup>

In Part I, I briefly discuss the status of cities and counties as local sovereigns enacting criminal laws on behalf of their community. Criminal law is often thought of as the public law of the polity; however, the existence of federal, state, and local polities all having concurrent jurisdiction complicates that picture. In Part II, I consider some of the formal aspects of local criminal law, and in particular their tendency to lack a mental state. I suggest that, for some crimes, mental states do much different work than we normally assume, and so the presence or absence of mental states need not be a cause for concern. In Part III, I consider a set of laws targeting young Black men through the fashions that they wear. I suggest that these criminal laws are unaffected by the presence or absence of a mental state and may be quite specifically tailored to pick out certain communities. It is not the presence or absence of certain formalities that undermines these laws, but rather their endorsement of the facially neutral but effectively race-, class-, and gender-targeted criminalization of whole groups of people as presenting a public nuisance.

## I. CITY SOVEREIGNS

Quite apart from federal and state governments, county and municipal governments enact criminal laws enforceable within their jurisdiction. With few exceptions,<sup>9</sup> the legal academy has tended to overlook issues of criminal legislation at the local level<sup>10</sup> and has instead focused on federal and state

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files/american\_neighborhood\_change\_in\_the\_21st\_century\_-\_full\_report\_-\_4-1-2019.pdf [https://perma.cc/FM65-AMGB].

8. *See id.* at 861–67.

9. The major exception is Wayne Logan’s excellent series of articles on local criminal laws. *See generally, e.g.,* Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143 (2009); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001) [hereinafter Logan, *The Shadow Criminal Law of Municipal Governance*]; Wayne A. Logan, *What the Feds Can Do to Rein in Local Mercenary Criminal Justice*, 2018 U. ILL. L. REV. 1731. Andrew Taslitz also recognized local lawmaking as an important legislative forum. *See, e.g.,* Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 168–73 (2011); Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 289–93 (2010). Taslitz relies heavily on LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 120–66 (2008) (discussing interest group participation in municipal crime legislation).

10. The editors of the Model Penal Code (MPC) have also noticed this lack of attention, suggesting that this “vast area of penal law . . . [has] received little systematic consideration by legislators, judges, or scholars.” MODEL PENAL CODE §§ 250.1–250.12 explanatory note (AM. L. INST. Official Draft and Revised Comments 1985).

criminal legislation. Fissell's article is a much-needed contribution to this literature.

The creation and enforcement of criminal law is an inherently political enterprise. The criminal law is a core statement of a polity's civil order—what criminal law theorist Antony Duff calls “the normative ordering of its civic life.”<sup>11</sup> By enacting criminal laws, political communities establish the conditions under which they choose to live together as members of a shared community.<sup>12</sup> When members of the community threaten the peace and safety of the public, the criminal law steps in on the community's behalf to condemn these threats to shared, public, community interests.<sup>13</sup>

However, the existence of local ordinances poses a question that criminal law theorists generally ignore: just what polity gets to make the criminal law? The usual answer is “the state.”<sup>14</sup> For some theorists, the proper answer is “the public” because crimes are constitutively wrongs done to the public (in addition to any individual) and condemned by the public.<sup>15</sup> However, the existence of local criminal law complicates the question, because the county or city governments that make criminal law are not “the state.” To be sure, we can come up with a theory of delegated authority in which these local legislatures ultimately receive their power from the state passed down to the county or municipality,<sup>16</sup> but that does not answer the question of who makes the law. For even if the state delegates lawmaking power, the county or municipality, not the state, makes the law in question. *These* institutions

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11. R. A. DUFF, *THE REALM OF CRIMINAL LAW* 7 (2018).

12. *See id.* (describing criminal law “as concerned with kinds of wrongdoing that fall within or bear on the distinctive practice of civic life—of living together as members of a polity”); *see also* NEIL MACCORMICK, *INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY* 221 (2007) (“[T]he most basic demand citizens ought to make of criminal law is that it contribute to securing the conditions of civility and social peace, thus sustaining civil society.”).

13. *See, e.g.*, R. A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 72 (2003) (writing that “to understand crimes as ‘public’ wrongs is to understand them as wrongs to which the community should respond” by expressing the community's condemnation in formal criminal trials).

14. *See, e.g., id.* at xi (“To ask, ‘What can justify criminal punishment?’—the central question in philosophical discussions of punishment—is to ask what can justify practices of this kind. That question is unavoidable for anyone who cares about how states should treat their citizens.”).

15. *See, e.g.*, R. A. Duff, *Perversions and Subversions of Criminal Law*, in *THE BOUNDARIES OF THE CRIMINAL LAW* 88, 88–89 (R. A. Duff et al. eds., 2010) (“The criminal law deals in wrongs—in wrongs that count as ‘public’ wrongs in the sense that they are the proper concern of all citizens in virtue of their shared membership of the polity.” (footnote omitted)); *see also* DUFF, *supra* note 13, at 63 (“We could also say that these are wrongs in which the community shares. As members of the community, we should see them not merely as the victim's wrongs but as ‘our’ wrongs.”).

16. One famous version of this delegation of power is Hans Kelsen's discussion of the law as a hierarchically integrated normative system. *See* Hans Kelsen, *The Function of a Constitution*, in *ESSAYS ON KELSEN* 117–19 (Richard Tur & William Twining eds., 1986); HANS KELSEN, *PURE THEORY OF LAW* 221–36 (Max Knight trans., Univ. of Cal. Press 1967) (1960). Kelsen argues that state constitutions contain black letter law from which other laws can be derived. KELSEN, *supra*, at 223. He calls this the “material” authority of a constitution and argues that it creates a hierarchical pyramid of derivation and subsumption, in which higher-law principles are concretized into more specific laws. *Id.* at 222–24.

contain the community that makes and enforces local criminal law, not the federal or state polity.

Having local communities make criminal law has some advantages. For example, William Stuntz has forcefully argued for a version of a subsidiarity principle to support a more accountable and egalitarian criminal process.<sup>17</sup> Whilst there is good reason to question whether this is so<sup>18</sup>—and I shall do so shortly—because the nature of the polity changes as it becomes smaller, so might the nature of the targeted crimes. The sorts of conduct that pose a problem at the neighborhood level are likely to be missed at the state or national level, and so the content of the criminal law is likely to be different for these different polities.

For example, among the conduct that the Dodge City, Kansas municipal code regulates is excessive noise.<sup>19</sup> Kansas's state public nuisance statute targets this sort of irritant.<sup>20</sup> However, even though cities throughout Kansas have adopted the public nuisance statute by local ordinance,<sup>21</sup> Dodge City (as Fissell notes)<sup>22</sup> has adopted its own extensive noise abatement statute that specifies places, times, and decibel levels in far more specificity than the statewide nuisance statute.<sup>23</sup>

The federal or state governments are unlikely to produce a comprehensive code of noise abatement. For the most part, municipalities take up the slack in regulating this sort of conduct. The same goes for crimes of public urination and public defecation: Kansas has no state law targeting precisely this conduct,<sup>24</sup> but Dodge City does.<sup>25</sup> Different criminal-lawmaking communities have distinctive sociopolitical interests to consider when addressing breaches of civil order. Smaller communities sharing a particular

17. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 39 (2011) (“Make criminal justice more locally democratic, and justice will be more moderate, more egalitarian, and more effective at controlling crime.”).

18. See, e.g., Logan, *The Shadow Criminal Law of Municipal Governance*, *supra* note 9, at 1443–48 (discussing the ways local ordinances can make outcasts of members of the local community).

19. DODGE CITY, KAN., CODE §§ 8-401 to -405 (2021).

20. See KAN. STAT. ANN. § 21-6204 (2019). Under the terms of the statute:

(a) Maintaining a public nuisance is knowingly causing or permitting a condition to exist which injures or endangers the public health, safety or welfare.

(b) Permitting a public nuisance is knowingly permitting property under the control of the offender to be used to maintain a public nuisance, as defined in subsection (a).

(c) Maintaining a public nuisance or permitting a public nuisance is a class C misdemeanor.

*Id.*

21. See *City of Lincoln Ctr. v. Farmway Co-Op, Inc.*, 316 P.3d 707, 714 (Kan. 2013) (“[A]ccording to . . . [the] League of Kansas Municipalities, nearly 300 . . . municipalities also use [the state public nuisance] language in their nuisance ordinances.”).

22. Fissell, *supra* note 2, at 869.

23. Compare DODGE CITY, KAN., CODE § 8-402, with KAN. STAT. ANN. § 21-6204.

24. Presumably, the public nuisance statute would apply at the state level, but only perhaps to the sort of consistent urination or defecation similar to allowing swine to run wild in the street. See J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 *CAMBRIDGE L.J.* 55, 76 (1989) (discussing the criminalization of keeping pigs in the street as a public nuisance).

25. Fissell, *supra* note 2, at 870 (citing DODGE CITY, KAN., CODE § 11-206).

local sense of identity are likely to address different problems than more geographically and politically diverse communities with a more regional or national identity.<sup>26</sup> At the state level, laws addressing public nuisances in some general fashion might seem worthy of consideration, but not to the level of detail encompassing noise abatement and public defecation laws. At the local level, where neighborhoods suffer from car alarms and blaring stereos, and people relieve themselves in local parks or on street corners, such legislation may take on more urgency and can be easier to target upon specific places.

All of this is to argue that drafting criminal law at different levels—federal, state, or local—implicates different political communities. These different sociopolitical groupings create separate formal criminal law institutions of civil order, each of which draw from the background informal social and political orderings that structure these different political communities.<sup>27</sup> The social and political order at a more local level need not, through its criminal laws, specify or make more determinate<sup>28</sup> the social and political order that contains it<sup>29</sup>: these more local orders may instead seek to stand apart from or even in opposition to the larger communities in which they are located. The power to create local laws enables the local community to entrench *its* sense of civil order by criminalizing conduct that challenges the local polity's particular sociopolitical identity. These different types of civil order are expressed in part through the acts that the different legislatures regulate using the criminal process.

## II. FORM AND SUBSTANCE

I have highlighted two types of law in Dodge City that create more detailed and targeted offenses to flesh out the state's more general, public nuisance type of offense: one example addresses noise abatement,<sup>30</sup> and the other targets public urination and public defecation.<sup>31</sup> Not only does the substance of the laws differ from the state-level public nuisance law, but they also differ

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26. See, e.g., Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 971 (2019) ("In many current state/local conflicts, cities are asserting versions of direct claims under home rule and related doctrines.").

27. See, e.g., MACCORMICK, *supra* note 12, at 221 ("Criminal law . . . cannot work at all . . . without background social conditions that the law does not establish, but which it can damage.").

28. See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 284–90 (1980) (describing the activity of making more concrete a background legal principle); Neil MacCormick, *Reconstruction After Deconstruction: A Response to CLS*, 10 OXFORD J. LEGAL STUD. 539, 548 (1990) (describing making more determinate as "the act of setting a more concrete and categorical requirement in the spirit of the [background legal] principle").

29. That is, we need not regard the local law as a specification of the more general law: the local law may seek to resist or transform the more general law, as Fissell argues in noting the sorts of formal changes in dropping mens rea and rendering the language more archaic. See Fissell, *supra* note 2, at 840–42.

30. See *supra* notes 19–24 and accompanying text.

31. See *supra* note 25 and accompanying text.

in lacking certain *formal* crime-definition features, specifically (as Fissell emphasizes) a mental element.<sup>32</sup>

Mental states play a number of different roles in justifying the criminalization of different types of conduct. Sometimes the act is categorically wrong.<sup>33</sup> Torturing someone, for example, is such an act. In that case, the mental state may simply ensure that the agent is aware of those aspects of their behavior that constitute what they are doing as a crime, so as to avoid being surprised by criminal liability.<sup>34</sup> Some activities are inherently self-conscious, and so the need to bring attention to the conduct using a mental state may be quite weak.<sup>35</sup> On other occasions, it is the mental state that bears the weight of identifying why the action is wrong and punishable. For these sorts of activity, the act itself need not be wrongful, but the manner of acting is.

The Model Penal Code (MPC), whatever its other virtues, obscures the wrong-making function of blameworthy mental states. Under the common law, where acts are categorically and self-consciously wrong, the mental state is implicit: we say they are general intent crimes.<sup>36</sup> Where the blameworthy manner of action must be made manifest, the common law has a plethora of terms—reckless, malicious, willful, and so on—that wear their wrongfulness

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32. See Fissell, *supra* note 2, at 861–67. There are two forms of strict liability at play in the criminal law: *mens rea* strict liability, which entails the absence of a mental state; and *no-fault* strict liability, which entails the absence of any excuses or justifications. See John Gardner, *Wrongs and Faults*, in *APPRAISING STRICT LIABILITY* 51, 68–69 (A. P. Simester ed., 2005). The two are not equivalent, because even absent a mental state, the law can provide defenses that excuse or justify the otherwise prohibited conduct. *Id.* Since Fissell’s article addresses primarily *mens rea* strict liability, I shall too.

Fissell also argues that many local ordinances are more beholden to common-law formulations or less precise in their wording when copying from state equivalents. See Fissell, *supra* note 2, at 861–67. For what it is worth, I am less convinced about the advantages of the MPC’s elements analysis than Fissell. In particular, an advantage of many common-law mental state terms is that they wear their culpability meaning on their face. For many crimes, it is not the act itself but rather the manner of acting that is wrongful. For example: Driving is permitted but driving recklessly is not. Destroying property is fine but doing it maliciously is not. In each case, the mental term specifies what John Gardner calls a “fault-anticipating” wrongful way of acting. Gardner, *supra*, at 67–68.

33. See DUFF, *supra* note 13, at 62 (“[T]he central crimes should be kinds of conduct that are categorically wrong—kinds of conduct from which all citizens should be able to expect, categorically, to be safe in the course of their normal lives.”).

34. See Gardner, *supra* note 32, at 69–70.

35. That is certainly a feature of some common-law formulations of general-intent crimes in which the mental state is left implicit. In those cases, the law does not need to make specific provision for *mens rea*. Since a (sane, sober, awake) person can scarcely have sex, enter a building, or sign his name, without realizing that this is what he is doing, the case made for *mens rea* by the rule of law is weaker in these instances.

John Gardner & James Edwards, *Criminal Law*, in 2 *THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS* 1186, 1192 (Hugh LaFollette ed., 2013).

36. The paradigmatic such crime is common law rape: “unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will.” *Rape*, *BLACK’S LAW DICTIONARY* (11th ed. 2019). The act of forcible, nonconsensual sexual intercourse is categorically wrong; and sex is one of those acts that people engage in self-consciously. See Gardner & Edwards, *supra* note 35, at 1192.

on their face. Where both the MPC and common law agree is when the wrongful manner of acting must be spelled out: there is nothing obviously wrong with entering a dwelling house at night, but doing so with a specific intent or purpose, such as to commit a felony, is wrongful.<sup>37</sup>

Thus, whether or not the underlying act is a criminal wrong, a culpable mental state identifies an additional, though derivative, wrong<sup>38</sup> that justifies using the criminal law to police and punish such behavior—doing the act in a blameworthy way.<sup>39</sup> The formula emphasizing this adjectival aspect of criminal fault may be stated in this way (with “ $\phi$ ” representing the act in question): “No person shall  $\phi$  in a wrongful way.”<sup>40</sup> For example, driving a car is not a wrongful act, but driving a car *recklessly* is. So the formulation “No person shall drive a car recklessly” depends upon the mental state in two ways: to insist that driving a car is not itself wrongful, but driving a car in a particular manner *is* wrongful.<sup>41</sup>

When a statute fails to include a culpable mental state, it renders certain explanations or justifications of conduct irrelevant. It no longer matters in what state of mind the act was done in a blameworthy manner, only that the person acted in the prohibited way. As we have seen, this way of justifying criminalization is clear enough when the act itself is categorically wrong, and it provides sufficient autonomy when the crime comes with an intent attached.<sup>42</sup> However, where these conditions are not present, it is not clear why the act merits the solemn condemnation of the community. One plausible implication, given the role of criminal law in our society, is that if the act is not wrong and the manner of acting (or mental state) is not blameworthy, then it must be something about the agent themselves that

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37. See MODEL PENAL CODE § 221.1 (AM. L. INST. Official Draft and Revised Comments 1985); *Burglary*, BLACK’S LAW DICTIONARY, *supra* note 36.

38. See Gardner, *supra* note 32, at 67–68. Gardner calls these additional, derivative wrongs “fault-anticipating wrongs” and suggests that they “are always parasitic or secondary wrongs. One commits them only if one lacks justification or excuse for something *else* one does in committing them.” *Id.*

39. See *id.* at 68.

40. See Fissell, *supra* note 2, at 862 (using a similar formulation: “no person shall [ $\theta$ ]” (with “ $\theta$ ” representing the act in question)).

41. The fault-specifying function of mental states is also one way some legal codes distinguish between civil and criminal liability: these codes mandate criminal laws to require at least recklessness—in other words, some subjective awareness of wrongdoing. See Gardner & Edwards, *supra* note 35, at 1192 (“[S]ome legal systems distinguish a criminal standard of ‘recklessness,’ which requires awareness that one is taking a risk, from the civil standard of ‘negligence,’ which includes no such requirement . . .”). Furthermore, where there is a broad range of sentences from which to draw, then the mental states operate to indicate the *level* of fault or culpability with which the person acted. A legislature could use certain mental states to mark the boundary between misdemeanors and felonies, for example, or to rank culpability within different acts. This is most obviously the case with assaults and killings. See, e.g., MODEL PENAL CODE §§ 210.2–4 (distinguishing among murder, manslaughter, and negligent homicide according to, among other things, mental states). Where there is little-to-no choice among sanctions, these differences matter much less.

42. See *supra* notes 33–34 and accompanying text.



makes them the “sort of person” that deserves condemnation.<sup>43</sup> The characteristic formulation of these local ordinances seems to point to the traditional “status” formulation of the public nuisance crime: being annoying is specific enough.<sup>44</sup>

The editors of the MPC worried that traditional common-law definitions of disorderly conduct and public nuisance operated in just this status-oriented way. To get a sense of these criticisms as leveled against both the state and municipal public nuisance laws in Kansas, it is worth taking a look at the MPC’s public nuisance variant.<sup>45</sup> The rules covering the traditional public nuisance crimes include MPC section 250.2’s prohibition of disorderly conduct:

(1) Offense Defined. A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

. . . .

(b) makes unreasonable noise . . . ; or

(c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

“Public” means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.<sup>46</sup>

In the explanatory note to section 250, the editors recognize that these crimes have low institutional visibility<sup>47</sup> but high social impact on vulnerable populations.<sup>48</sup> Part of the problem, as the editors note, is the vast number of municipal ordinances that are “chaotic[,] . . . vague” and lacking in

43. See, e.g., Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1025–26 (2004).

44. See MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 95–96 (2005).

45. My thanks to Catherine Hancock of Tulane Law School for prodding me to discuss this section of the MPC.

46. MODEL PENAL CODE § 250.2.

47. The editors note that “[t]he penalties involved [for disorderly conduct and public nuisance] were generally minor, the defendants usually came from the lower social and economic levels, and appeals were consequently infrequent. For these reasons, pressures for legislative reform were minimal.” *Id.* §§ 250.1–250.12 explanatory note.

48. *Id.* (“[D]isorderly conduct and related offenses form a critically important area of the criminal justice system. Offenses in this category affect a large number of defendants, involve a great proportion of public activity, and powerfully influence the view of public justice held by millions of people.”). I have previously discussed elsewhere some of the ways in which the criminal process can have low institutional visibility but high community visibility. See Eric J. Miller, *Reasonably Radical: Terry’s Attack on Race-Based Policing*, 54 IDAHO L. REV. 479, 483–86 (2018) (“Despite the high visibility of police activity to observers on the street, that activity is rarely observed or reported to the various institutions charged with regulating police activity and holding patrol police accountable. Institutionally, public-order policing is a ‘low-visibility’ activity.”).

coherence,<sup>49</sup> as well as “creating ‘status crimes,’ such as being a common scold, common prostitute, common gambler, or common drunkard.”<sup>50</sup> The MPC’s rewriting of disorderly conduct and public nuisance laws makes clear that these crimes are bound up with a challenge to the civil order—having the purpose to cause public inconvenience, annoyance, or alarm.

The MPC criminalizes individuals because they have the specific intent to annoy the community. Local ordinances, in discarding this intent, give the community more scope to penalize individuals because the community finds those individuals annoying.

Markus Dubber, in his book discussing the polity’s police power, also considers the way communities regulate public nuisances.<sup>51</sup> Dubber emphasizes the way nuisance statutes fail to properly distinguish between acts, omissions, and statuses.<sup>52</sup> However, quite as much as act-minimization, the absence of a mental state is an essential feature of the nuisance formulation. It helps to ostracize people and groups by rendering irrelevant reasons which could demonstrate that the offender does not intend to give offense. Instead, strict liability strips the person of certain moral backstories that could justify or excuse their conduct.<sup>53</sup>

In other words, low-level political communities find this sort of strict liability formulation attractive precisely because the status of an antisocial person is assumed in the formulation of the law and confirmed through the public, condemnatory, criminal process. With these proxy-status crimes, the legislator does not need to address the mental state because the insubordinate nature of the person or group targeted is assumed: it is that social backstory that brings the attention of the criminal process down on them.

### III. POLICING POLLUTANTS

Nuisances are crimes of antisociality. As Dubber puts it, public nuisance laws came into play in response to threats to the community:

When the very survival of the community, as a community, was at stake, it made sense to err on the side of safety. When in doubt, the reach of police was expanded, rather than contracted. In this context, vague offense definitions (like annoying the “repose” of any “considerable number of persons”) were acceptable, even necessary. One simply couldn’t afford to

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49. MODEL PENAL CODE §§ 250.1–250.12 explanatory note.

50. *Id.* In a similar vein, Risa Goluboff has noted the use of vagrancy laws to criminalize, in particular, *Black* individuals’ mobility and social status. See RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 117 (2016). We might therefore think of public nuisance laws as taking up the role of the now-disfavored “[v]agrancy laws [that] proved useful in keeping whites and minorities in prescribed social and cultural places. That meant apart, with whites on top.” *Id.*

51. DUBBER, *supra* note 44, at 95.

52. *Id.* at 95–96.

53. Yxta Murray suggests that this sort of contagion metaphor “do[es] not cohere with our common understanding of how human motivation and behavior operates, which creates the impression that offenders are somehow outcasts from the community.” Yxta Maya Murray, *The Pedagogy of Violence*, 20 S. CAL. INTERDISC. L.J. 537, 558 (2011).

await the actual infliction of an injury. It was enough that the police of the state was “endangered.”<sup>54</sup>

Nuisance laws were typically justified as “striking at all gross violations of health, safety, order, and morals.”<sup>55</sup> They do not distinguish between threats to public welfare matters—health and safety—and threats to civil order matters—order and morals.<sup>56</sup> In either case, nuisance laws also do not discriminate between “animate and inanimate threats,”<sup>57</sup> whether persons, buildings, odors, and so on. Their goal is to insulate the community from blights and pollutants by minimizing or removing contact between decent folk and the vectors of contagion that threaten the community’s integrity and vitality.<sup>58</sup>

One famous endorsement of “the competency of the state legislatures in the exercise of their police power”<sup>59</sup> to preserve the integrity or civil order of the community was the U.S. Supreme Court’s ratification in *Plessy v. Ferguson*.<sup>60</sup> There, the police power in question entrenched the “separation [of the races] in places where they are liable to be brought into contact.”<sup>61</sup> *Plessy* contains a lengthy discussion assessing which exercises of the police power—the power over health and safety, order and morals—are “reasonable, and extend only to such laws as are enacted in good faith for the promotion [of] the public good, and not for the annoyance or oppression of a particular class.”<sup>62</sup> The Court evaluated the reasonableness of a Louisiana statute enacted to minimize contact between and “commingling”<sup>63</sup> of white and Black people in railway carriages in terms that sound in nuisance law: “In determining the question of reasonableness [the legislature] is at liberty

54. DUBBER, *supra* note 44, at 96.

55. ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION: AN ESTIMATE OF RESTRICTIVE AND CONSTRUCTIVE FACTORS 66 (1st ed. 1917). Though Freund thought that nuisance law was unlikely to “become an instrument of oppression or mischief,” *id.*, he was willfully wrong about that. See *infra* notes 59–64 and accompanying text (discussing *Plessy v. Ferguson*, 163 U.S. 537 (1896), a racially discriminatory public nuisance case decided two decades before Freund’s book was published).

56. Freund somewhat identifies this elision where he notes that nuisance laws cover both “that which is offensive [order] and that which is unwholesome [welfare].” ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 158 (1904). Even the term “safety” acts as both a welfare and an order term. See *id.*

57. DUBBER, *supra* note 44, at 96.

58. For a useful discussion of how the sort of medicalized language of disease and contagion, when applied to fellow humans, is dehumanizing, see Murray, *supra* note 53, at 538–39. Murray argues that, in describing people “as ‘vectors’ of pestilence . . . we may be more likely to treat them unjustly as a matter of criminal justice or other social strategies . . . it also obfuscates the emotions, desires, and personal histories” of the people described in these health-and-contagion ways. *Id.* at 539.

59. *Plessy*, 163 U.S. at 544.

60. 163 U.S. 537 (1896).

61. *Id.* at 544.

62. *Id.* at 550. Note that the *Plessy* Court did not think separating the races was oppressive because it was not arbitrary. See *id.* (stating that in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the municipal statute was supposedly arbitrary because it was not based on any reason whatsoever in distinguishing among different properties subject to burdensome municipal laws).

63. *Id.* at 551.

to act with reference to the established usages, customs and traditions of the people, and with a view to *the promotion of their comfort, and the preservation of the public peace and good order.*<sup>64</sup>

The protection of “comfort,” public order, and “public decency” was a paradigmatic feature of early nuisance statutes.<sup>65</sup> It sought to protect the community from outside pollutants: people who would be discomforting and disturbing to the customs of the community. This approach received a modern twist in the neonusance laws at the core of the set of strict liability laws Fissell identifies.<sup>66</sup> These statutes fit the nuisance model by conflating community welfare and civil order (health and morals) and promote a criminalizing response to abate or extirpate the people or conduct that threatens the sensibilities of representative members of the community.<sup>67</sup>

In this light, consider a raft of municipal laws introduced between 2000 and 2010 criminalizing the fashion of “sagging”: wearing one’s trousers slung low along one’s buttocks.<sup>68</sup> At least two states attempted and failed to pass antisagging statutes: Virginia and Louisiana.<sup>69</sup> However, at the local level, municipalities in states such as Louisiana,<sup>70</sup> Alabama,<sup>71</sup> Florida,<sup>72</sup>

64. *Id.* at 550 (emphasis added).

65. See DUBBER, *supra* note 44, at 95.

66. See Fissell, *supra* note 2, at 862–67 (surveying “strict liability” offenses across large and small localities).

67. See DUBBER, *supra* note 44, at 95–96.

68. See Niko Koppel, *Are Your Jeans Sagging?: Go Directly to Jail.*, N.Y. TIMES (Aug. 30, 2007), <https://www.nytimes.com/2007/08/30/style/30iht-30baggy.7316649.html?searchResultPosition=1> [<https://perma.cc/X88S-GC7A>].

69. See Kyle Trygstad, *Kid Gloves*, RICH. TIMES DISPATCH (Mar. 10, 2005), [https://richmond.com/kid-gloves/article\\_ed2fb02f-06b3-5c44-9f21-c81cd4d5b1cc.html](https://richmond.com/kid-gloves/article_ed2fb02f-06b3-5c44-9f21-c81cd4d5b1cc.html) [<https://perma.cc/53MZ-PP8Z>] (discussing Virginia’s failed attempt to pass an antisagging statute). Louisiana tried and failed at least twice. See S.B. 225, 2008 Reg. Sess. (La. 2008); HB 1703, 2004 Reg. Sess. (La. 2004).

70. See, e.g., ACADIA PAR., LA., CODE § 13-16(b) (2018) (prohibiting wearing “pants, shorts, or skirts in such a manner as to expose [the wearer’s] undergarments” when in public or in view of the public, and also prohibiting “display[ing] the skin under which said undergarments are intended to cover.”); BASTROP, LA., CODE § 8-123(2) (2020) (prohibiting “[e]xposure of underwear or undergarments by intentionally wearing pants, trousers or outer garments below the waist or natural beltline of a person, in any public place or place open to public view”); BREAU BRIDGE, LA., CODE § 9-93.3(a) (2020) (prohibiting wearing clothing in any public place “which either intentionally exposes undergarments or which intentionally exposes any portion of the pubic hair, cleft of the buttocks, or genitals”); POINTE COUPEE PAR., LA., CODE § 15-11 (2016) (prohibiting public “nudity or partial nudity, or . . . any indecent exposure of [one’s] person or undergarments, due to sagging of pants”); SHREVEPORT, LA., CODE § 50-167(a) (2018) (prohibiting “appear[ing] in public wearing pants below the waist which expose the skin or undergarments”), *repealed by* SHREVEPORT, LA. ORDINANCE NO. 70 (2019); TERREBONNE PAR., LA., CODE § 19-17(a) (2021) (prohibiting wearing in public clothing “below the waist which expose the skin or undergarments”).

71. See LANETT, ALA., CODE § 18-15 (2018).

72. See OPA-LOCKA, FLA., CODE § 16.33 (2020), *repealed by* OPA-LOCKA, FLA., ORDINANCE NO. 2020-18 (2020); see also Hector Florin, *A Saggy-Pants Furor in Riviera Beach*, TIME MAG. (Oct. 1, 2008), <http://content.time.com/time/world/article/0,8599,1846205,00.html> [<https://perma.cc/HC2S-GTAZ>] (describing the antisagging ordinance passed in Riviera Beach, Florida).

Georgia,<sup>73</sup> Illinois,<sup>74</sup> Mississippi,<sup>75</sup> and Missouri<sup>76</sup> passed local ordinances targeting this behavior as a form of public nuisance.

All of the criminal antisagging laws lack a mental-state element. The statutes have the same general form. They prohibit: (1) appearing in public<sup>77</sup> while (2) wearing pants that (a) are saggy<sup>78</sup> or worn below the waist<sup>79</sup> or “three inches below the top of the hips,”<sup>80</sup> and that (3) “expose[] the skin or undergarments.”<sup>81</sup> For the most part, the statutes are not particularly vague (though perhaps they could be clearer by specifying that they prohibit showing *any* part of the person’s skin or undergarments). Nonetheless, the statutes relatively clearly proscribe a certain fashion style.

Lacking mental states is one thing; loosely defining prohibited conduct is another. However, the problem with the sagging pants statutes is not that they fail to specify some activity, but rather that they specify the activity all too well to target particular populations. Simply attaching a mental state to the prohibited conduct or attendant circumstances statute would not make any difference in the state’s ability to prosecute the young Black men and boys who are the group primarily targeted by the statute.<sup>82</sup> These men and boys purposely appear in public, purposely wear pants, and purposely expose their skin or undergarments. That is, they purposely adopt the fashion prohibited here.

Some of the lawmakers—or the statutes themselves—make statements indicating that the goal is to protect the community from blight. For example, Mayor Sylvester Caldwell of Pine Lawn, a majority-Black suburb in St. Louis County, Missouri, was motivated to enact an antisagging ordinance “when the St. Louis County Economic Council brought a group of developers to Pine Lawn to discuss its potential for redevelopment . . . [and] the developers talked about improving the city’s image and specifically

73. See JEFFERSON CTY., GA., CODE § 24-2(a) (2020); LYONS, GA., CODE § 38-64(a) (2020); MOULTRIE, GA., CODE § 74-23(b)(6) (2021).

74. See COLLINSVILLE, ILL., CODE § 9.16.190 (2016), *repealed by* COLLINSVILLE, ILL. ORDINANCE 17.74 (2021); see also Marlon A. Walker, *Collinsville Outlaws Saggy Pants*, ST. LOUIS POST-DISPATCH (July 12, 2011), [https://www.stltoday.com/news/local/illinois/collinsville-outlaws-saggy-pants/article\\_643a6d42-5c26-5562-8701-26c6f90a205b.html](https://www.stltoday.com/news/local/illinois/collinsville-outlaws-saggy-pants/article_643a6d42-5c26-5562-8701-26c6f90a205b.html) [<https://perma.cc/JLW3-NRY8>].

75. See COLUMBUS, MISS., CODE, 20-36(c)(4) (2019).

76. See PINE LAWN, MO., CODE § 215.760(A) (2014).

77. E.g., LYONS, GA., CODE § 38-64(a); MOULTRIE, GA., CODE § 74-23(b)(6).

78. E.g., OPA-LOCKA, FLA., CODE § 16.33 (2020), *repealed by* OPA-LOCKA, FLA., ORDINANCE No. 2020-18 (2020).

79. E.g., LYONS, GA., CODE § 38-64(a); PINE LAWN, MO., CODE § 215.760(A).

80. E.g., JEFFERSON CTY., GA., CODE § 24-2(a) (2020); MOULTRIE, GA., CODE § 74-23(b)(6) (2021).

81. E.g., LYONS, GA., CODE § 38-64(a); MOULTRIE, GA., CODE § 74-23(b)(6); COLUMBUS, MISS., CODE, 20-36(c)(4) (2019).

82. See, e.g., Jason Armstrong & Sarah Kuck, *Saggy Pants Ordinance Analysis: Disparate Impact Versus Respectability*, 11 INT’L J. BUS. & SOC. SCI., Sept. 2020, at 1, 2–3; Sara MacNeil, *Black Men Make Up 96 Percent of Sagging Arrests in Shreveport*, SHREVEPORT TIMES (June 11, 2019, 8:55 PM), <https://www.shreveporttimes.com/story/news/2019/06/02/black-men-make-up-96-percent-sagging-arrests-shreveport/1285063001/> [<https://perma.cc/X5DR-4L3S>].

mentioned the propensity of Pine Lawn's youths to let their pants ride a little low."<sup>83</sup>

In 2008, the city of Riviera Beach, Florida, adopted a similar statute after receiving overwhelming support from the community:

"Everywhere I went, there was a groundswell, a cry for something to be done for what the community was seeing as disrespect, indecent exposure, disorderly conduct, as related to the pants situation," [Mayor Thomas A.] Masters explained. The collection of more than 4,700 signatures in a petition drive to place the issue on the ballot only emphasized the city's concern . . . and voter approval cemented it.<sup>84</sup>

Sometimes, the local ordinances themselves make clear this fear of community contagion. For example, the antisagging statute in Breaux Bridge, Louisiana, includes a statement of policy emphasizing that "[t]he mayor, board of aldermen, and chief of police are charged with the explicit and/or implicit duty and responsibility to protect the sensibility and moral standards embraced by the citizens, visitors, and patrons of the city."<sup>85</sup>

The antisagging laws plausibly are motivated by either race or age. The laws target a fashion choice popularized by young Black people, overwhelmingly Black men.<sup>86</sup> In some jurisdictions, the laws have been enforced quite aggressively. For example, one justification for repealing the antisagging statute in Shreveport, Louisiana, was its overwhelming use to criminalize Black men:

Since the law against wearing pants below the waistline passed 12 years ago, a total of 699 black men were arrested for sagging, while 12 white men were arrested.

Adding 13 black women to the number of black men arrested made a total of 712 black people out of 726 arrests. The total number of white people arrested was 13, including one woman and 12 men. Black people made up 98 percent of arrests for wearing pants below the waist line.<sup>87</sup>

Similarly, early reports of the enforcement of the antisagging ordinance in Riviera Beach, Florida, suggested that the ordinance was mostly enforced against Black men.<sup>88</sup>

Some of the jurisdictions enacting these laws, including Pine Lawn<sup>89</sup> and Riviera Beach,<sup>90</sup> are majority-Black municipalities. However, the politics of

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83. Michele Munz & Stephen Deere, *I See Paris, I See France, I See Pine Lawn Enact . . . a Ban on Saggy Pants*, ST. LOUIS POST-DISPATCH, Nov. 14, 2007, Gale OneFile, Doc. No. GALE|A171337671.

84. See Florin, *supra* note 72.

85. BREUX BRIDGE, LA., CODE § 9-93.2 (2020).

86. See Dawn Turner Trice, *What Do Baggy Pants Really Say?*, CHI. TRIB. (Nov. 2, 2009), <https://www.chicagotribune.com/news/ct-xpm-2009-11-02-0911010232-story.html> [<https://perma.cc/S3F2-UCZF>].

87. MacNeil, *supra* note 82. The ordinance was repealed in 2019. SHREVEPORT, LA. ORDINANCE NO. 70 (2019).

88. See Florin, *supra* note 72.

89. See Munz & Deere, *supra* note 83.

90. See Florin, *supra* note 72.

respectability driving this particular fear of blight in these exurban suburbs may be seen as classist, ageist, racist, and gendered<sup>91</sup>—what James Forman Jr. identified as a disciplinary or “punitive approach . . . necessary to protect the African American community”<sup>92</sup> especially targeted against vulnerable, young Black people as part of “what might be termed the politics of responsibility.”<sup>93</sup> Rather than seeking to understand, accommodate, or uplift, these civil order laws are socially conservative and seek to preserve the current social arrangements dominant in the community by projecting onto the targeted individuals the demand to “do better.”<sup>94</sup>

We can think of antisagging as a form of zoning that regulates appearance as a form of urban blight. It should be no surprise that suburban municipalities, whatever their racial composition, enact nuisance statutes that effectively label violators as a threat to the community’s social fabric. Zoning laws are part of the police power derived from public nuisance laws<sup>95</sup> and by the 1920s became a proxy for racial exclusion laws.<sup>96</sup> These public nuisance ordinances that regulate status and behavior are thus deeply rooted

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91. See, e.g., Armstrong & Kuck, *supra* note 82, at 2–3 (discussing the disparate impact of a “saggy pants” ordinance in Albany, Georgia as a form of respectability politics designed to exclude Black men).

92. JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 11 (2017).

93. *Id.* at 44; see also Imani Perry, *Do You Really Love New York?: Exposing the Troubling Relationship Between Popular Racial Imagery and Social Policy in the 21st Century*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 92, 106–07 (2008) (“The identification of things that are highly correlated to racial groups but not inherent to racial groups as undesirable . . . allows for policies and social practices that are racially discriminatory yet facially neutral. Moreover, these discriminatory practices are justified as a simple demand that black people ‘do better.’”).

94. Perry, *supra* note 93, at 106–107 (“[T]hose who are poor and black are held responsible for their own experiences of discrimination against them with little question raised as to the legitimacy of the basis of identifying ‘doing badly’ according to the given terms which are often stylistic rather than substantive.”).

95. One of the early public nuisance cases to reach the Supreme Court was a zoning-as-public-nuisance case. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The *Plessy* Court suggested that criminalization of the Chinese community in *Yick Wo* was the result of arbitrary decision-making by the city zoning laws. See *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896). In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), however, the Court adopted the rationale, trotted out in *Plessy*, that zoning was justified in the name of civil peace and reasonable reliance on local customs. See *id.* at 337–38; 391–92. Zoning empowered the suburban village to hold back the tide of urban contamination by excluding from residential areas “the confusion and danger of fire, contagion, and disorder which in greater or less degree attach to the location of stores, shops and factories.” *Id.* at 391. Here again, nuisance laws perform much the same role as vagrancy statutes. See GOLUBOFF, *supra* note 50, at 115–16 (describing how vagrancy laws targeted Black individuals’ mobility to enforce racial segregation); *id.* at 261 (discussing *Euclid* in the context of vagrancy laws).

96. After *Euclid*, the City of St. Louis engaged in a pattern of “expulsive zoning,” which systematically underzoned African American neighborhoods. In the short term, this pattern denied these neighborhoods protection from commercial or industrial development. In the longer term, it hardened the view that black occupancy was a nonconforming blight on the central city and paved the way for its displacement under urban renewal.

COLIN GORDON, *MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY* 125 (2008).

in preserving not only communities but also particular places in which individuals are to be welcomed or excluded.

On this view, local ordinances organized around preserving civil order operate as low-level offenses punishing socially vulnerable people for conduct that directly or indirectly inconveniences the powerful. Not all local ordinances operate in this manner. Nonetheless, they can and often do.

Certain structural and pragmatic features render the criminal law particularly prone to perversion in this way.<sup>97</sup> In particular, the criminal law works in an asymmetric manner: on the one hand, the process empowers the state to hold individuals accountable for episodic acts of wrongdoing or rule violation. On the other hand, individuals are unable to hold the state reciprocally accountable for *its* episodic *or systemic* wrongdoing, including through making rules that predictably target vulnerable groups and through the distributing of policing to target vulnerable groups.

#### IV. REPRESENTING THE PUBLIC

Municipal strict-liability criminal ordinances preserve civil order when they criminalize community members as nuisances that threaten to disturb community integrity. Disturbing conduct need not be wrongful conduct. The focus is not on whether the conduct is morally unjustified, but upon whether the conduct causes offense or discomfort to other members of the community. The wrong appears to be violating interpersonal norms of civil order and *respectability*.<sup>98</sup>

I have discussed elsewhere the importance of the concept of respectability in policing—and especially in the policing of race and class.<sup>99</sup> Local ordinances—especially ordinances which structure the community as composed of insiders and outsiders, present the outsiders as an unreasoning contagion, and use the criminal law to keep out the threat of pollution—have been a staple of “Broken Windows” policing for almost four decades.<sup>100</sup>

Respectability is a parochial, socially contingent concept, not an inherently egalitarian one. Respectability is enforced through social norms that construct the rituals of interpersonal conduct used to acknowledge each other’s status within the community;<sup>101</sup> it is enforced, either formally or informally, expressly or implicitly, through serious pressure for conformity

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97. Antony Duff thinks the criminal law is perverted when it is used to “criminaliz[e] conduct that cannot plausibly be portrayed as wrong.” Duff, *supra* note 15, at 93.

98. See, e.g., Armstrong & Kuck, *supra* note 82, at 3 (discussing sagging pants laws and respectability).

99. See Eric J. Miller, *Knowing Your Place: The Police Role in the Reproduction of Racial Hierarchy*, 89 GEO. WASH. L. REV. (forthcoming 2021); Eric J. Miller, *The Moral Burdens of Police Wrongdoing*, 97 RES PHILOSOPHICA 219, 249–57 (2020).

100. See generally James Q. Wilson & George L. Kelling, *Broken Windows*, in CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 455 (Roger G. Dunham & Geoffrey P. Alpert eds., 7th ed. 2015).

101. See, e.g., ERVING GOFFMAN, *On Face-Work: An Analysis of Ritual Elements in Social Interaction*, in INTERACTION RITUAL: ESSAYS IN FACE-TO-FACE BEHAVIOR 5, 8 (1967) (discussing how individuals interact to maintain status).



to those rules.<sup>102</sup> Respectability is most obviously emphasized in the England of the *Barchester Chronicles* or *Sense and Sensibility*: the rules of respectability and the consequences of breaking them are part of the warp and weft of these novels and the society they depict. Respectability also lies at the heart of the honor codes of the Antebellum South and the Jim Crow laws<sup>103</sup> which entrenched gender and racial subordination. And respectability is often trotted out in defense of “middle class” values used to suppress, shame, and demonize various forms of dissent to the current status quo.<sup>104</sup>

The sort of social reciprocity insisted upon in the name of respectability thus often reinforces social hierarchy, where those demanding respect insist on being recognized as occupying a particular social role or station that is socially superior to those from whom they demand respect. Without socially and politically egalitarian reciprocity, including a commitment to social justice, respectability may simply be a polite way of enforcing servility. In the micropolitics of the suburban United States, in which social status depends upon advantages inherited through de facto segregation, but in which the demographics of municipalities sometimes change rapidly, criminalizing incomers as public nuisances is a powerful form of social control through reinforcing the dominant civil order.<sup>105</sup> Designating some members of the community as nuisances is one way to preserve this hierarchical, dominative notion of respectability.

All policing is about place: who belongs where.<sup>106</sup> What makes the “Broken Windows” style of policing distinctive is its focus on enforcing low-level crimes to protect the “quality of life” of the community:

[S]ociety wants . . . an officer to have the legal tools to remove undesirable persons from a neighborhood when informal efforts to preserve order in the streets have failed . . . [that is] to perform, in the only way they can, a function that every neighborhood desperately wants them to perform . . . What the police in fact do is . . . [i]n the words of one officer, “. . . kick ass.” . . . The tacit police-citizen alliance . . . is reinforced by the police view that the cops and the gangs are the two rival sources of power in the area, and that the gangs are not going to win.<sup>107</sup>

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102. See, e.g., H.L.A HART, *THE CONCEPT OF LAW* 57 (3d ed. 2012) (discussing rules as maintained through pressure for conformity).

103. See generally James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *YALE L.J.* 1279 (2000).

104. See MARTHA C. NUSSBAUM, *THE MONARCHY OF FEAR: A PHILOSOPHER LOOKS AT OUR POLITICAL CRISIS* 106–25 (2018).

105. See, e.g., Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 *UCLA L. REV.* 1540, 1555–56 (2012).

106. P.A.J. WADDINGTON, *POLICING CITIZENS: POLICE, POWER AND THE STATE* 42 (1999) (“[W]hat police do is not to maintain order by preventing or quelling disorder, but to order social relationships in conformity with prevailing notions of respectability. They do so by keeping subordinate groups ‘in their place’ and excluding those who challenge that order.”).

107. Wilson & Kelling, *supra* note 100, at 462–63.

Local ordinances give the police the tools to remove those undesirables who would contaminate the community.

#### CONCLUSION

Local ordinances permit cities and suburbs to determine their partisan, sovereign political identity through the criminal law. The nuisance structure of the ordinances assigns social statuses and roles to the municipal legal officials and their targets. It is nuisance all the way down, and so the legal officials are able to humanize themselves as part of a collaborative carceral process in contrast to the legally incomprehensible subjects over which they preside. These subjects are precisely excludable because the criminal law is invoked at the local level to stigmatize and reject these people and groups as members of the local polity.