

MULTILAYERED CRIMINAL (F)LAWS

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INTRODUCTION

I am delighted to have the opportunity to share some reactions to Brenner Fissell’s thorough, thoughtful, and important article, “Local Offenses.”¹ Scholarly projects such as that reflected in “Local Offenses” are unfortunately rare, not because municipal laws are less meaningful or significant than other legal subjects of inquiry, but due to a combination of factors reflecting the less-than-optimal research incentives and priorities of the academy. First and foremost, such projects take a great deal of careful and often entirely original work. In undertaking to explore, or offer insights regarding, the general state of municipal criminal law, one must create one’s own legal “dataset” by identifying and then diligently scrutinizing a suitably diverse and representative sample of municipal codes. No matter the subject of interest, it is much easier to write about federal law, as there is only one jurisdiction to research! Issues involving federal law, or at least multistate trends and developments, are also sure to be relevant to a nationwide audience of law journal readers (or editors), whereas a focus on local laws may be less obviously so. Moreover, in the area of substantive criminal law specifically, some “major” crimes (homicide and drug offenses, for example) seem more important or prevalent than others, and therefore more worthy of academic inquiry, notwithstanding the profound (and inequitable) impact of local and low-level law enforcement on many lives. Given these factors, one should hardly be surprised to find a dearth of scholarship on, say, state constitutional law relative to federal constitutional law,² and (until recently) the almost complete lack of attention to criminal law below the state (or felony) level.³

Fissell’s work here is significant not only in joining the recent wave of scholarship drawing attention to “minor” and local crimes and enforcement

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

2. My former colleague Bob Williams at Rutgers Law School has been among the few longstanding and major voices devoting and demanding scholarly attention to issues of state constitutional law. *See generally, e.g.*, ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (5th ed. 2015); Robert F. Williams, *Foreword: A Research Agenda in State Constitutional Law*, 66 *TEMPLE L. REV.* 1145 (1993).

3. Fissell’s article points to some of the significant contemporary scholarship focusing on misdemeanors and on local law and enforcement—a welcome trend. For an additional recent example, *see generally* Alexandra Natapoff, *Criminal Municipal Courts*, 134 *HARV. L. REV.* 964 (2021).

practices, but also in its consideration of relationships between substantive criminal law and broader political structures and issues, both theoretical and practical. He explores not only the law's content but also its context: the underlying dynamics and processes that shape how the law is made and influence its form and substance. To couple such depth of research with such breadth of perspective is impressive and exemplary.

The following discussion presents three observations that I hope will offer some further useful perspective on Fissell's project. The first is about the "modern" state codes to which Fissell compares the largely "archaic" municipal codes he excavates and analyzes. While Fissell is entirely correct that those modern codes represent a vast improvement both over what preceded them at the state level and over what apparently continues to persist at the local level, it is worth remembering that such codes are far from perfect and in various ways fall short of the consistent requirement of culpability toward wrongdoing that Fissell rightly prizes. Second, I call attention to a shortcoming of the "archaic" local codes that I consider distinct from, though not at all inconsistent with, Fissell's critique about their tendency to impose strict liability. Third, I briefly note that the interaction between the various "layers" of criminalization—federal, state, and local—introduces additional concerns beyond those they generate in isolation from each other.

In summary, even "modern" state criminal codes have major problems; "archaic" codes may be even worse, and in more ways, than Fissell notes; and the relation between the two is independently problematic. (Abandon all hope, ye who enter here!)

I. HARMFUL SYMMETRY?

Fissell accurately describes the profound impact of the Model Penal Code (MPC) on state codes across the nation, "most especially by enhancing clarity with respect to culpability requirements that were previously absent or confusing," and introducing "element analysis" that demanded and established rules for determining a specified degree of culpability with regard to each objective element of a criminal offense.⁴ He finds that local codes, on the other hand, bear a "harmful asymmetry" to modern state codes in their continuing use of strict liability.⁵

Unfortunately, even many of the "modern" codes that most clearly show the influence of the MPC are not nearly as rigorous or consistent as the original in insisting on culpability with regard to all objective elements. Such codes frequently depart meaningfully from the MPC's high standard both in their general culpability rules and in their definitions of specific offenses. As a single example in this brief Essay, I will focus on the large state that I, Fissell, and the journal in which this appears all happen to call home—New

4. Fissell, *supra* note 1, at 849.

5. *Id.* at 868.

York—but it is by no means the only such example among “modern” code states.⁶

Consider section 15.15 of the New York Penal Law, which provides the state’s versions of the interpretive rules set out in MPC sections 2.02(3) and (4) — rules that, as Fissell properly notes, are crucial to the MPC’s modern culpability scheme.⁷ The first subsection of New York’s provision establishes a rule similar to MPC section 2.02(4): “When one and only one of [the defined culpability] terms appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears.”⁸ So far, so good, at least in terms of statutory rules, although unfortunately, the New York courts have concluded that intended exceptions to the apply-stated-culpability-to-all-elements rule “clearly appear” all over the place,⁹ enabling them to find strict liability elements within various crimes that explicitly state a culpability requirement.¹⁰

Moreover, subsection 15.15(2), New York’s version of MPC section 2.02(3), offers a far weaker version of that provision’s across-the-board rule requiring proof of (at least) recklessness as to any element for which no

6. Take, for example, the twenty-four state codes Fissell treats as the most solid “MPC states.” *See id.* at 850. A number adopt “read-in” culpability rules that (like New York, which is also among those twenty-four states) do not explicitly demand culpability as to all elements—much less a prescribed level of culpability, like the MPC’s default of recklessness—but rather say culpability “may” be required even though unstated. *See, e.g.*, ALA. CODE § 13A-2-4(b) (2021) (adopting rule similar to N.Y. PENAL LAW § 15.15(2) (McKinney 2021)); ARIZ. REV. STAT. ANN. § 13-202(B) (1) (2021) (“If a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for commission of the offense, no culpable mental state is required for the commission of such offense, and the offense is one of strict liability unless the proscribed conduct necessarily involves a culpable mental state”); COLO. REV. STAT. § 18-1-503(2) (2021) (adopting rule similar to N.Y. PENAL LAW § 15.15(2)); KY. REV. STAT. ANN. § 501.040 (West 2021) (adopting rule similar to N.Y. PENAL LAW § 15.15(2)).

7. Fissell, *supra* note 1 at, 849.

8. N.Y. PENAL LAW § 15.15(1).

9. Indeed, New York’s highest court has explicitly stated that such exceptions are all over the place. *See People v. Mitchell*, 571 N.E.2d 701, 703 (N.Y. 1991) (“The Penal Law is replete with offenses which contain aggravating factors which elevate the degree of criminal responsibility without coupling a requirement of proof of a culpable mental state.”).

10. “For example, in *People v. Campbell*, the Court held that assault in the second degree, committed by a person who ‘[w]ith intent to prevent a . . . police officer . . . from performing a lawful duty . . . causes physical injury to such . . . police officer,’ does not require an intent to cause such injury.” RICHARD A. GREENBERG ET AL., NEW YORK CRIMINAL LAW § 1:8 (2020 update) (alterations in original) (citing *People v. Campbell*, 532 N.E.2d 86 (N.Y. 1988)). The treatise further notes that in *Mitchell*, 571 N.E.2d at 703, “the Court cited other examples of statutes for which no *mens rea* attaches to an aggravating factor, *e.g.*, N.Y. PENAL LAW § 140.30 (burglary in the first degree), N.Y. PENAL LAW § 155.42 (grand larceny in the first degree), N.Y. PENAL LAW § 160.15 (robbery in the first degree) and N.Y. PENAL LAW § 165.54 (criminal possession of stolen property in the first degree).” *Id.*; *see also People v. Burman*, 102 N.Y.S.3d 849, 851 (App. Div. 2019) (finding that an assault crime covering one who “[w]ith intent to cause physical injury to a person who is [65] years of age or older . . . causes such injury to such person” requires no culpability as to the age of the victim) (first and second alterations in original) (quoting N.Y. PENAL LAW § 120.05(12)).

culpability is explicitly “prescribed by law.”¹¹ New York neither explicitly demands culpability as to all elements nor sets out a particular level of culpability to serve as a default to “read in,” as the MPC does with recklessness.¹² Rather, the New York version equivocates as to whether culpability is required for every offense; and if so, whether it is required for every element of every offense; and if so, what level of culpability is required for such element(s). The provision appears here, with its wishy-washy parts italicized:

Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state *may* nevertheless be required for the commission of such offense, or with respect to *some or all* of the material elements thereof, if the proscribed conduct *necessarily involves* such culpable mental state.¹³

Is this even a rule, or more of a suggestion? Certainly some New York courts have been willing to conclude that defined crimes lacking a specified culpability requirement do not “necessarily involve” a culpable mental state and thus impose strict liability.¹⁴ Such findings may well be correct, insofar as it is hard to know what kind of conduct, if any, “necessarily involves” a culpable state of mind, as opposed to conduct that is capable of occurring inadvertently as well as culpably.

Yet, the imposition of strict liability might seem to run counter to the following sentence of the subsection, which articulates a rule that strict liability is disfavored: “A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability.”¹⁵ The language of that sentence, though, indicates only a desire to avoid strict liability *crimes*, not a clear rule demanding culpability with regard to each *element* of a crime. And as noted above, the courts have been quite comfortable imposing strict liability as to specific elements, especially aggravating factors, that have a profound impact on the availability and extent of criminal liability. For example, the victim’s death aggravates kidnapping with no requirement of culpability

11. MODEL PENAL CODE § 2.02(3) (AM. L. INST. Official Draft and Revised Comments 1985).

12. *Compare id.*, with N.Y. PENAL LAW § 15.15(2).

13. N.Y. PENAL LAW § 15.15(2) (emphasis added).

14. *See, e.g.*, *People v. Anyakora*, 162 Misc.2d 47, 51 (N.Y. Sup. Ct. 1993) (“The statute provides no explicit *mens rea* and the proscribed conduct, refusing to treat a person in need of emergency medical treatment, does not necessarily involve the culpable mental state of knowing that the person who is being refused emergency medical treatment is in actual need of such treatment.”); *see also* *People v. Patterson*, 708 N.Y.S.2d 815, 822 (Crim. Ct. 2000) (finding that “[t]here is nothing about the definition of the crime of Failure-to-Register under SORA that ‘necessarily involves’ intentional conduct” and that offense’s use of word “fail” clearly evidences legislative intent to impose strict liability). *But see* *People v. Haddock*, 852 N.Y.S.2d 441, 442 (App. Div. 2008) (holding that the crime of Failure-to-Register requires intentional conduct).

15. N.Y. PENAL LAW § 15.15(2).

toward the death;¹⁶ and more broadly, of course, like nearly all states (even “modern” ones), New York continues to recognize the felony-murder doctrine that imposes liability for murder while requiring no culpability as to causing death.¹⁷ Moreover, notwithstanding the rule above, New York courts have also shown considerable willingness to treat entire crimes as strict liability offenses, so long as they are *malum prohibitum* offenses.¹⁸ Even in “modern” codes, then, strict liability is allowed and alive.

At the same time, though states’ culpability requirements may be less consistent and categorical than the MPC’s, at least some states impose those requirements on offenses outside the criminal code as well as those within it—possibly including municipal offenses.¹⁹ Altogether, there might be some degree of symmetry between the “modern” state codes and the “archaic” local ones, albeit an unfortunate one, as both allow for strict liability to an extent that undercuts the criminal law’s proper limitation to culpable wrongdoing.

II. A FURTHER ARCHAISM

Fissell thoroughly, and quite properly, describes how local codes’ allowances of strict liability disserve that proper focus on culpable wrongdoing. Yet, I think there is a further unfortunate sense in which local codes tend to be “archaic”: not only do they fail to focus on acts that are culpable, but they also take a rudimentary and often misguided approach in defining wrongdoing. As a result, not only do they ignore the importance of *mens rea*, but they also often criminalize an *actus* that is not necessarily *reus*.

While some longstanding offenses such as homicide obviously require a specific result (death), many common law crimes were defined in terms of conduct, rather than the harms or dangers the conduct entailed. The act itself served as a proxy for the real underlying concern—typically, the safety and integrity of people and property. Thus, the *actus reus* of a common law crime like arson consisted of setting a fire improperly, and would technically be satisfied regardless of whether, or the extent to which, the fire caused damage to property or risk to life.²⁰ This remains true of arson in many jurisdictions.²¹ Similarly, the *actus reus* of assault and battery focused on the attack or wrongful “touching,” rather than the occurrence or extent of the ensuing injury; burglary on the trespass, rather than on the success of the

16. See GREENBERG ET AL., *supra* note 10, § 8:7 (“The death of the victim is a strict liability element of first degree kidnapping; there is no requirement that the defendant intend to cause the death of the victim.”).

17. See *id.* §§ 6:14–6:16.

18. See, e.g., *People v. Mobley*, 40 N.Y.S.3d 426, 428 (App. Div. 2016) (finding offense of unauthorized practice of medicine to be a *malum prohibitum* crime, hence appropriately considered one of strict liability).

19. See, e.g., *People v. Salamon*, 44 N.Y.S.3d 675 (Crim. Ct. 2016) (reading N.Y. PENAL LAW § 15.15 to apply to misdemeanor defined in New York City administrative code); cf. N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2021) (stating that code’s “read-in” culpability rule applies to non-code offenses, but not stating whether this means only state offenses or also local ones).

20. See Michael T. Cahill, *Grading Arson*, 3 CRIM. L. & PHIL. 79, 86–87 (2009).

21. *Id.*

criminal venture motivating the trespass; forgery on the act of alteration or false authentication, rather than the success or extent of the resulting fraud; and so on.²² To be sure, common law crimes were concerned with the likelihood or occurrence of actual harm, but frequently the offense definition would explicitly identify that harm, if at all, by way of the mens rea element, requiring intent to injure, intent to commit a crime, intent to defraud, etc.²³ In that sense, many common law crimes are essentially inchoate in nature, requiring culpability as to harm, as well as some act that might correlate with or tend to threaten such harm or be a meaningful step in its direction, but not requiring that the harm occur, or even explicitly requiring that a substantial risk of the harm arise.

One possible underappreciated advance of the MPC was the extent to which it shifted the focus of offense definitions, and gradations, toward the harms and risks imposed by the conduct, rather than the conduct itself. For example, in addition to defining its assault crimes in terms of causing or risking injury (and distinguishing between injury and serious injury),²⁴ the MPC added an endangerment offense whose definition did not focus on specific dangerous conduct, but rather was oriented toward the risk of harm generated by conduct of any nature.²⁵ Similarly, in addition to adding a risk-of-harm requirement to the arson offense (albeit by way of an affirmative defense for nonendangering acts),²⁶ the MPC included an offense of “causing or risking catastrophe” that was more concerned with harm or the risk of harm than the particular acts by which such harm might be threatened.²⁷ Even the MPC’s public-order offenses are defined to demand not only conduct itself, such as vandalism, but the tendency of that conduct to provoke a harmful result in the form of community outrage.²⁸ There are certainly many ways in which the MPC might have gone even further in this direction, such as by eliminating crimes like arson and burglary altogether. However, on the whole, it represented a useful and meaningful shift toward emphasizing the harms and dangers criminal law sought to punish and prevent, rather than specifying particular forms of conduct that only crudely captured the real concerns and thus might be over- or underinclusive with regard to them.

All too often, the local offenses Fissell describes are “archaic” in failing to embrace the MPC’s more modern approach to criminal conduct as well as criminal culpability. As Fissell notes: “A common form of a local offense

22. See PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW § 15.4 at 562 (2d ed. 2012) (assault and battery); *id.* § 16.2 at 610 (burglary); *id.* § 16.5 at 625 (forgery).

23. See, e.g., *id.* § 15.4 at 562 (noting crimes of assault with intent to murder, rape, etc.); *id.* § 16.2 at 610 (burglary: intent to commit a felony); *id.* § 16.2 at 624–25 (forgery and fraud offenses do “not require that the offender actually obtain property but only that she have the purpose of defrauding another,” making this category of crime akin to attempted theft).

24. See MODEL PENAL CODE § 211.1 (AM L. INST. Official Draft and Revised Comments 1985)

25. See *id.* § 211.2.

26. See *id.* § 220.1(1).

27. See *id.* § 220.2.

28. See, e.g., *id.* § 250.9 (desecration of venerated objects); *id.* § 250.10 (abuse of corpse).

is: ‘no person shall θ ’ (θ meaning some given conduct).”²⁹ That form is problematic not only in failing to require culpability, but in criminalizing categories of conduct without specifying any harm or danger such conduct is understood or required to threaten. Consider the following offenses noted by Fissell³⁰ (this is not exhaustive of the possible examples):

- “No person engaged or employed in the business of a masseur or masseuse shall treat a person of the opposite sex.”³¹

- “It shall be unlawful for any person to sweep any substance from a sidewalk or other place into a grating used for purposes of ventilating any subway railroad.”³²

- “No person . . . shall possess, use, sell or distribute Silly String at, within or upon any public or private property that is either within public view or accessible to the public, including, but not limited to, public or private streets, sidewalks, parking lots, commercial or residential buildings, places of business, or parks within the Hollywood Division during Halloween.”³³

- “It shall be unlawful for any person to consume or offer to another for consumption any alcoholic beverage in or upon any public street, road, alley, sidewalk, railroad right-of-way, parking lot which is generally open to the public, park, shopping plaza or upon any outdoor facility owned or operated by the City of Vineland.”³⁴

- “No owner, tenant or occupant of any plot of land, lot, street, highway, right-of-way or any other public or private place shall cause, allow or permit ragweed or poison ivy to grow or exist thereon.”³⁵

- “It shall be unlawful to attach posters or handbills to any telegraph, telephone, light, signal or other pole or gas post standing in the street or right-of-way.”³⁶

The problem with these offenses is not just their culpability requirements, or more accurately lack thereof (i.e., that they impose strict liability), but also their objective requirements: they define categories of conduct without directly demanding that the conduct in question harm, threaten, or bother anyone.

Significantly, this problem would not go away if the offenses were changed to add a culpability requirement. Given the nature of their objective elements, they would still demand culpability only as to the specified conduct itself, and not as to any demonstrably wrongful or harmful aspect or consequence of that conduct. For example, it would not fully ameliorate the issues with the first listed offense by having it address only cases where licensed massage therapists *knowingly* or *intentionally* “treat a member of the

29. Fissell, *supra* note 1, at 862.

30. *See id.* at 860 n.128, 863–66.

31. *See id.* at 860 n.128 (citing CAMDEN, N.J., CODE § 496-2 (2019)).

32. *See id.* at 863 (citing N.Y.C., N.Y., CODE § 19-173 (2019)).

33. *See id.* at 864 (citing LOS ANGELES, CAL., CODE § 56.02 (1987)).

34. *See id.* at 865 (citing VINELAND, N.J., CODE § 216-32 (2020)).

35. *See id.* (citing CAMDEN, N.J., CODE § 159-2 (2019)).

36. *See id.* at 866 (citing PERRY, FLA., CODE § 18-4 (2019)).

opposite sex.”³⁷ The problem with the existing offense is not only that it might be applied to someone who inadvertently massages someone of the opposite sex; the problem is that giving such a massage, whether on purpose or by accident, is not really the kind of thing criminal law exists to prohibit.

To be fair to the local codes, this criminalization problem is fairly pervasive.³⁸ It is often difficult, if not impossible, to identify categories of behavior (what philosophers call “act-types”) for which every particular instance of such behavior (each “act-token”) is wrongful.³⁹ One might try to avoid this issue by defining a crime in terms of the offender’s culpable attitude toward a defined harm, such as recklessly risking the lives of others, rather than the specific act-type that might (but in particular cases might not) risk such harm. At the same time, though, we sometimes need clear rules, for the sake of providing ex ante notice, promoting good conduct and effectively deterring bad conduct, and enabling sound and consistent enforcement. We need a speed limit, even though any particular speed limit will be arbitrary and will not prohibit all, or only, dangerously fast driving.

Still, needing a speed limit does not mean we need a criminal ban on Silly String, or ragweed, or posters. Given the strength of the criminal sanction, one would hope that legislators would be at pains to criminalize as little as possible to achieve their aims and would try to ensure that the laws they enact are limited as much as possible to genuinely wrongful acts and culpable actors.

III. ONE-WAY RATCHET

As I and others have noted before (and note again above), the form and scope of state criminal law is often pretty poor.⁴⁰ As Fissell’s article makes clear, the form and scope of local criminal law is also problematic and, indeed, probably even worse.⁴¹ Making matters even more difficult, these

37. See *id.* at 860 n.128 (citing CAMDEN, N.J., CODE § 496-2).

38. For more on the challenges and tradeoffs involved in crafting criminal offenses, see generally Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879 (2007); Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207 (2009).

39. See *Types and Tokens*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 28, 2006), <https://plato.stanford.edu/entries/types-tokens/#Phi> [<https://perma.cc/S243-SV5C>] (noting general distinction between types and tokens and observing, in section 2.2 of entry, debate in ethics regarding whether entire act-types or only specific act-tokens can be characterized as wrongful); cf. *Theories of Criminal Law*, STAN. ENCYCLOPEDIA OF PHIL. (2018) § 1, <https://plato.stanford.edu/entries/criminal-law/> [<https://perma.cc/J7CY-388T>] (“To criminalize an act-type—call it ϕ ing—is to make it a crime to commit tokens of that type.”).

40. See generally Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633 (2005); Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169 (2003).

41. Fissell, *supra* note 1, at 840 (noting that “[t]he most important trend” observed in the study conducted for the article is that “many local jurisdictions draft criminal offenses in what we can call an archaic form”); *id.* at 841 (noting implications of form for scope of enforcement, as avoidance of archaic form “facilitates post hoc adjudication of liability and grading, while also constraining arbitrary discretion”).

independently problematic state crimes and local crimes do not merely coexist as parallel entities. Where they overlap, they are not merely redundant or superfluous of each other; because an offender can be charged with and convicted of both state and local offenses, their effect can be cumulative, compounding the flaws of each to enable overpunishment or multiple punishments. Constitutional double jeopardy rules provide only very limited protection against this problem.⁴² Federal criminal law only adds yet another layer of criminalization, and the “dual sovereignty” exception to double jeopardy ensures that the potential for duplicative punishment is entirely unconstrained.⁴³

As a matter of political theory and accountability, real and interesting questions exist as to which authority—federal, state, or local—if any, should appropriately exercise criminalization power, either in general or with regard to particular concerns. For almost none of those questions would one expect the right answer to be “All of them,” and particularly not “All of them should be able to criminalize the same conduct *ex ante*, and each of them should be able to punish that conduct *ex post*, irrespective of whether the others also have.” Yet such is essentially the situation. Any authority can criminalize, and none has much capacity to limit or preempt any other’s ability to exercise criminalization authority. In short, it is a one-way ratchet; each can add more to the others, but none can subtract from the others.

Among other things, this would seem to have important implications for the project of those Fissell describes as “the democratizers,” who call for an increased local role in criminal justice matters. Yet, one does not get the sense that the democratizers’ agenda is to significantly increase the sum total of criminal offenses available for the imposition of punishment on our citizens—having too few crimes on the books, or too little enforcement of them, does not seem like a problem in any locality of which I am aware. If the democratizers’ goal is not to *expand* the criminal law but to *devolve* it from “higher” levels of government down to the local level, though, it is not clear what legal or practical account they can give about how criminalization authority might be shifted to the local level *to the exclusion* of the state and federal levels. It is not as if a municipality could formally recognize *defenses* to state crimes that are unrecognized in the state code but could be applied within the municipality’s jurisdiction to state as well as local offenses. Of course, enforcement agents can and do informally decline to prosecute some categories of federal and state cases (most commonly in the areas of drugs and immigration), and there are also various ways in which local political action and mobilization can pressure states to change their own laws.⁴⁴ But

42. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.4(b) (4th ed. 2020).

43. See *generally* *Bartkus v. Illinois*, 359 U.S. 121 (1959) (holding that federal acquittal does not bar subsequent state prosecution and conviction); *Abbate v. United States*, 359 U.S. 187 (1959) (holding that state conviction does not bar subsequent federal prosecution and conviction).

44. For one example, New York recently repealed its “loitering for purposes of prostitution” ban (also known as the “walking while trans” law) in response to various forms of local pressure, including resolutions in the New York City Council. See Jesse McKinley &

with regard to the scope of the substantive criminal law—the law on the books—there does not seem to be an obvious way for local exercises of lawmaking power to push back against state or federal exercises of such power.

CONCLUSION

Brenner Fissell has written an interesting and important article and, like most such articles, his raises questions for further exploration. As just one example, I am not certain how much work has been done to investigate or keep comprehensive records regarding the rates of enforcement and punishment under local versus state offenses. How many offenders in a given jurisdiction are charged with local crimes, state crimes, or both? How often do courts or other legal agents borrow (or feel required to use) rules from the “general part” of a state code, such as those governing culpability requirements, to guide their interpretation of the elements of a locally defined offense?⁴⁵ Surely there is a rich mine of further work to conduct with respect to local offenses and their relation to their state counterparts. With “Local Offenses,” Fissell has opened an entrance to that mine and has shone a light more than a few steps down its passage.

Luis Ferré-Sadurní, *N.Y. Repeals Law That Critics Say Criminalized “Walking While Trans”*, N.Y. TIMES (Mar. 2, 2021), <https://www.nytimes.com/2021/02/03/nyregion/walking-while-trans-ban.html>. [<https://perma.cc/EYH8-FYMP>] For a fuller discussion of advocacy (including litigation) challenging the ban, see generally Kate Mogulescu, *Your Cervix Is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk*, 74 U. MIA. L. REV. CAVEAT 68 (2020). I am indebted to Jocelyn Simonson for offering this specific example.

45. See ROBINSON & CAHILL, *supra* note 22, § 2.1 at 53 (explaining distinction in modern codes between “general part,” which defines broadly applicable rules, and “special part,” which defines offenses).