

## Article

### Police-Made Law

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*This Article presents evidence that police are writing laws that they enforce. This newly discovered phenomenon compounds the existing understanding of police “making” law through the exercise of discretion. They make law in a far more direct way, functioning as quasi-legislators at the local level—identifying a social problem, drafting an offense to address it, and directly proposing their offense for enactment. The conduct targeted, and the reasons for doing so, are diverse. For example, in one city a police chief successfully criminalized public intoxication so that intoxicated people would go to jails instead of hospitals; in another, a chief pushed through an anti-vaping ordinance because of news articles he read about the dangers of e-nicotine.*

*Contextualizing police-made law within policing theory and local government structure makes it less surprising, but we should be critical of it in many cases. Democratic political theory sets requirements for when bureaucratic interest groups may legitimately influence legislative deliberation, and police often fail to meet these. Basic expectations of neutrality and expertise, derived from administrative law, are often lacking. Moreover, the power of police to use violence makes them more analogous to*

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*military officials than to administrative agencies. This should trigger a strong norm of civilian control and a presumption against advocacy in policymaking.*

*Police-made law changes how we understand the role of police in governance. Rather than being the downstream recipients of extraneously conferred authority, they are active participants in the expansion of their own power. Police are not mere agents of the mass misdemeanor system—they are also its architects.*

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## INTRODUCTION

While scholars have long known that police help to “make” the laws they enforce through the exercise of discretion,<sup>1</sup> their involvement in lawmaking can be far more direct. Yet undiscovered by those who study police behavior is a surprising phenomenon: police are proposing and writing the offenses that they enforce. The goal of this Article is to present the evidence of this police offense “sponsorship,”<sup>2</sup> to contextualize it, and to critique it.

Legal academics and political scientists have long focused their attention on the political role of police officials and interest groups, and their most important findings can be boiled down to two observations. First, the police function as a powerful bureaucratic interest group that expects to receive (and does receive) deference on many aspects of policymaking—including legislation.<sup>3</sup> Second, the concerns advanced by police interest groups have almost entirely been related to job benefits and protections, such as “Law Enforcement Officers’ Bills of Rights” or increased salaries.<sup>4</sup> Alone among these voices was that of the renowned scholar William Stuntz, who posited in 2001 that police also had an interest in expanding the content of substantive criminal law so as to increase their authority to make arrests.<sup>5</sup>

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1. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001) (“Broad criminal law thus means that the law as enforced will differ from the law on the books. And the former will be defined by law enforcers, by prosecutors’ decisions to prosecute and police decisions to arrest.”). Recently, Professor Rachel Harmon highlighted another source of law emanating from the police—the verbal commands they issue while interacting with civilians. See Rachel Harmon, *Law and Orders*, 123 COLUM. L. REV. 943, 966 (2023).

2. This is a term of art from legislative processes at the state and federal level. The “sponsor” of a bill drafts it and introduces it for a vote, and such “[s]ponsorship of a bill usually carries with it the obligations to oversee the writing of legislation to be introduced and to shepherd the legislation through the legislative process.” James C. Garand & Kelly M. Burke, *Legislative Activity and the 1994 Republican Takeover: Exploring Changing Patterns of Sponsorship and Cosponsorship in the U.S. House*, 34 AM. POL. RSCH. 159, 161–62 (2006).

3. See *infra* Part I.

4. See *infra* Part I; see also Zoë Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. 1965, 1994–95 (2023) (discussing generally police unions “lobb[ying] state legislatures to pass law enforcement officer bills of rights” and providing examples of such bills of rights and their goals).

5. See Stuntz, *supra* note 1, at 538 n.133.

This Article will show that Stuntz was correct—police chiefs draft and propose new offenses to local legislatures. A study of over twenty years of journalistic accounts of police involvement in local legislation (from 2001 to 2022) confirms this behavior, which occurs in localities of all sizes, ranging from major cities to very small villages.<sup>6</sup> At the apex of police involvement in offense-creation was this mode of “sponsorship” identified above, with police identifying a social problem, drafting a new offense to address it, and formally proposing it during a legislative session.<sup>7</sup> Other lesser forms of involvement were also observed. For instance, in many cases, police merely identified a social problem but did not also draft an offense themselves, and in others, the police were directed to draft an offense after the legislature identified the problem.<sup>8</sup> Sponsorship is most interesting as it situates police chiefs as quasi-legislators.

Police were motivated to sponsor new offenses for many different reasons. This study identified seven major categories: (1) to create an enforcement tool justifying police intervention where none existed before, (2) to enact the police chief’s chosen theory of criminology, (3) to guard against a danger that the police chief perceives, (4) to create an investigative tool helpful for the detection of more serious offenses, (5) to reduce a drain on limited police resources, (6) to react to recent incidents that illustrate recurring problems, and (7) to formulate a response to a large number of citizen-initiated complaints or calls to the police.<sup>9</sup>

An example of the first category occurred in 2019 in the locality of Waite Park, Minnesota.<sup>10</sup> Prior to that year, public intoxication was not a criminal offense in the locality. The Waite Park police chief stated that this regulatory gap was hamstringing the department’s ability to deal with “disruptive” behavior

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6. See *infra* Part II.B.

7. See *infra* Part II.B (illustrating “sponsorship” through various case studies).

8. See *infra* Part II.B.

9. See *infra* Part II.B (articulating through each sub-heading each of the seven major categories).

10. Clairissa Baker, *Waite Park Police Propose Public Intoxication Ordinance to Curb Disruptions*, ST. CLOUD TIMES (Aug. 8, 2019), <https://www.sctimes.com/story/news/local/2019/08/08/waite-park-police-propose-disruptive-public-intoxication-ordinance/1954741001> [<https://perma.cc/HP3Z-RCWU>].

by intoxicated individuals.<sup>11</sup> Without an offense, the conduct was treated as a public health matter and the intoxicated individual was taken to the hospital instead of jail. The police chief believed that this was a problem, and that the creation of a new intoxication offense would provide a “tool” needed to justify arrest, and thus the diversion of intoxication cases away from hospitals and into jails.<sup>12</sup> An ordinance was enacted into law the same year, making “public intoxication and conduct that is disruptive” a misdemeanor.<sup>13</sup>

An example of offense-creation to address a police chief’s perception of “danger,” occurred in North Platte, Nebraska, in 2019.<sup>14</sup> The police chief appeared to be motivated by a recent University of Nebraska survey showing that use of e-cigarettes and vaping devices was popular among local youth.<sup>15</sup> He characterized the problem as “an epidemic” and a “huge issue,” arguing that the industry suffered from a lack of “quality control” that caused children to get “horrifically ill” and to suffer from “lung problems.”<sup>16</sup> While use of e-cigarettes was already an offense at both the state and local levels, the chief believed that more regulation was needed—that mere possession should also be an offense.<sup>17</sup>

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11. *Id.*

12. *Id.* (“[The ordinance] provides officers with another ‘tool’ when responding to disruptive situations. The ordinance would allow police to book a disruptive person who was under the influence in jail, preventing staff at medical facilities from being exposed to potentially aggressive behavior while still getting the person the ‘help they need.’”).

13. WAITE PARK, MINN., ORDINANCES ch. 9–10, ord. 106, §§ 106.1, 106.5 (2019).

14. See Todd Von Kampen, *Under New Unicam Bill, County Treasurers Would Be Required to Take Yearly Class*, KEARNEY HUB (Jan. 10, 2020), [https://kearneyhub.com/news/state/under-new-unicam-bill-county-treasurers-would-be-required-to-take-yearly-class/article\\_cac83f9b-279b-5b68-bada-f4c0981710de.html](https://kearneyhub.com/news/state/under-new-unicam-bill-county-treasurers-would-be-required-to-take-yearly-class/article_cac83f9b-279b-5b68-bada-f4c0981710de.html) [<https://perma.cc/CWW7-NYBZ>].

15. See *North Platte City Council 12-3-2019*, YOUTUBE, at 14:50 (Dec. 3, 2019), [https://www.youtube.com/watch?v=dS3qe0CR72Q&ab\\_channel=cyngutsch](https://www.youtube.com/watch?v=dS3qe0CR72Q&ab_channel=cyngutsch).

16. *Id.* at 19:00–19:25 (statement of Police Chief) (“There is no quality control; we don’t know what’s in ‘em . . . You read a lot of articles across the nation that our kids are getting, you know, horrifically ill because of this causing lung problems and diseases and it’s because there is no quality control.”).

17. *Id.* at 18:35–18:49 (statement of Police Chief) (“Right now the way it says we can’t take any enforcement action unless someone sees them actually



Figure 1. Meeting of North Platte, Nebraska, Council (December 3, 2019). Police chief, standing at lectern, sponsors an anti-vaping ordinance.<sup>18</sup>

An offense prohibiting possession was enacted a month after the police chief's proposal, and it punishes the conduct as a misdemeanor carrying a potential monetary fine of \$100.<sup>19</sup>

The North Platte sponsorship brings with it an occasion to note an important point: while many of the offenses that police sponsored were non-jailable misdemeanors or civil offenses, their effect on the expansion of police power (and on the correspondent diminution of individual liberty) is identical to that of the most serious felony.<sup>20</sup> The severity of an offense, so long as it is criminal, justifies broad intrusions by the police into the private lives of civilians—most obviously the power to arrest and search incident to arrest, as well as to ultimately “book[]” the person and conduct a nude body cavity search.<sup>21</sup> Moreover, much

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utilizing it. So, what this ordinance does is it brings us into the ability to take enforcement action for the mere possession of someone under the age of nineteen.”).

18. *Id.*

19. NORTH PLATTE, NEB., ORDINANCES ch. 130, §§ 130.040, 130.999(B) (2020).

20. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 348 (2001) (discussing how a custodial arrest was permitted for a seatbelt law violation).

21. *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 335 (2012) (discussing how a body cavity search was permitted during a jail booking regardless of the offense severity).

of the police-authorization inherent in criminalization is also inherent in the creation of civil offenses.<sup>22</sup> Police officers in many states are authorized to investigate, detain, and cite for even civil ordinance violations,<sup>23</sup> and any police encounter can spiral into a violent situation depending on how the officer and individuals involved react to each other.<sup>24</sup> After the courts become involved in the adjudication and disposition of these low-level

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22. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1079–80 (2015) (“[F]ull custodial arrests are permissible under the Fourth Amendment for nonjailable civil offenses, even when state law expressly prohibits it. . . . As a result, numerous federal courts have upheld the constitutionality of arrests for fine-only civil offenses.” (footnotes omitted)).

23. This will be state and locality specific. There is no blanket federal prohibition on searches and seizures for investigation of civil offenses, although the Supreme Court has placed limits on warrantless home intrusions for investigation of these offenses. *See* *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984). The Court recently suggested that under such circumstances, the appropriate thing to do would be to obtain a warrant. *See* *Lange v. California*, 141 S. Ct. 2011, 2021 (2021). For instance, officers can obtain arrest warrants for civil offenses. *See* *United States v. Phillips*, 834 F.3d 1176, 1182 (11th Cir. 2016) (“We conclude that a writ of bodily attachment for unpaid child support is a warrant for purposes of the Fourth Amendment. With possible exceptions not relevant here, an arrest based on a valid warrant is *per se* reasonable.” (citation omitted)). Thus, states can, and do, empower police to enforce civil offenses. *See, e.g.,* *State v. Duncan*, 43 P.3d 513, 519 (Wash. 2002) (“Although we decline to extend *Terry* to the civil infraction at issue here, chapter 7.80 RCW provides an independent basis that could justify a stop for the investigation of a civil infraction. RCW 7.80.050(2) explicitly states, ‘[a] notice of civil infraction may be issued by an enforcement officer when the civil infraction occurs in the officer’s presence.’” (alteration in original)). And city charters often make no distinction between police power over the investigation of criminal versus civil offenses. For example, the New York City Charter empowers the police department to “enforce and prevent the violation of all laws and ordinances in force in the city.” NEW YORK CITY, N.Y., CHARTER ch. 18, § 435. And the Philadelphia City Charter states that police “shall have the power to make lawful searches, seizures and arrests for violations of any statutes or ordinances in force in the City.” PHILA., PA., HOME RULE CHARTER art. V, ch. 2, § 5-201; *see also* 53 PA. CONS. STAT. § 13349 (2024) (summarizing the proceedings that happen when an individual violates ordinances). *But see* HOUS., TEX., CODE OF ORDINANCES ch. 34, art. 2, § 34-21 (empowering police to “enforc[e] the *penal* ordinances of the city” (emphasis added)). The biggest category of civil offenses justifying police interactions is traffic offenses. *See generally* Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672 (2015) (examining the frequency and impact of noncriminal traffic offenses).

24. *See* Avlana Eisenberg, *Policing the Danger Narrative*, 113 J. CRIM. L. & CRIMINOLOGY 473, 514 (2023) (describing how police responding violently to a situation creates a self-fulfilling prophecy that the danger they created is inherent to the practice of policing).

offenses, they preside over a racialized “managerial model” of social control in which defendants are marked for procedural hassle and the performance of court-ordered activities.<sup>25</sup> Police sponsorship is, therefore, worthy of our attention.

While the primary goal of this Article is to demonstrate that the phenomenon of police offense-sponsorship is occurring across localities in the United States, it is also worth attempting to understand and evaluate it. While I will argue that certain features of policing theory and of local government law make sponsorship less surprising than it would initially seem, sponsorship is objectionable in many categories of cases.

First, how can we understand police sponsorship? Many likely react strongly to the notion of police writing the laws that they themselves enforce. Such a practice scandalizes the classic, and perhaps naïve, view of police as mere neutral enforcers of pre-determined rules.<sup>26</sup> A deeper contextualization within the larger currents of policing theory, however, reveals that sponsorship is an explicit component of the now-dominant conception of the police’s proper role: “community-oriented policing,” and specifically its sub-theory of “problem-oriented policing.”<sup>27</sup> This theory asks police to go beyond mere reactive incident response, and to identify deeper “problems” giving rise to the incidents they are called to, as well as to propose solutions.<sup>28</sup> And local government

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25. ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 21 (2018) (describing characteristics of the managerial model as (1) aim of “marking” defendants by putting arrests and convictions on their records for tracking purposes; (2) creating “procedure hassles” to test “rule-abiding propensities” marked individuals (e.g., appearing in court); and (3) “performance,” which requires engagement in activities such as drug treatment).

26. The most famous representations of this view come from the cases on unconstitutional vagueness. *See United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (“Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people’s ability to oversee the creation of the laws they are expected to abide.”); *see also City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (noting that criminal laws cannot be written such that they “entrust[] lawmaking to the moment-to-moment judgment of the policeman on his beat” (quoting *Kolender v. Lawson*, 461 U.S. 352, 360 (1983))). While I agree that this view is naïve given the reality of police sponsorship, I will later argue that these statements by the Court form the basis for a critique of sponsorship. In other words, this naïveté expresses an aspiration that we should not abandon.

27. *See infra* Part III.A.

28. *Infra* Part III.A.

law makes local legislatures particularly receptive fora for problem-oriented policing of this nature. Local council meetings, unlike those of state legislatures or Congress, are procedurally informal and open to interventions by non-members.<sup>29</sup> Local government law also lacks the strong separation of powers principles that structure institutional relationships at higher governmental levels, and therefore the legislative proposals of executive-type actors such as police are likely to be viewed with less suspicion.<sup>30</sup>

To observe that certain forces facilitate police sponsorship of offenses, though, is not to say that one should endorse sponsorship as a normative matter. Given the wide range of substantive conduct sponsored for prohibition by police, as well as the diverse motives for doing so, any evaluation is a complex undertaking. In doing so, we can be guided by the analytic framework provided by liberal democratic theory.

One must begin by recognizing that in a democratic society, offense definition is ideally a task for a representative legislature, and that departures from this paradigm should be viewed with great skepticism. The creation of offenses by a political community represents one of the most severe forms of state action, as it restricts human autonomy—it prohibits the conduct of otherwise free persons. Given the controversial nature of many of these decisions, in a pluralistic society, they can only legitimately be made by a representative institution operating on a principle of majority rule. The Supreme Court’s void-for-vagueness jurisprudence is animated by this concern: “[S]tate power [must] be exercised only on behalf of policies reflecting an authoritative choice among competing social values . . . .”<sup>31</sup> and this choice is a product of “democratic self-governance.”<sup>32</sup>

This demand is not merely formalistic, and therefore when considering the legitimacy of offense-creation one must also consider the legislative process leading up to any eventual enactment. Certain influences on legislative deliberation, then, and not just the final vote itself, can be viewed as legitimate or not. The role of police as expert officials is such an influence that must be assessed, given the inherent tension between

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29. See *infra* Part III.B.

30. *Infra* Part III.B.

31. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984).

32. *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019).

democracy, which demands equal influence, and expertise, which claims superior knowledge. This tension is not irresolvable in all cases. While bureaucratic interest groups possess no right to inclusion in deliberation as a matter of democracy—after all, internal government actors are the targets of such influence (not its claimants)—many theorists present sophisticated arguments in favor of expert official influence when certain minimal conditions are met.<sup>33</sup> The field of federal administrative law has produced the best examples of this. From this body of thought, one can distill at least two necessary conditions for administrative agency influence over legislation: (1) neutrality, and (2) expertise.<sup>34</sup>

Once one identifies these two requirements for the legitimization of expert official influence over lawmaking, the disanalogy between federal administrative agencies and local police becomes glaringly apparent. There are good reasons to think that many police officials lack both neutrality and expertise over the subject matter on which they are opining.

Regarding neutrality, police are structurally partisan and exist in a culture that is inimical to healthy deliberation. Structurally, they are adversarial (not inquisitorial) law enforcement officials whose primary task is to represent only one side of the “v” in a criminal case.<sup>35</sup> To facilitate this they are permitted to lie to civilians, and even when they engage in their “community caretaking” function the evidence they discover is admissible in a criminal case.<sup>36</sup> Beyond this structural role, sociologists have identified a number of common cultural traits among police that can harmfully affect deliberation: police are often alienated from the communities they serve, expect deference, and are resistant

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33. See *infra* Part IV.A–B (describing the general deliberation that takes place in a liberal democratic polity and then analyzing the tension between bureaucratic expertise and democracy—how bureaucratic experts can legitimately influence such liberal democratic deliberation).

34. See *infra* Part IV.B (concluding that the democratic legitimacy of bureaucratic influence is predicated on, at a minimum, satisfaction of two conditions: (1) the neutrality of the agency, and (2) the agency’s expertise over the legislative subject matter).

35. See *infra* Part IV.C.1.a (discussing how structural partisanship contributes to a lack of neutrality).

36. See *infra* Part IV.C.1.a (analyzing sources that discuss and define “community caretaking”).

to legal constraints.<sup>37</sup> Structural and cultural aspects of police loom over the endeavor of offense sponsorship, making their influence on legislatures presumptively negative.

The assessment of police expertise regarding offense definition is more complicated, but similarly yields a presumption of illegitimate influence over many cases of offense sponsorship. Sponsorship involves a number of distinct stages, each of which implicates different competencies. A social problem must be identified, which in turn involves both the observation of conduct and then its moral evaluation.<sup>38</sup> Then, the sponsor must determine that a legal response is warranted, and more precisely, a response in the form of an offense prohibiting conduct.<sup>39</sup> Finally, the text of the offense must be drafted, and it must be proposed to the legislatures.<sup>40</sup> While police may possess expert knowledge as conduct observers—they are regularly interacting with the community, and the department serves as a clearinghouse for information collection on citizen complaints—they are no experts in conduct evaluation, or in the decision as to what legal response (if any) is appropriate. These decisions involve irreducibly controversial moral judgments about what conduct is socially harmful, what is the appropriate role of the state, and what tradeoffs and risks are tolerable when enacting policy. This means such decisions are not expertise-apt, let alone within police expert competence. Additionally, police clearly lack expertise regarding proper drafting techniques, and thus ought not be involved in that process either.

If the comparison of police and administrative agencies is one of a disanalogy, though, then there is another comparison that is more apt: the military. Both the police and the military are authorized to use violent force to pursue their ends, and this differentiates them from nearly all other executive branch actors. In the field of civil-military relations, this has led to a strong and uncontroversial norm of civilian control, as well as a presumptive bar on the military engaging in attempts to

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37. See *infra* Part IV.C.1.b (discussing how cultural norms lead to a lack of neutrality).

38. See *infra* Part IV.C.2.a (articulating how this lack of expertise problem shows itself during problem identification).

39. See *infra* Part IV.C.2.b (diving into the “regulatory response phase” conducted by officers).

40. See *infra* Part IV.C.2.c (describing the drafting phase and how it shows officers’ lack of expertise).

influence civilian leaders in making military policy.<sup>41</sup> If the police resemble the military in a crucial respect, then, the implication is that they too should be subordinated to elected civilian leaders and should not turn themselves into policy advocates. Whatever one may think about the role of administrative agencies in influencing lawmaking, the police are part of a category of executive-type actors of special concern.<sup>42</sup>

All these observations suggest that we should view police sponsorship with great skepticism. To counteract the risks of illegitimate influence identified above, local legislatures should heavily scrutinize police-sponsored offenses. They should ask in every case whether the official has a valid claim to being an expert over the issue at hand, and whether there is evidence of non-neutrality motivating the claim.

It is important to clarify that the critique I aim to present here is one of process and not substance—it is broadly applicable whether or not one supports the creation of the sponsored offense on its own merits. However, there are significant substantive concerns one might have with the expansion of the mass misdemeanor system.<sup>43</sup> To the extent one has those concerns, police sponsorship only exacerbates them.

This Article proceeds as follows. Part I discusses the findings of past scholars addressing the influence of police on legislation, noting that none have discussed attempts to alter the content of substantive offenses. Part II presents new evidence that

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41. See *infra* Part IV.D (articulating the analogy between the police and the military and the concept of civilian control generally).

42. See *infra* Part I (discussing through the various case studies where police act as legislative sponsors).

43. I survey the literature on these critiques, especially those of Alexandra Natapoff & Issa Kohler-Hausmann, in Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837, 876–80 (2020). To more general observations about the mass misdemeanor system, one might identify the proliferation of public order offenses—a major category of police-made law—as especially problematic. The primary criticism of public order offenses is that their vagueness confers excessive discretion on police officers, and that discriminatory application results.

I will also add a further clarificatory point: while my critique of police sponsorship is procedural, and is not tied to the substance of the offense being sponsored, the critique is limited to police advocacy *for* the creation of offenses. I do not consider here how police sponsorship of a *decriminalization* measure would fare on the scale of political legitimacy. The primary reason for this is that I did not observe such a phenomenon taking place. This is unsurprising, as the power of discretion makes it such that police do not need a formal repeal of an offense to effectively repeal it themselves (thanks to David Jaros for this insight).

police are acting as quasi-legislative sponsors with respect to criminal and civil offenses in local government codes. This Part discusses a number of case studies categorized by the apparent motivation for the sponsorship. Part III contextualizes police offense sponsorship in the movement for “problem-oriented policing,” and in the structure of local government law. Finally, Part IV undertakes a normative evaluation of this phenomenon, concluding that many cases of sponsorship are illegitimate influences on healthy legislative deliberation.

### I. PRIOR STUDIES OF POLICE AND LEGISLATION: POLICE AS SELF-REGARDING BUREAUCRATIC INTEREST GROUP

Within the field of criminal legal scholarship, perhaps no topic has spawned a larger literature than that of policing.<sup>44</sup> But far narrower a field is the scholarship that addresses the role of police in influencing legislation.<sup>45</sup> Perhaps this is because there has been so much to say about the *way* laws are enforced by the police, so less attention has been paid to the part police play in also creating those laws. Recently, though, a number of scholars have begun to document the influence of police as a legislative interest group through their membership in professional associations and unions. One can identify two major conclusions that emerge from this work: (1) the police are a powerful bureaucratic interest group in the legislative process, but (2) they are almost entirely focused on job-related protections. Unpacking these conclusions will help to set the stage for the contribution of this Article.

Writing in 1981, a political scientist summarized prior scholarship as concluding that in criminal justice lawmaking, “groups composed of criminal justice professionals (law enforcement personnel, corrections officials, attorneys) are more influential than

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44. Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U. L. REV. 65, 70–73 (2021) (discussing the various veins of policing scholarship over time).

45. See, e.g., Laura Huey & Danielle Hryniewicz, “We Never Refer to Ourselves as a Lobby Group Because ‘Lobby Group’ Has a Different Connotation”: Voluntary Police Associations and the Framing of Their Interest Group Work, 54 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 287, 288 (2012) (observing the “surprisingly thin literature on the politics of the police”); Stuntz, *supra* note 1, at 529 n.102 (“The role of interest groups in criminal lawmaking has not been the subject of much study.”).

those with social service or reform concerns.”<sup>46</sup> While influential and operating from “a relatively privileged position” accorded special access and deference,<sup>47</sup> police-based interest groups are often at pains to obscure that influence, and to frame their lobbying efforts as something else:

While it is unequivocally the case that voluntary police organizations operate as interest groups in public policy domains . . . there is often a deep reluctance on the part of representatives of such groups to openly acknowledge the political nature of their advocacy work. Lobbying thus becomes “consultation” or is recast in even more idealized terms as “seeking to find the truth,” whereas police interest groups become “stakeholders” advocating not on behalf of themselves but for “safer communities.”<sup>48</sup>

According to these scholars, “the fiction of police neutrality is politically expedient: it permits police groups to preserve the symbolic capital that their role in a democratic society affords them, a form of capital that relies, in large part, on their avoiding overt engagement with politics.”<sup>49</sup> Thus, police are a powerful interest group influencing legislation, according to these scholars, but police view themselves (and society views them) as a bureaucratic interest group whose expertise makes it worthy of deference by the legislature and the public.<sup>50</sup>

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46. Erika S. Fairchild, *Interest Groups in the Criminal Justice Process*, 9 J. CRIM. JUST. 181, 181 (1981).

47. Huey & Hryniewicz, *supra* note 45, at 300 (“Not only are police associations said to enjoy access to policy makers frequently denied other interest groups, but it has also been suggested that the views of such groups are accorded a greater degree of deference.”); *see also* Lisa L. Miller, *Rethinking Bureaucrats in the Policy Process: Criminal Justice Agents and the National Crime Agenda*, 32 POL’Y STUD. J. 569, 570 (2004) (discussing the influence of law enforcement bureaucrats in federal legislation and arguing that “criminal justice agents dominate the criminal justice policy process at the national level”).

48. Huey & Hryniewicz, *supra* note 45, at 288.

49. *Id.* at 288–89.

50. Robinson & Rushin, *supra* note 4, at 2021–22 (“When the law enforcement lobby engages in efforts to influence public policy, it comes with the imprimatur of state authority. Governmental institutions and their actors find themselves uniquely situated to dominate state policy on behalf of the state itself, ensuring a circular ‘web of influence.’ Second and relatedly, the information received from the law enforcement lobby as state actors, carries with it the perception of expertise. . . . The totem of expertise presents the law enforcement lobby as comprised of professional and impartial bureaucrats. The asymmetrical provision of information, then, is legitimized, with law enforcement officials perceived as expert proxies that can accurately represent the interests of

More recent work by legal scholars has explicitly framed police as a “lobby” at work in American politics and legislation, with a specific goal of protecting police officers’ prerogatives as government employees. Legal scholars Barry Friedman and Elizabeth Jánosky argue that police unions are “a potent lobbying force,” and that “[l]aw enforcement officials care even more about matters that affect them directly than they do about sentencing.”<sup>51</sup> Similarly, Zoë Robinson and Stephen Rushin identify that the “law enforcement lobby—police unions, correctional officer unions, and prosecutor associations—has played an integral role in shaping criminal justice policy.”<sup>52</sup> The methods employed by this lobby include direct campaign contributions, outreach to legislatures, and also the structuring of collective bargaining agreements.<sup>53</sup> Situating the legislative influence of police in the concepts of public choice, Rushin and Robinson argue that the power of the law enforcement lobby “raises many of the traditional lobbying costs identified in other contexts, including the risk of conflicts of interest, regulatory capture, and corruption.”<sup>54</sup> Police, then, are a rent-seeking interest group, but unlike many other interest groups, they have no countervailing influences.<sup>55</sup> The rents extracted by the police lobby, according to Rushin and Robinson, almost entirely center on protecting

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all persons involved in the criminal justice system, rather than repeat players that have an intense self-interest in expanding the scope of criminal justice policy.” (quoting Miller, *supra* note 47, at 569)). This is true of other bureaucratic interest groups involved in criminal justice. See Karim Ismaili, *Contextualizing the Criminal Justice Policy-Making Process*, 17 CRIM. JUST. POL’Y REV. 255, 265 (2006) (“As active members of the policy community subgovernment, these [official/bureaucratic] interest groups represent professions with institutionalized stakes in the operation of the criminal law and the criminal justice system. Their influence is enhanced by the high degree of public deference accorded them, especially on policy matters concerning the day-to-day operation of the criminal justice system.” (citation omitted)).

51. Barry Friedman & Elizabeth G. Jánosky, *Policing’s Information Problem*, 99 TEX. L. REV. 1, 37 (2020).

52. Robinson & Rushin, *supra* note 4, at 1969.

53. *Id.* at 1968 (finding, for example, a law enforcement lobby had donated tens of millions of dollars to local elected officials in hopes of influencing their state’s criminal justice policy).

54. *Id.* at 2009 (footnotes omitted).

55. See *id.* at 1978 (highlighting that police have the power to perpetuate the status quo in the criminal justice system).

police interests as employees.<sup>56</sup> Thus, they seek collective bargaining agreements that “impede officer accountability,”<sup>57</sup> agitate for statutory changes aimed at the same goal (often called “Law Enforcement Officer’s Bills of Rights”), and buy ads to advocate for more police hiring.<sup>58</sup> Other commentators have focused specifically on the influence of police unions, noting similar observations.<sup>59</sup>

What these scholars do not identify is a pattern of police attempting to influence *substantive* criminal law—the law they are tasked with enforcing.<sup>60</sup> A very notable exception is the famous claim made two decades ago by William Stuntz regarding the “pathological politics” of criminal law.<sup>61</sup> Stuntz’s 2001 work

56. *Id.* at 2010 (“In the context of the law enforcement lobby, these economic rents may include few criminal prosecutions of police officers, weak internal disciplinary standards, and regressive criminal justice policies that contribute to the growth and strength of the lobby.”).

57. *Id.* at 1988–90 (“First, police unions have leveraged the collective bargaining process to thwart officer accountability and limit democratic oversight of policing. . . . These include [contract] provisions that delay interviews of officers after allegations of misconduct, limit or ban civilian oversight, purge disciplinary records from personnel files, and establish complex appellate procedures that can lead to terminated officers being rehired by arbitrators against the wishes of police chiefs and city leaders.” (footnotes omitted)).

58. *Id.* at 1992 (“In Houston, the police union ‘bought ads warning about rising crime and pressing for more officers to be hired.’” (quoting Daniel DiSalvo, *The Trouble with Police Unions*, NAT’L AFFS., Fall 2020, at 24, 33)).

59. Benjamin Levin, *What’s Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1340, 1343 (2020) (describing literature summarized as the “obstructionist critique” of police unions, meaning that “feeble accountability mechanisms are the direct result of concerted action by police” undertaken during collective bargaining); *see also* Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017) (demonstrating that police departments’ internal disciplinary procedures, often established through the collective bargaining process, can serve as barriers to officer accountability); SARAH ANZIA, *LOCAL INTERESTS* 202 (2022) (“We have already seen that interest groups are also active in local politics and that unions of police officers and firefighters are among the most politically active of all. They have a tremendous stake in how much cities spend and what they spend it on. They also have a stake in other types of policies that recent protests against police brutality have brought into the spotlight: policies governing how public employees do their jobs and how they are managed—and thus how public services are provided.”).

60. There is only one example of this. *See* Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. RICH. L. REV. 1097, 1102–03 (2020) (recounting a 2018 event when the California State Sheriffs’ Association and California Police Chiefs Association unsuccessfully lobbied the Governor against a proposed narrowing of the scope of felony murder liability).

61. Stuntz, *supra* note 1, at 505.

remains the most in-depth treatment of the relationship between police and substantive legislation.

Criminal law is not just the product of politics; it is the product of a political *system*, a set of institutional arrangements by which power over the law and its application is dispersed among a set of actors with varying degrees of political accountability. . . . Those institutional arrangements give those actors certain baseline incentives.<sup>62</sup>

One such actor, called one of “criminal law’s three lawmakers,” is the combination of prosecutors and police.<sup>63</sup> Like the scholars above, Stuntz claims that private competing interest groups will be dwarfed by the influence of bureaucratic interests such as police.<sup>64</sup> The specific interests of police, according to Stuntz, is to “maximize arrests,”<sup>65</sup> which is in turn facilitated by the expansion of substantive criminal law, and specifically low-level public order offenses:

To the extent that police seek to make arrests, or to exercise coercive power short of arrest, they need criminal law to enable them to do those things . . . .

Thus, police benefit from laws that criminalize street behavior that no one wishes actually to punish, solely as a means of empowering them to seize suspects. This is the force that drives much of the current movement to expand the range of so-called ‘quality of life’ offenses, crimes that cover low-level street behavior that will only rarely be prosecuted, but that often serve as a convenient basis for an arrest and, perhaps, a search. Such crimes make policing cheaper, because they permit searches and arrests with less investigative work. Just as cheaper prosecution helps not only prosecutors but legislators too, cheaper policing should be a boon to police and legislators alike.<sup>66</sup>

The result of the incentives of police, along with the incentives of other actors, is the expansion of criminal law—the effect of the “pathological politics” of criminal law.<sup>67</sup> But Stuntz’s

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62. *Id.* at 528 (footnote omitted).

63. *Id.* at 529.

64. *Id.*

65. *Id.* at 538.

66. *Id.* at 539 (footnotes omitted).

67. *Id.* However, Stuntz did not view police incentives as divergent from those of legislators, claiming that “[l]awmaking and law enforcement are given to different institutions, in part to diffuse power, but the institutions are usually seeking the same ends.” *Id.* at 534–35. Yet, he did observe that police “are more culturally distinct from the rest of the population than are prosecutors.” *Id.* at 538. This observation would apply *a fortiori* when comparing police with legislators.

*hypothesis* was just that; he had no robust evidence that police were actually lobbying for new and broader criminal offenses.<sup>68</sup>

## II. A NEW FINDING: POLICE AS LEGISLATIVE SPONSORS

This Article presents new evidence of police involvement in legislation—evidence that proves the Stuntz-ian hypothesis. This involvement goes far beyond intervention as a mere “interest group,” and it directly relates to the substantive offenses that the police are tasked with enforcing. The phenomenon identified is that of police *sponsorship* of local criminal and civil offenses.<sup>69</sup> There are three significant components of police as legislative sponsors. First, the police chief takes on the substantive role of determining a general societal goal, and of determining that the regulation of individual conduct via a new offense can advance this goal. Second, he or she undertakes the task of drafting text for an ordinance that would create the offense. Finally, he or she proposes this ordinance to the legislative body, either through informal or formal mechanisms. In doing so, police are acting in the way that so-called “sponsors” of legislation act at the federal and state level.<sup>70</sup>

In what follows, I will first discuss the method used to discover the evidence of police sponsorship, and then discuss the results through case studies. The case studies were chosen from the larger set of findings—reported in appendix form after the conclusion—because of their especially detailed documentation of the police official’s role in the lawmaking process.<sup>71</sup> They are categorized based on the apparent public motivations of the police official in sponsoring the offense.

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68. At most Stuntz briefly adverted to the movement for community policing. *Id.* at 539 n.138 (citing Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997)). The connection between community policing and lobbying for new substantive offenses will be discussed below.

69. See, e.g., Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001) (identifying the phenomenon of local criminalization but not the phenomenon of police sponsorship of offenses).

70. *Glossary of Legislative Terms*, CONGRESS.GOV, <https://www.congress.gov/help/legislative-glossary> [<https://perma.cc/E3Z9-GTFY>] (defining “sponsor” as “[a] Representative or Senator who introduces or submits a bill or other measure”).

71. See *infra* Appendix.

## A. METHOD

Studying the laws of localities in the United States is a daunting task. U.S. Census data from 2017 reveals that there are 38,779 general-purpose local governments, each with its own code of ordinances.<sup>72</sup> Thus, researchers who hope to peer into this underexplored body of law must avoid generalizing while also avoiding a descriptive project that would be impossible to complete in one lifetime. As Dean Michael Cahill has explained, the “less-than-optimal research incentives and priorities of the academy” therefore serve to dissuade entrants into this vast and unknown legal world.<sup>73</sup> However, it is precisely because of the vast number of local governments and their power over people’s daily lives that this subject is worth further study. Researchers presented with the problem of numerosity mentioned earlier have generally taken two approaches. First, one can study in-depth a single local government or a small number of local governments, hoping to glean lessons from that study that would be more broadly applicable.<sup>74</sup> Second, one can attempt not to create a comprehensively representative sample size in the statistical sense, but instead look at a large enough number of the phenomena such that one can identify patterns that make each individual case seem more than anecdotal.<sup>75</sup>

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72. 2017 *Census of Governments*, U.S. CENSUS BUREAU (2017), <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html> (choose and download “Table 2. Local Governments by Type and State: 2017 [CG17000ORG02]” from list of Tables; then open COG2017\_ CG17000ORG02\_Data.xlsx; see Line 4).

73. Michael Cahill, *Multilayered Criminal (F)laws*, 89 FORDHAM L. REV. ONLINE 183, 183 (2021) (“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.”).

74. See generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 35–61 (1979) (studying New Haven court system); KOHLER-HAUSMANN, *supra* note 25, at 16–20 (studying the New York City misdemeanor system).

75. See generally ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018) (examining the broad inequality of the misdemeanor system); Fissell, *supra* note 43, at 877–80 (describing “misdemeanorland”). Even this practice is sometimes criticized as “anecdotal.” See Stephanos Bibas, *Small Crimes, Big Injustices*, 117 MICH. L. REV. 1025 (2019) (reviewing NATAPOFF, *supra*).

The study that identified the evidence presented in this Article follows the second approach. Comprehensively identifying when police involved themselves in the creation of local offenses is effectively impossible. This is true both because of the huge number of local governments, but also because of the paucity of legislative history maintained by most of those governments.<sup>76</sup> Moreover, police involvement is often off the record. One must start with a clear-eyed recognition of the limits of what can be knowable before attempting nevertheless to know something within those limits.

So, what is knowable? This study is premised on the notion that the best way to understand what is happening in local legislation is to rely initially on journalistic accounts of lawmaking. Just as there are a great number of local governments, so too are there are a great number of local newspapers and local reporters devoted to covering the workings of city hall. This study effectively deputizes local journalists as first-line reporters of police involvement in offense-creation. The diffuse work of these reporters has been collected and digitized in the form of the Westlaw News Database—a searchable dataset of almost 6,000 newspapers.<sup>77</sup> Again, even this database will be underinclusive, leaving out many smaller publications.<sup>78</sup> But the database is an excellent window into an otherwise opaque legislative terrain.

In this study, a Boolean search aimed at identifying police involvement in the proposal and drafting of legislation after the year 2000 was run through Westlaw News.<sup>79</sup> This yielded 1,336 hits of local news stories. Analysis of these stories in turn yielded *prima facie* evidence of widespread police involvement in local legislation creating civil and criminal offenses, breaking down

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76. Lindsay Nash, *Expression by Ordinance: Preemption and Proxy in Local Legislation*, 25 GEO. IMMIGR. L.J. 243, 273 n.152 (2011) (noting the difficulty of obtaining legislative history for municipal legislation).

77. *News Databases*, WESTLAW 5, <http://lscontent.westlaw.com/research/ppts/westlaw%20for%20the%20practitioner%20-%20news%20databases.ppt> [<https://perma.cc/7PU9-JNJV>] (“All News (ALLNEWS) contains more than 5,800 newspaper, magazine, transcript, newsletter, and journal databases.”).

78. For example, the database does not include the newspaper of my hometown, the *Cobleskill Times-Journal*, which is the primary news source covering twenty-two local governments in Schoharie County, New York.

79. This was the term and connector search: advanced: (“town council” “city council” “town board” “village board” “board #of supervisors” “county commission” “city commission”) & ((POLICE) /s (propose draft “put forward”) /s (law ordinance)) & DA (aft 12-31-2000).

into four broad categories. The highest level of involvement, police sponsorship, is discussed in this Article. Other types of involvement below that of sponsorship included (1) police serving as the primary complainant regarding certain conduct, although without drafting or presentation of ordinance text,<sup>80</sup> (2) police serving as delegates tasked to draft offenses, usually together with the city attorney, after conduct was identified as worthy of regulation by the legislature,<sup>81</sup> and (3) police serving as expert consultants during the legislative process, but not as drafters or proposers.<sup>82</sup>

Since police sponsorship represents the apex of police involvement in legislation, this study undertakes a full analysis of that phenomenon. Of the news stories indicating prima facie evidence of sponsorship, illustrative case studies were selected for further research on the basis of their particularly detailed description of the police official's involvement. Meeting minutes were located for many of these case studies, and in some recent cases, videos of the meetings were located. Finally, the ultimate outcome of the sponsorship was determined, with the current code provision identified.

## B. CASE STUDIES

Police sponsorship is diverse in subject matter and locality type, making generalization difficult. However, broad categories can be discerned when identifying the apparent public

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80. See, e.g., Andy Grimm, *Police Endorse Curfew, but Teens Protest; Let Parents Set Rules*, MERRILLVILLE POST-TRIB., April 28, 2007, at A3, 2007 WLNR 8972259 ("In Porter, police commission members have asked the Town Council to draft a curfew ordinance in part to help them deal with petty crimes committed by idle youths, Police Chief James Spanier said.") (full set of journalistic accounts on file with Author).

81. See, e.g., Michael Burge, *Council to Hear Plan to Control Club Rowdiness Entertainment License Part of Requirements*, SAN DIEGO UNION-TRIB., Sept. 14, 2007, 2007 WLNR 18130418 ("Mayor Bud Lewis asked owners to voluntarily reduce the rowdy behavior and got little cooperation. After that, the council told police to draft a law giving the department the tools to crack down on the downtown weekend club scene, which was getting rowdier by the month.") (full set of journalistic accounts on file with Author).

82. See, e.g., Eric Leake, *Concerns Raised over Massage Code*, LAS VEGAS SUN (Jan. 18, 2005), <https://lasvegassun.com/news/2005/jan/18/concerns-raised-over-massage-code> [<https://perma.cc/XHK7-XHZ9>] ("[Councilwoman Buck] said the city has been working to draft the [massage parlor] ordinance for more than a year and that the police department was also involved in the process.") (full set of journalistic accounts on file with Author).

motivation of the official's proposed offense.<sup>83</sup> The expressed motivation of the police official is the most useful analytical delineator to deploy, as it reveals how she sees her role in the larger institutional schema.

Below, I sort the case studies of sponsorship into seven categories based on official motivation: (1) to create an enforcement tool justifying police intervention where none existed before, (2) to enact the police chief's chosen theory of criminology, (3) to guard against a danger that the police chief perceives, (4) to create an investigative tool helpful for the detection of more serious offenses, (5) to reduce a drain on limited police resources, (6) to react to recent incidents that illustrate recurring problems, and (7) to formulate a response to a large number of citizen-initiated complaints or calls to the police. These will be discussed in turn.

### 1. Enforcement Tools and Gaps in the Law

Many of the cases of police sponsorship were apparently motivated by the police department's identification of a gap in the law, such that their authority to intervene in a recurring situation was hampered.<sup>84</sup> Through sponsorship of substantive offenses, they worked to plug this hole, justifying search, seizure, and removal of persons where none may have existed before.<sup>85</sup>

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83. Importantly, this is an *apparent* motivation, based on statements made to the press and to the council itself, and make no claim as to what the true motive of the department proposing the law was. Moreover, in many cases there are multiple motivations. I attempt below to identify what appears to be the most significant.

84. See, e.g., Baker, *supra* note 10 (discussing police sponsorship of a public intoxication ordinance); Meagan Ellsworth, *Willis Mulls Instituting Anti-Camping Ordinance*, HOUS. CHRON., July 30, 2020, at A001, 2020 WLNR 21337750 (discussing police introduction of multiple ordinances criminalizing common behaviors of people experiencing homelessness); Gillian Graham, *Old Orchard Might Limit Sex Offender Living Areas*, PORTLAND PRESS HERALD (July 20, 2015), <https://www.pressherald.com/2015/07/20/old-orchard-beach-might-limit-sex-offender-living-areas> [<https://perma.cc/82TV-UFQA>] (discussing a police-sponsored ordinance to restrict where sex offenders may live).

85. See, e.g., Baker, *supra* note 10 (discussing a proposed statute that would give officers increased abilities to arrest intoxicated persons); Ellsworth, *supra* note 84 (discussing multiple police-sponsored ordinances that increase police ability to issue fines); Graham, *supra* note 84 (discussing a police-sponsored ordinance that would increase officers' ability to seize sex offenders); see also Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 152–53 (2020) (“[*Atwater*] permits custodial arrest and intrusive

In these cases, one regularly sees the proposed offense being described as a “tool” for the police.<sup>86</sup>

Police in Waite Park, Minnesota (population around 8,000),<sup>87</sup> sponsored a disruptive intoxication ordinance in 2019.<sup>88</sup> The police chief proposed the law because “[p]ublic intoxication is not a crime,” and therefore officers dealing with “disruptive” behavior by intoxicated individuals only had the option of taking the person to the hospital.<sup>89</sup> He argued that the criminalization ordinance would be a “tool,” in that it allowed the person to be detained in jail as opposed to in a hospital, thus “preventing staff at medical facilities from being exposed to potentially aggressive behavior.”<sup>90</sup> The chief modeled the draft language off that of neighboring jurisdictions.<sup>91</sup> This ordinance was enacted into law the same year, and punishes “disruptive intoxication”: “No person, while intoxicated, in a public place shall conduct him or herself so as to be a danger to themselves or others and/or engage in a public disruption.”<sup>92</sup> This is a misdemeanor punishable by up to three months incarceration.<sup>93</sup>

Police in Conroe, Texas (population approximately 100,000),<sup>94</sup> sponsored a number of homelessness-related

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searches for any offense, no matter how minor. It converts racial profiling into jailtime. As a matter of governance structure, the decision authorizes police to insist upon incarceration even where the democratically elected state legislature has expressly decided that incarceration would be excessive punishment. *Atwater* is, in that sense, a doctrinal pillar of the American police power.”)

86. See, e.g., Baker, *supra* note 10 (describing the proposed ordinance as a police “tool”); Graham, *supra* note 84 (same).

87. *QuickFacts Waite Park City, Minnesota*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/waiteparkcityminnesota/POP060210> [<https://perma.cc/C6G9-UZR4>] (estimating Waite Park’s 2022 population at 8,366).

88. Baker, *supra* note 10.

89. *Id.*

90. *Id.*

91. *Id.* (explaining that Waite Park’s ordinance draws from similar ordinances in nearby St. Joseph and St. Cloud).

92. WAITE PARK, MINN. ORDINANCES ch. 9–10, ord. 106, § 106.3 (2019).

93. *Id.* § 106.5 (establishing a violation of the disruptive intoxication ordinance as a misdemeanor); *id.* at ch. 1, ord. 14, § 14.2 (2013) (establishing misdemeanors as “punishable by . . . up to 90 days in jail”).

94. *QuickFacts Conroe City, Texas*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/conroecitytexas/POP060210> [<https://perma.cc/HC26-SWKE>] (estimating Conroe’s 2022 population at 101,405).

ordinances in 2019.<sup>95</sup> Spurred to action by a rising unhoused population, and by an incident of property damage caused by an unhoused person, the ordinances were “presented by the Conroe Police Chief Jeff Christy and prohibit[ed] sleeping in places that limit public access, urinating and defecating in public, and panhandling aggressively.”<sup>96</sup> These three offenses were enacted into law that year.<sup>97</sup> These are civil offenses punished by a \$500 fine.<sup>98</sup> The minutes reflect no discussion or public comment—only the presentation by the police chief.<sup>99</sup> A video of the council’s working session, though, shows the chief being called on by the mayor to describe the proposed ordinances, and after some questioning he describes them as a “tool in the toolbox.”<sup>100</sup>

Police in Old Orchard Beach, Maine (population about 9,000),<sup>101</sup> sponsored a 2015 ordinance restricting areas where registered sex offenders can live.<sup>102</sup> Police were prompted to propose the new law after observing enactments in neighboring towns, and the chief thought that restrictions “are needed to ‘safeguard places where children congregate.’”<sup>103</sup> “It’s another

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95. Ellsworth, *supra* note 84 (providing background information on the Conroe ordinance).

96. *Id.*

97. CONROE, TEX., CODE OF ORDINANCES ch. 46, art. I, §§ 46-7 to -9 (2019).

98. *Id.* (articulating no specific penalty for a violation of these sections); *Id.* at ch. 1, § 1-13 (“[W]here no specific penalty is provided, the violation of any provisions of this code . . . shall be punished by a fine not exceeding \$500.00 . . .”).

99. *Minutes of the Conroe City Council June 12 & 13, 2019*, CITY OF CONROE 2, <https://www.cityofconroe.org/home/showpublisheddocument/21915/636988668824330000> [<https://perma.cc/NA9N-9R28>] (noting the only presentation on amending Chapter 46 by Police Chief Christy).

100. *Jun 12, 2019 Workshop*, CITY OF CONROE, at 02:20 (June 12, 2019), <https://conroetx.new.swagit.com/videos/67109> (on the lefthand “Video index,” select “Item B”) (discussing the amendment of Code of Ordinances Chapter 46). The video recording also clarifies that the sponsorship of the chief was not with respect to the content of the ordinances, but with their applicability outside the core downtown business district. *Id.* at 00:49. “The issue is wider than downtown,” he says. *Id.* at 02:13. Previously, they were limited to the business district. *Id.* at 01:46.

101. *QuickFacts Old Orchard Beach CDP, Maine*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/oldorchardbeachcdpmaine/POP060210> [<https://perma.cc/MM9B-8UFN>] (estimating Old Orchard Beach’s 2020 population at 8,960).

102. Graham, *supra* note 84 (quoting Police Chief Dana Kelley).

103. *Id.*

tool that we can use if we have to,” he said.<sup>104</sup> The chief’s proposal carved out certain areas as off limits to sex offender residency, and it was enacted into law that year.<sup>105</sup> In the findings and purposes section, the ordinance echoed the chief, stating, “the Town finds that further protective measures are necessary and warranted to safeguard places where children congregate.”<sup>106</sup> Violations are punished as civil offenses with a fine of \$500 per day of residency.<sup>107</sup>

In 2013, police in Carmel-by-the-Sea, California (population about 3,200),<sup>108</sup> sponsored a social host ordinance punishing the serving of alcohols to minors in private homes.<sup>109</sup> The sponsoring chief claimed that the law was needed in order to create probable cause to enter a home when there are no other offenses being committed: “That would be another investigative tool, he said,” and “I want to be proactive and make sure we have our tools in place.”<sup>110</sup> This ordinance was never enacted.<sup>111</sup>

Police in Davis, California (population about 70,000),<sup>112</sup> sponsored a 2012 ordinance dubbed as a “Minor Alcohol Preclusion Ordinance.”<sup>113</sup> The law “would give Davis police officers the power to cite minors under the influence of alcohol in a public

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104. *Id.*

105. OLD ORCHARD BEACH, ME., CODE OF ORDINANCES ch. 7, § 7-30 (2015).

106. *Id.* § 7-27.

107. *Id.* § 7-32.

108. *Carmel-by-the-Sea City, California*, U.S. CENSUS BUREAU (2022), [https://data.census.gov/profile/Carmel-by-the-Sea\\_city,\\_California?g=160XX00US0611250](https://data.census.gov/profile/Carmel-by-the-Sea_city,_California?g=160XX00US0611250) [<https://perma.cc/AF5C-N3N5>] (estimating Carmel-by-the-Sea’s 2020 population at 3,220).

109. Larry Parsons, *Carmel May Consider Ordinance Aimed at Underage Drinking*, MONTEREY CNTY. HERALD, Jan. 11, 2013, 2013 WLNR 812900.

110. *Id.* This Article does not categorize this case as an “investigative tool” motivation, despite the words used by the official, because the tool here is not to investigate another more serious crime—it is a tool to enable the enforcement of a law that is directly related to social hosting: underage drinking. *See id.*

111. *Cf.* CARMEL-BY-THE-SEA, CAL., MUN. CODE tit. 9, ch. 9.56 (2023) (marking chapter “reserved” and featuring no regulations).

112. *QuickFacts Davis City, California*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/daviscitycalifornia/PST045222> [<https://perma.cc/9ZR5-STJW>] (estimating Davis’s 2022 population at 67,048).

113. Tom Sakash, *Proposal to Tighten Laws on Alcohol Use by Minors Stirs up Community Discussion*, DAVIS ENTER. (Jan. 12, 2012), [https://www.davisenterprise.com/news/city\\_government/proposal-to-tighten-laws-on-alcohol-use-by-minors-stirs-up-community-discussion/article\\_17caa084-2ba2-5399-b683-01e45126040f.html](https://www.davisenterprise.com/news/city_government/proposal-to-tighten-laws-on-alcohol-use-by-minors-stirs-up-community-discussion/article_17caa084-2ba2-5399-b683-01e45126040f.html) [<https://perma.cc/9YWQ-VVJU>].

place.”<sup>114</sup> The police chief who proposed this, Landy Black, viewed it as problematic that it was illegal for minors to purchase or consume alcohol, but that it was legal “for a minor to have alcohol in his or her system while in public.”<sup>115</sup> Black appeared to draw a connection between drug usage and alcohol intoxication:

“The community, the downtown and campus area, those neighborhoods where families live, are plagued with young people using without regard for their neighbors,” Black said. “There is no doubt that there’s a connection between alcohol and those problems.

“What is easily identifiable is there has been a lot of talk and there has not been results. It’s my thought, and this is after a lot of discussion, maybe we need to do something a little bit different. There’s a big hole here.”<sup>116</sup>

When the chief presented the ordinance to the city council, the council members “balked” at the idea because of the lack of the involvement of other groups outside the police department.<sup>117</sup> After a few months of meetings and a public hearing with many negative comments, the ordinance failed to receive sufficient votes for adoption despite the chief’s continued sponsorship.<sup>118</sup> In its 2013 year-end report detailing goals for 2014–2015, the police department stated as a goal “continu[ing] with efforts, negotiations, and educational outreach to win broad enough community and Council support to bring the Minor Alcohol Preclusion Ordinance into existence.”<sup>119</sup> Davis’s current code reflects that the ordinance has not been enacted.<sup>120</sup>

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114. *Id.*

115. *Id.* The specific impetus for this ordinance was an upcoming “Picnic Day” at UC Davis, which regularly involved binge drinking and nuisance parties. *Id.*

116. *Id.*

117. *Id.*

118. *Minutes of the Davis City Council Meeting of March 6, 2012*, CITY OF DAVIS 6–7 (Mar. 6, 2012), <https://documents.cityofdavis.org/Media/Default/Documents/PDF/CityCouncil/CouncilMeetings/Minutes/2012/Minutes-2012-03-06-City-Council-Meeting.pdf> [<https://perma.cc/3LZT-GD7U>] (documenting the Council’s refusal to adopt the ordinance and deferring further discussion to future meetings).

119. *2013 Annual Report*, DAVIS POLICE DEPT 12 (2013), <https://www.cityofdavis.org/home/showdocument?id=4601> [<https://perma.cc/YN92-RVPB>].

120. *Cf.* DAVIS, CAL., MUN. CODE ch. 26, art. 26.04, § 26.04.020 (regulating public consumption of alcoholic beverages without specific provisions for minors).

In 2003, police in Molalla, Oregon (population around 10,000),<sup>121</sup> sponsored a new noise ordinance for the city.<sup>122</sup> Molalla has previously had no laws regulating the creation of noise, but the police chief decided to propose one because “previous city councils did not want to deal with the issue.”<sup>123</sup> The chief said that “the proposed law is needed to reduce the public’s and police department’s frustration with louder noises for which there are few legal remedies.”<sup>124</sup> The city council enacted the ordinance, which the chief drafted himself, the same year.<sup>125</sup> Violations are punished as civil offenses carrying a fine of up to \$1,000.<sup>126</sup>

## 2. Criminological Theories

Some cases of police sponsorship appeared to be motivated by the police chief’s belief in a given theory of criminology, or in a specific view as to the criminogenic nature of certain low-level conduct (think of the Davis chief’s connection between drugs and alcohol discussed above).<sup>127</sup>

In 2010, there was a push by the police department in the Dayton, Ohio, suburb of Trotwood to tackle the perceived problem of graffiti.<sup>128</sup> Trotwood had a population of approximately 24,000 at the time.<sup>129</sup> The article states that “[i]n an effort to become pro-active in spotting and shutting down graffiti in the neighborhood, the Trotwood Police Department requested the city council to draft up an ordinance to eliminate graffiti from

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121. *QuickFacts Molalla City, Oregon*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/molallacityoregon/PST045222> [<https://perma.cc/D4LK-3CJP>] (estimating Molalla’s 2022 population at 10,171).

122. Steven Amick, *Molalla Panel Lets Residents Sound Off for Noise Code*, OREGONIAN, Feb. 25, 2003, at B02, 2003 WLNR 15791118.

123. *Id.*

124. *Id.*

125. *Id.*; see MOLALLA, OR., MUN. CODE tit. 9, ch. 9.13, §§ 9.13.010–9.13.040 (2003).

126. MOLALLA, OR., MUN. CODE tit. 9, ch. 9.13, § 9.13.070.

127. See Sakash, *supra* note 113 (connecting underage alcohol use to broader drug use problems).

128. Toni Coleman, *Trotwood Says No to Graffiti*, DAYTON DAILY NEWS (Feb. 12, 2010), <https://www.daytondailynews.com/news/local/trotwood-says-graffiti/vCa15Yhx0YpJNTEdcGQBmM> [<https://perma.cc/2LCS-7VP3>].

129. *QuickFacts Trotwood City, Ohio*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/trotwoodcityohio/AGE295221> [<https://perma.cc/TSU8-QW5W>] (reporting the 2010 population of Trotwood as 24,431).

the city, including vacant business properties.”<sup>130</sup> The police chief was quoted as saying that “they need the ordinance after seeing ‘pockets of graffiti surfacing in sections of the community,’” and argued that the ordinance would “address the ‘broken window theory’ when ‘unaddressed disorder (becomes) a sign that no one cares and actually invites further disorder.”<sup>131</sup> He tasked a subordinate with overseeing the process of the drafting, which he estimated would take one to two months, with plans to propose it to the city council after.<sup>132</sup> While no stories report on the outcome of this effort, Trotwood’s code of offenses includes a chapter on graffiti that was enacted three months after the publication of the original story.<sup>133</sup> The ordinance broadly prohibits the creation of graffiti, the possession of implements such as spray paint near overpasses and other public areas, and the furnishing of implements to minors.<sup>134</sup> Violation of the ordinance is punishable by fine up to \$500 and twenty-five hours of community service.<sup>135</sup> In the “Purpose” section of the enacted ordinance one sees a clear indication of broken windows theory: “Graffiti is a visual symbol of disorder and lawlessness. It contributes to a downward spiral of blight and decay, decreasing property values, lessening business viability and potentially adversely affecting tax revenues . . . .”<sup>136</sup>

Police in Clark County, Nevada (population about 2.3 million),<sup>137</sup> raised the issue of street race spectators as a problem in 2004, and they participated in drafting an ordinance prohibiting the conduct.<sup>138</sup> The Metropolitan Police Department initiated the process, and one of its sergeants helped to write the text.<sup>139</sup> Speaking to the media, the Sergeant justified the offense by

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130. Coleman, *supra* note 128.

131. *Id.* (alteration in original).

132. *Id.*

133. TROTWOOD, OHIO, CODE OF ORDINANCES pt. 5, ch. 557, § 557.01 (2010).

134. *Id.* §§ 557.01–557.05.

135. *Id.* § 557.99.

136. *Id.* § 557.01.

137. *QuickFacts Clark County, Nevada*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/clarkcountynevada/PST045222> [<https://perma.cc/9QVF-Z9KL>] (estimating Clark County’s 2022 population at 2,322,535).

138. Adrienne Packer, *Ordinance Would Fine Spectators at Street Races*, LAS VEGAS REV.-J., Feb. 18, 2004, at 1B, 2004 WLNR 847426.

139. *Id.*

likening the races to “cock fights”: “It’s like cock fights . . . . Without spectators at these events, there is no sport.”<sup>140</sup> He described the races as dangerous and also as draining on the resources of police, and that “it becomes a sport when the police show up. They scatter like cockroaches.”<sup>141</sup> When an ACLU attorney appeared at the meeting proposing the ordinance and raised constitutional objections to the criminalization of innocent conduct, the Sergeant dismissed these concerns by stating that “[a] normal person will know this event is not legal . . . . What else would you be doing in the middle of the night at an industrial park?”<sup>142</sup> The county commissioners unanimously approved the introduction of the ordinance, and one appeared persuaded by the Sergeant’s arguments: “If you take the spectators away, you take away the thrill for those violating the law . . . . That is what this ordinance is designed to do, take away the spectator thrill.”<sup>143</sup> The ordinance was soon thereafter enacted into law, and punished being “knowingly present as a spectator . . . at an illegal motor vehicle speed contest or illegal exhibition of speed.”<sup>144</sup> The offense is punishable as a misdemeanor by up to six months incarceration in county jail.<sup>145</sup>

Police in Hillsboro, Oregon (population about 107,000),<sup>146</sup> sponsored a 2011 ordinance regulating “social gaming”—playing card games for money while in public places.<sup>147</sup> A police department commander who proposed the rules at a city council meeting said the department “supports social gaming on a small scale,” but “does not want to legalize card rooms or large-scale gaming operations, though, so it suggested restrictions.”<sup>148</sup> The department’s proposed ordinance went into great detail:

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. CLARK CNTY, NEV., CODE OF ORDINANCES tit. 14, ch. 14.24, § 14.24.070 (2004).

145. *Id.* § 14.64.080.

146. *QuickFacts Hillsboro City, Oregon*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/hillsborocityoregon/PST045223> [<https://perma.cc/DQS7-PK4U>] (estimating Hillsboro’s 2022 population at 107,299).

147. Casey Parks, *Hillsboro Considers Allowing, Essentially, Card Games Played for Money Inside City Businesses*, OREGONIAN, Nov. 16, 2011, 2011 WLNR 23863069.

148. *Id.*

[It] recommended that a business only be able to host the games one night a week or only on 25 percent of the floor space. It also suggested that a business must have been operating for at least six months before it can offer space for the games. It must also clearly post notices that gaming is occurring. If a business breaks those rules, the department suggests a \$1,000 fine—rather than the normal \$250 code violation fine.<sup>149</sup>

At the meeting where the ordinance was proposed, the council suggested changes and asked the department to work on another draft with other city staff.<sup>150</sup> The ordinance was eventually enacted in 2012, and it imposed the suggested restrictions from the police department proposal, as well as some others.<sup>151</sup> Violations are punishable as civil offenses carrying a \$1,000 fine.<sup>152</sup> Minutes and staff reports from a 2020 city council meeting indicate that the regulated businesses view the ordinance as unduly restrictive, and asked for the six-month waiting period and the 25% floor space restriction to be relaxed.<sup>153</sup>

### 3. Danger and Safety

The police regularly sponsored offenses by claiming that the conduct they sought to prohibit was a danger to the safety of the community.<sup>154</sup> The malleability of dangerousness claims made this an especially common motivation.<sup>155</sup> Consider just one example.

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149. *Id.*

150. *Id.*

151. HILLSBORO, OR., MUN. CODE ch. 5, subch. 5.44 (2012).

152. *Id.* § 5.44.060.

153. *Hillsboro, Oregon City Council Teleconference Meeting Agenda*, HILLSBORO, OR. 645–49 (Dec. 15, 2020), <https://hillsboro-oregon.civicweb.net/document/25396> [<https://perma.cc/8C7D-89LV>] (summarizing community complaints on the social gaming ordinances). The city’s planning director remarked that relaxation of restrictions would “need” police support: “Mr. Cooper mentioned the need for the Police Department’s support if the ordinance is relaxed.” *Hillsboro, Oregon, City Council Minutes*, HILLSBORO, OR. 8 (Dec. 15, 2020), <https://hillsboro-oregon.civicweb.net/document/26120> [<https://perma.cc/HTA9-69TR>].

154. See, e.g., Packer, *supra* note 138 (discussing how the police chief sponsoring an anti-street racing ordinance described the activity as dangerous); Sakash, *supra* note 113 (discussing how the police chief sponsoring an ordinance regulating minors’ consumption of alcohol described intoxicated minors as posing a danger to their neighbors).

155. See, e.g., Packer, *supra* note 138 (applying this logic to street racing); Sakash, *supra* note 113 (applying this logic to publicly intoxicated minors).

The police department in Winchester, Virginia (population around 30,000),<sup>156</sup> sponsored an ordinance in 2017 that would prohibit roadside panhandling.<sup>157</sup> The police chief “asked City Council . . . to consider adopting an addition to Chapter 14 of [the] City Code, which governs vehicles and traffic. The ordinance would prohibit the exchange of items between pedestrians and motorists on public roadways.”<sup>158</sup> The chief stated as his rationale that “those transactions are inherently dangerous, and they affect the flow of traffic through the city,” and that “[a]s the city continues to grow and we see more and more traffic . . . I’m fearful we’re going to end up seeing somebody get hit, or we’ll have accidents.”<sup>159</sup> During the discussion at the council work session where the chief proposed the law, the city attorney noted a potential issue with the ordinance’s constitutionality, as a district court in 2015 struck down a Charlottesville panhandling ordinance as a content-based restriction on speech.<sup>160</sup>

The ordinance proposal was not taken up at the next monthly meeting, though, and was instead proposed again by the chief two years later in 2019.<sup>161</sup> In the minutes of that meeting the ordinance is noted as being “Presented by John R. Piper, Chief of Police.”<sup>162</sup> At a meeting days later, the ordinance was adopted unanimously and without public comment.<sup>163</sup> The

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156. *QuickFacts Winchester City, Virginia*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/winchestercityvirginia/PST045222> [<https://perma.cc/QWQ3-8CU3>] (estimating Winchester’s 2022 population at 27,936).

157. Brian Brehm, *Police Department Proposes New Law to Prevent Panhandling*, WINCHESTER STAR, Oct. 12, 2017, 2017 WLNR 31237873.

158. *Id.*

159. *Id.* (alteration in original).

160. *Oct 10, 2017 City Council Work Session*, WINCHESTER, VA. (Oct. 10, 2017), <https://winchesterva.new.swagit.com/videos/42104> (noting the attorney’s remarks occur around 34:20); *see also* *Clatterbuck v. City of Charlottesville*, 92 F. Supp. 3d 478 (W.D. Va. 2015) (sustaining a First Amendment challenge to a Charlottesville anti-panhandling ordinance).

161. *Winchester Common Council in Regular Meeting June 11, 2019*, WINCHESTER, VA. 4 (June 11, 2019), <http://winchesterva.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=1674&Inline=True> [<https://perma.cc/WT43-3RKV>].

162. *Id.*

163. Brian Brehm, *Council Makes Roadside Panhandling Illegal in Winchester*, WINCHESTER STAR (June 28, 2019), [https://www.winchesterstar.com/winchester\\_star/council-makes-roadside-panhandling-illegal-in-winchester/article\\_55bd4b3c-31a8-5177-8678-426b948495bc.html](https://www.winchesterstar.com/winchester_star/council-makes-roadside-panhandling-illegal-in-winchester/article_55bd4b3c-31a8-5177-8678-426b948495bc.html) [<https://perma.cc/YQ88-53Q6>].

enacted text prohibited (among other things) “exchang[ing] or attempt[ing] to exchange any item while the operator’s motor vehicle is located in a traffic or travel lane on city roadways,” and punished violations as a traffic infraction.<sup>164</sup> This law was in effect for about two years in the locality, until it was repealed in 2021 with the stated explanation that the ordinance failed to comply with the 2015 district court decision and a related Fourth Circuit opinion from the same year.<sup>165</sup> It seems strange that the 2015 decisions would be the reason for repealing the laws enacted in 2019 in full knowledge of the precedent,<sup>166</sup> and a journalistic account of the repeal indicates that the changes were mostly motivated by a change in the city’s policy on addressing homelessness.<sup>167</sup>

#### 4. Investigative Tools

Police sponsorship also often targeted conduct for prohibition not because it was itself deemed to be worthy of punishment but because it fit within a regulatory scheme that helped police to solve more serious offenses.<sup>168</sup> These investigation-type

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164. Winchester, Va., Ordinance 2019-24(4)(a) (June 25, 2019).

165. Winchester, Va., Ordinance O-2021-15 (May 12, 2021) (citing *Clatterbuck*, 92 F.Supp.3d; *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015)).

166. See *supra* note 160 and accompanying text.

167. Brian Brehm, *City Looks to Repeal Panhandling Laws*, WINCHESTER STAR (Apr. 23, 2021), [https://www.winchesterstar.com/winchester\\_star/city-looks-to-repeal-panhandling-laws/article\\_f3ec7a03-d0e8-530f-ad2a-e5df8a65d3b6.html](https://www.winchesterstar.com/winchester_star/city-looks-to-repeal-panhandling-laws/article_f3ec7a03-d0e8-530f-ad2a-e5df8a65d3b6.html) [<https://perma.cc/JQM7-RAZP>] (“‘We’re not going to arrest our way out of homelessness issues,’ City Manager Dan Hoffman told Winchester’s Public Health and Safety Committee at a special meeting on Wednesday evening. ‘Law enforcement can sometimes be a blunt instrument and is not appropriate to address homelessness as a whole.’”).

168. See, e.g., Lee Hermiston, *Cedar Rapids Police Propose Change to Security Camera Ordinance*, GAZETTE (Oct. 2, 2014), <https://www.thegazette.com/news/cedar-rapids-police-propose-change-to-security-camera-ordinance> [<https://perma.cc/25ZP-3QGU>] (discussing a police-sponsored ordinance that would require certain retailers to install security cameras); Michael Holtzman, *Police, Council Discuss Proposal to Crack Down on Copper Thieves*, HERALD NEWS, Sept. 28, 2011, at 3A, 2011 WLNR 22992473 (discussing a police-sponsored ordinance requiring second-hand stores to send police daily reports of customers).

offenses usually helped to create or preserve evidence of other crimes.<sup>169</sup>

In 2014, police in Cedar Rapids, Iowa (population around 136,000),<sup>170</sup> sponsored an ordinance requiring a wide range of businesses to maintain a surveillance camera system, and that it must be of a certain quality.<sup>171</sup> A police lieutenant involved in the proposal stated to media that “many . . . videos are useless for evidentiary purposes due to inefficiencies in camera placement, equipment and maintenance . . . [and] [i]t is anticipated that a set of standards will help produce a better product that can be used to solve and prosecute a crime.”<sup>172</sup> He also said that the business types selected for the requirement were thought to potential “targets of violent crime.”<sup>173</sup> The city council directed the police department to “reach[] out to business owners” for their input, and the department then scheduled two listening sessions.<sup>174</sup> The ordinance was enacted into law the following year, and is punishable as a misdemeanor or a civil offense.<sup>175</sup>

Police in Fall River, Massachusetts (population around 93,000),<sup>176</sup> sponsored a 2011 ordinance aimed at facilitating the investigation of metal thievery from structures.<sup>177</sup> Here, the effort was spearheaded by a detective (not the chief), who made a compelling presentation to the City Council, complete with pictures of copper theft implements, as well as a list of streets where

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169. See, e.g., Hermiston, *supra* note 168 (discussing how a police-sponsored ordinance to mandate certain retailers to install security cameras would assist in solving violent crimes); Holtzman, *supra* note 168 (discussing how a police-sponsored ordinance requiring second-hand stores to report their customers to police would help curb copper theft).

170. *QuickFacts Cedar Rapids City, Iowa*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/cedarrapidscityiowa/PST045223> [<https://perma.cc/5M7N-E65T>] (estimating Cedar Rapids’ 2022 population at 136,429).

171. See Hermiston, *supra* note 168.

172. *Id.*

173. *Id.*

174. *Id.*

175. CEDAR RAPIDS, IOWA, CODE OF ORDINANCES ch. 60A, § 60A.8 (effective May 12, 2015).

176. *QuickFacts Fall River City, Massachusetts*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/fallrivercitymassachusetts/PST045222> [<https://perma.cc/U8DU-C6SH>] (estimating Fall River’s 2022 population at 93,682).

177. See Holtzman, *supra* note 168.

copper wires were recently stolen.<sup>178</sup> Apparently impressed by this presentation, the council “accepted” from the detective the laws he proposed, including “a draft amending the city laws requiring second-hand shops to keep computerized records of purchases sent daily to police for entry into a New England data bank and fully identify customers with photographs.”<sup>179</sup> The Council also tasked the detective to work with its law department to also draft an ordinance requiring second-hand scrap dealers to hold materials for a certain period before resale.<sup>180</sup> While the precise legislative history is unavailable, a few months later the city council undertook a major overhaul of its code article covering “Junk and Secondhand Dealers.”<sup>181</sup> Stringent recordkeeping requirements were added, certain items were prohibited from being bought and sold, and all these rules were enforced by a licensure regime backed by a civil fine of \$300.<sup>182</sup>

##### 5. Police Resource Conservation

Police also regularly sponsored offenses that were aimed at reducing strains on police resources. A large sub-category included sponsorship of false alarm ordinances.<sup>183</sup> Others, like the ordinance below, sought to deputize landlords to police their properties through “crime free rental” provisions.<sup>184</sup> The goal of this category of sponsorship is to reduce the number of calls being made to patrol officers.

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178. *Id.*

179. *Id.*

180. *Id.*

181. *See* FALL RIVER, MASS., MUN. CODE ch. 14, art. X, §§ 14-370, 14-375, 14-383 (2022) (documenting that three sections were amended by ordinance on Jan. 10, 2012).

182. *Id.* §§ 14-375, 14-383.

183. *See infra* Appendix (noting three of such instances in the Full Dataset of Journalistic Accounts).

184. Scholars refer to this as “third-party policing.” *See* Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 117, 118 (2012) (“Third-party policing attempts to control or prevent crime and disorder by activating nonoffending persons who are thought to influence environments where offenses have occurred or may occur.”).

Police in Menasha, Wisconsin (population about 17,000),<sup>185</sup> sponsored a 2008 ordinance targeting rental apartments that are regularly visited by police.<sup>186</sup> The department's officials called the proposal a "chronic nuisance abatement ordinance," and billed it as a way to reduce the disproportionate strain placed on police resources.<sup>187</sup> The department undertook a study to determine which apartment complexes were the biggest drains, and identified a number of complexes clustered in a distinct area of the municipality.<sup>188</sup> The sponsored ordinance was modeled on an ordinance passed in Green Bay which had resulted in a large drop in police responses to local apartments; the proposed ordinance sanctioned landlords about \$200 per police response after a property has been deemed a chronic nuisance.<sup>189</sup> The department justified the ordinance by arguing that "nuisance properties are a blight on a neighborhood, frighten away law-abiding residents, discourage re-investment and consume too many town and police services."<sup>190</sup> The police chief said that "[t]his is not to punish the landlords," and that "[w]e understand the landlords' position and difficulty in evicting [problem tenants] . . . . But this is more of a collaborative effort; we're willing to work with the landlords. We just want to see some cooperation to get the problem solved."<sup>191</sup> The department's community liaison officer argued that "[t]he landlord has a lot more power than the police department."<sup>192</sup> This was enacted, and is punishable by fine of up to \$500, and imprisonment for ninety days if the fine is not paid.<sup>193</sup>

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185. *QuickFacts Menasha City, Wisconsin*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/menashacitywisconsin,US/PST045223> [<https://perma.cc/KR4L-FR7G>] (estimating Menasha's 2022 population at 17,889).

186. *Police Target Trouble Areas*, POST-CRESCENT, June 14, 2008, at A02, 2008 WLNR 26881077.

187. *Id.*

188. *Id.* ("Weber, who initiated a study upon seeing an increase of more than 1,000 calls for service last year . . . .").

189. *Id.* ("The ordinance, modeled after one in use in Green Bay that has an 86 percent success rate . . . .").

190. *Id.*

191. *Id.*

192. *Id.*

193. MENASHA, WIS., CITY CODE ch. 1, § 1-1-7 (2024); *Id.* at ch. 7, § 11-7-6.

## 6. Reacting to Recent Incidents

Police often sponsored offenses in reaction to recent incidents, especially those that were high profile. These include incidents involving the police, or publicized incidents in the community more generally. This is the local analog, well documented at state and national levels, of criminalization following a sensational event.<sup>194</sup>

In 2014, the police chief in Genoa, Illinois (population around 5,000),<sup>195</sup> sponsored a vicious dog ordinance after a recent biting incident.<sup>196</sup> “As it stands now, the city is authorized to destroy the dog,” the chief said, but “[t]hat was a 1978 code that needs to be changed.”<sup>197</sup> The chief’s proposal changed this to a requirement that the animal be neutered and microchipped, and that it be muzzled when in public.<sup>198</sup> The chief also proposed changes to the sanctions regime: “Right now, the way the ordinance reads, if there’s no specific fine amount listed, it’s a mandatory court appearance . . . . It’s just a matter of cleaning up what was already there.”<sup>199</sup> This ordinance was enacted into law the same year but includes a provision requiring \$1,000,000 in liability insurance when owning a vicious dog, and also greatly limits the circumstances under which the dog can be brought out in public.<sup>200</sup> The sanction for violation of the ordinance is a \$750 fine.<sup>201</sup>

Police in Lafayette, Indiana (population about 70,000),<sup>202</sup> sponsored an ordinance in 2010 that prohibited the possession of

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194. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 132–33 (2002) (describing how some legislative measures are a form of “acting out” which are passed amidst “great public outrage” in the wake of extreme violence).

195. *QuickFacts Genoa City, Illinois*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/genoacityillinois/PST045222> [<https://perma.cc/TY7K-VPG9>] (estimating Genoa’s 2022 population at 5,360).

196. Debbie Behrends, *Genoa Police Chief Proposes Updating Vicious Dog Ordinance*, DAILY CHRON., Jan. 29, 2014, 2014 WLNR 2571557.

197. *Id.*

198. *Id.*

199. *Id.*

200. GENOA, ILL., MUN. CODE tit. 5, ch. 3, § 5-3-6 (2023) (describing circumstances as including only veterinary care, public emergency, or court order).

201. *Id.* at tit. 1, ch. 4, § 1-4-1.

202. *QuickFacts Lafayette City, Indiana*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/lafayettcityindiana,US/>

so-called “spice”—a synthetic marijuana drug.<sup>203</sup> “Law enforcement leaders are pushing government bodies here to adopt ordinances that would prohibit spice from being sold in the community,” wrote a newspaper.<sup>204</sup> “Their concerns are prompted by what officials perceive to be growing popularity of the herbal mixture, particularly among youth.”<sup>205</sup> The specific motivation for the police sponsorship in Lafayette was a number of recent encounters between patrol officers and individuals who were high on the substance.<sup>206</sup> These “troubled” the chief, who said that “[w]e had to use force on one guy.”<sup>207</sup> The ordinance was enacted into law that year, and broadly prohibited the possession and sale of spice-type products.<sup>208</sup> The penalty for violation is confiscation and destruction of the spice.<sup>209</sup>

In 2006, the police chief of Palo Alto, California (population around 70,000),<sup>210</sup> proposed and drafted a law that criminalized the serving of alcohol at gatherings where minors are present.<sup>211</sup> This was prompted by a high-profile case of parents near Stanford hosting a Halloween party where minors were intoxicated, resulting in the parents being charged with state law misdemeanors.<sup>212</sup> The social host ordinance proposed by the chief was enacted the next year, and prohibits the hosting of private

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PST045223 [<https://perma.cc/CWQ3-UVZU>] (estimating Lafayette’s 2022 population at 71,402).

203. *Local Officials Urging Spice Ban*, J. & COURIER, Aug. 18, 2010, at A1, 2010 WLNR 16810872.

204. *Id.*

205. *Id.*

206. *Id.* (“Recent encounters between patrol officers and people who admitted being on spice troubled Lafayette Police Chief Don Roush.”).

207. *Id.*

208. LAFAYETTE, IND., MUN. CODE tit. 11, ch. 11.18, § 11.18.010 (2010).

209. *Id.*

210. *QuickFacts Palo Alto City, California*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/paloaltocitycalifornia/PST045222> [<https://perma.cc/DNB9-XDFF>] (estimating Palo Alto’s 2022 population at 66,010).

211. Kristina Peterson, *Party Parents to Face Charges: Couple Allegedly Allowed Underage Drinking at Home*, PALO ALTO DAILY NEWS, Dec. 16, 2006, 2006 WLNR 21873599.

212. *Id.*

gatherings where those under twenty-one are served alcohol.<sup>213</sup> This is punishable as a misdemeanor offense carrying a possibility of six months incarceration.<sup>214</sup>

## 7. Citizen-Initiated Complaints

Police sponsorship was also motivated at times by the receipt of a large number of citizen complaints to the department. In these situations, after repeated calls for a police response at a given location or regarding a certain type of conduct, police acted as conveyor belts for constituent opinion through offense sponsorship.

Police in Wilson, North Carolina (population around 48,000),<sup>215</sup> sponsored a 2018 ordinance that deems a property a nuisance if it repeatedly violates noise ordinances and thereafter fails to obtain a permit for a gathering.<sup>216</sup> “We have some nuisance places that will pop up in residential settings and those are problems,” said a police captain.<sup>217</sup> “We’ll encounter parties happening at the same house week after week, so the neighbors are complaining because the situation deteriorates their quality of life.”<sup>218</sup> He predicted that the ordinance “will be a pretty good tool for us to curb some of those situations.”<sup>219</sup> This law was enacted without discussion by the legislature and without comment from the public.<sup>220</sup> The ordinance lays out ten different ways in which a party can be classified as a “Nuisance Party,” including loud noise or littering, and imposes a permit

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213. Palo Alto, Cal., Ordinance 4,981, § 1(c) (Dec. 3, 2007) (“[N]o person shall suffer, permit, allow or host a gathering or event at his/her place of residence . . . where persons under the age of twenty-one (21) are present and alcoholic beverages are in the possession of, or are being consumed by, any person under the age of twenty-one (21) years . . .”).

214. PALO ALTO, CAL., MUN. CODE tit. 1, ch. 1.08, § 1.08.010(a) (2002 & Supp. 2023).

215. *QuickFacts Wilson City, North Carolina*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/wilsoncitynorthcarolina,US/PST045223> [<https://perma.cc/9HFK-55EW>] (estimating Wilson’s 2022 population at 47,606).

216. Brie Handgraaf, *Wilson Council Signs Off on Nuisance Party Permit Rules*, WILSON DAILY TIMES, Oct. 20, 2018, 2018 WLNR 32549728.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* (“The council approved the ordinance without discussion and no one from the public spoke on the subject.”).

requirement for future gatherings if a nuisance party has occurred on the property in the last two years.<sup>221</sup> Violations are punishable as either civil offenses or criminal misdemeanor offenses with up to thirty days incarceration.<sup>222</sup>

In 2005, the police chief in Newark, California (population around 45,000),<sup>223</sup> sponsored an ordinance prohibiting scavenging through wastebins.<sup>224</sup> In this case the police appeared to be motivated by citizen complaints they received.<sup>225</sup> The police lieutenant who helped draft the ordinance stated, “We’ve just been inundated with calls, especially the nighttime officers, about people going through other people’s property.”<sup>226</sup> He stated that scavenging had become “a regular business,” and noted that “[The scavengers] have gotten real, real pushy about going up onto people’s property.”<sup>227</sup> The proposal includes a sanction of increasing fines per offense, with repeat offenses punished as misdemeanors.<sup>228</sup> This ordinance was enacted into law the same year, and states, “It is unlawful for any unauthorized person to open, inspect or rummage through any container and/or remove any contents therefrom which contains waste.”<sup>229</sup> The final version includes the sanction scheme of escalating fines and a misdemeanor conviction after three offenses in the same year.<sup>230</sup>

### III. UNDERSTANDING POLICE SPONSORSHIP

Police sponsorship of offenses presents a challenge to a standard view of police as mere enforcers of pre-determined

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221. WILSON, N.C., CODE OF ORDINANCES ch. 25, art. VII, § 25-201 (2018) (giving the definition of a nuisance party).

222. *Id.* §§ 25-204, 25-207 (giving the civil and criminal penalties).

223. *QuickFacts Newark City, California*, U.S. CENSUS BUREAU (2023), <https://www.census.gov/quickfacts/fact/table/newarkcitycalifornia/PST045222> [<https://perma.cc/9HFK-55EW>] (estimating Newark’s 2022 population at 47,312).

224. Linh Tat, *Newark Police May Try to Halt Rummaging*, EAST BAY TIMES (Aug. 17, 2016), <https://www.eastbaytimes.com/2005/10/26/newark-police-may-try-to-halt-rummaging> [<https://perma.cc/U7SC-LCKX>].

225. *Id.* (describing how the police chief’s request was prompted by growing complaints through the years).

226. *Id.*

227. *Id.* (alteration in original).

228. *Id.* (describing how more than three ordinance violations within a 12-month period could upgrade an offense to a misdemeanor).

229. NEWARK, CAL., MUN. CODE tit. 8, ch. 8.10, § 8.10.020 (2005).

230. *Id.* at tit. 1, ch. 1.16, § 1.16.010(D).

laws,<sup>231</sup> but the practice seems less surprising when placed in context. Below, I will explain how two forces work together to help explain the phenomenon of sponsorship: (1) the popularity of the theory of “community policing,” and (2) features of local government that facilitate sponsorship as community policing’s product. Community policing encourages police to be seen (and see themselves) as part of the community and tasked with identifying social problems in need of regulation, while localities’ lack of separation of powers and informal legislative meetings make them especially receptive to this type of police influence.

#### A. COMMUNITY POLICING

First, consider the concept of “community policing.” Policing scholars divide American history into distinct eras: a “political” era in which police were under the direction and patronage of local party bosses (pre-early 1900s), a “professional” or “reform” era in which political independence and neutral enforcement were prized (1930s–1970s), and a “community” era from the 1980s on which sought to re-connect the police to their communities following the separation imposed during the reform era.<sup>232</sup> More recently, one can identify a post-community policing era in which procedural justice and democratic control are prioritized,<sup>233</sup> as well as the rise of abolitionist theories which seek to shrink or eliminate policing.<sup>234</sup> But while academic theories of

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231. See *supra* note 26.

232. George L. Kelling & Mark H. Moore, *The Evolving Strategy of Police*, NAT’L INST. JUST. J.: PERSPS. ON POLICING, No. 4, Nov. 1988, at 1, 2 (“The political era, so named because of the close ties between police and politics, dated from the introduction of police into municipalities during the 1840’s, continued through the Progressive period, and ended during the early 1900’s. The reform era developed in reaction to the political. It took hold during the 1930’s, thrived during the 1950’s and 1960’s, began to erode during the late 1970’s. The reform era now seems to be giving way to an era emphasizing community problem solving.”).

233. Baughman, *supra* note 44, at 71 (“More recently, legitimacy theories have rejected instrumentalist approaches—focusing not on goals of reducing crime or improving police function—but concentrating on community lack of trust in police.”).

234. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1787 (2020) (“Rather than aiming to improve police through better regulation and more resources, reform rooted in an abolitionist horizon aims to contest and then to shrink the role of police, ultimately seeking to transform our political, economic, and social order to achieve broader social provision for

policing may have moved on from “community policing,” this conception of police still holds sway among many actual departments and policymakers.<sup>235</sup>

The results of the present study also confirm that the legacies of community policing are alive and well, since a prominent version of community policing—“problem oriented policing”—explicitly calls for police sponsorship of offenses. This was most fully explicated by Herman Goldstein in 1979.<sup>236</sup> “The first step in problem-oriented policing,” he wrote, “is to move beyond just handling incidents. It calls for recognizing that incidents are often merely overt symptoms of problems. . . . [I]t requires that they take a more in-depth interest in incidents by acquainting themselves with some of the conditions and factors that give rise to them.”<sup>237</sup> Upon identifying a “problem” that is giving rise to incidents, the next question becomes how to solve it. According to Debra Livingston, problem-oriented policing demands that “[p]olice should move beyond handling incidents to carefully identifying substantive problems and developing more effective, customized police responses to these problems.”<sup>238</sup> Significantly, this was not limited to the *way* in which police responded to incidents or interacted with the community—it also included the proposal of new offenses:

Goldstein was one of the first scholars to note that police departments in some communities might need new, tailored criminal statutes (or

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human needs.”); *see also* Jessica M. Eaglin, *To “Defund” the Police*, 73 STAN. L. REV. ONLINE 120, 124–34 (2021) (discussing different versions of abolitionist thought as expressed by the slogan “defund the police”).

235. Perhaps the best example of this consensus in the policy world is the product of President Obama’s Task Force on 21st Century Policing from 2015. *See* DEP’T OF JUST. OFF. OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1–4 (2015). The DOJ’s “Office of Community Oriented Policing Services” assisted with this task force’s work, and the theory of community policing animates the entire document. *See id.* at 41. Of course, it is very hard to summarize the policies of tens of thousands of departments, and it may be that procedural legitimacy is gaining ground as a central theory of policing in practice. For the growth in the popularity of this theory, *see generally* Shawn Fields, *The Procedural Justice Industrial Complex*, 99 IND. L.J. 563, 588–601 (2024) (providing a comprehensive account of community policing’s role in the procedural justice industrial complex).

236. *See* Livingston, *supra* note 68, at 573 (noting that Goldstein’s arguments were first presented in 1979, and later expounded in a book in 1990).

237. HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING 33 (1990).

238. *Livingston, supra* note 68, at 573–74.

some other form of legal authority) to deal with public order problems, because these problems often persisted after courts invalidated disorderly conduct, loitering, and vagrancy statutes, leaving officers with no legal authority to intervene.<sup>239</sup>

Community policing also drew on the “idea of community-police reciprocity,”<sup>240</sup> and as applied to “problem-oriented policing,” this reciprocity expressly called for legislative sponsorship. Thus, Goldstein wrote that he was dismayed that “[i]n the past, police have not had as strong a tradition of initiating proposals for regulations to prevent some of the problems they must handle,” and he lauded the “notable exception” of the Portland Police Bureau in “pressing for” certain regulations aimed at preventing burglaries.<sup>241</sup> He argued that after identifying the “problem,” an option for the police is to propose “increased regulation, through statutes or ordinances, of conditions that contribute to problems.”<sup>242</sup> Other community policing theorists, too, echoed Goldstein’s calls for police involvement in legislating.<sup>243</sup>

Police sponsorship of local offenses, when placed in this context, seems less surprising. Community policing is arguably the dominant theory of policing currently employed by departments, and the problem-oriented component of this theory explicitly recommends offense sponsorship as part of its larger program of problem-solving.

#### B. LOCAL GOVERNMENT: INFORMAL MEETINGS, UNIFIED POWERS

Community policing helps to explain the prevalence of police sponsorship, but so too does the nature of the forum that is receiving the proposals: local governments. A number of features

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239. *Id.* at 575.

240. *Id.* at 575–76 (“[T]he concepts of community and problem-oriented policing are frequently used interchangeably.”).

241. *See* GOLDSTEIN, *supra* note 237, at 127.

242. *Id.* (capitalization omitted); *see also id.* at 128 (“Are the police sufficiently assertive in identifying such conditions and practices and in encouraging communities to choose, through their governing bodies, from among the alternatives they have for dealing with them?”).

243. *See* George Kelling et al., *Police Accountability and Community Policing*, NAT’L INST. OF JUST. J.: PERSPS. ON POLICING, Nov. 1988, at 1, 4 (“A second form of new relationship to the community, but not necessarily exclusive of the first, is for both police and citizens to nominate the problems with which police and citizens will deal, the tactics that each will use to address those problems, and the outcomes that are desired.”).

of localities combine to make them particularly receptive to the type of offense-sponsorship that community policing endorses. These include (1) the informality and openness of legislative sessions, and (2) the lack of robust separation of powers in most local governments.

### 1. Informal and Open Floor Meetings

The most significant facilitator of police sponsorship, I submit, is the openness of local legislative meetings. By this I do not mean openness of attendance, but openness of the floor for discussion. In Congress and state legislatures, only elected members can speak and introduce bills; members of the public and agency heads comment only during committee hearings.<sup>244</sup> In local legislative sessions, though, there is no such restriction. Many of the meeting minutes from the case studies above reveal that department heads such as police chiefs have official speaking roles and regularly participate in council meetings.<sup>245</sup> Videos indicate that some of them sit alongside the council members with other officials.<sup>246</sup> Moreover, the public is almost always given a chance to comment at the end of a meeting.<sup>247</sup> The overall effect is to break down the wall between member and non-member that exists at higher levels of government. When police chiefs are permitted to formally propose legislation, they become more like quasi-legislators in their own right.

Take the panhandling ordinance from Winchester, Virginia: the meeting minutes state that the ordinance was “[p]resented

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244. Compare STANDING RULES OF THE SENATE, S. DOC. NO. 107-1, at 18–19 (2002) (describing opportunities for “Senators” to speak during debate in Rule 19, and noting that the only other official who may speak is a former U.S. President), with H.R. 1, 2023 Gen. Assemb., Reg. Sess., GENERAL OPERATING RULES OF THE HOUSE OF REPRESENTATIVES (Pa. 2023) (noting opportunities for “members” to speak as part of Rule 10).

245. See *supra* Part II.

246. See, e.g., *Meeting Agenda: Village Board of Trustees*, VILL. OF HINSDALE (May 7, 2019), [http://villageofhinsdale.granicus.com/MediaPlayer.php?clip\\_id=201](http://villageofhinsdale.granicus.com/MediaPlayer.php?clip_id=201) [<https://perma.cc/HU7P-TDRA>].

247. JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 11:7 (“There is no *individual* right to notice and opportunity to be heard at meetings of local governmental bodies at which legislative action is to be taken, although the general public *may* have the right to minimal notice and opportunity to submit input at such meetings.” (second emphasis added)).

by John R. Piper, Chief of Police.”<sup>248</sup> Winchester’s City Charter says nothing about meeting procedures, and its Code of Ordinances requires merely that ordinances be presented in writing, reviewed by the City Attorney, and be considered at two meetings before adoption.<sup>249</sup> The code section detailing the powers of the chief of police states that he or she shall be responsible “for the enforcement of the City Ordinances, State Code, and other applicable criminal law.”<sup>250</sup> Thus, there was no explicit legal authority for Piper to propose an ordinance, but the council allowed him to do so nonetheless.

Local legislative meetings, then, are marked by a general lack of formality not observable at higher levels. The barrier between members and non-members is porous, and rules of debate are less stringent.<sup>251</sup> This informality has allowed a social practice to develop by which department heads, especially police chiefs, have the quasi-legislative power to introduce legislation.

## 2. Unified (Not Separate) Powers

Beyond the informality and openness of a local legislative session, there is a second aspect of local government law that makes localities particularly receptive to police sponsorship of offenses: most local governments do not have a clear separation of legislative and executive powers.<sup>252</sup> This is especially true in

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248. *Winchester Common Council in Regular Meeting*, CITY OF WINCHESTER (June 11, 2019), <http://winchesterva.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=1674&Inline=True> [https://perma.cc/KEC7-8JGL].

249. WINCHESTER, VA., CODE OF ORDINANCES ch. 2, art. III, § 2-61 (2020) (providing provisions requiring ordinances be reduced to writing and reviewed by the City Attorney); *id.* § 2-64(a) (providing the requirement that ordinances be considered in at least two meetings before going into effect).

250. *Id.* at ch. 20, art. II, § 20-18 (2011) (providing the general powers and duties of the police chief).

251. MARTINEZ, *supra* note 247, § 11.6 (“A local legislative body is not ordinarily bound to follow rules of procedure which derive neither from statute nor from charter.”); *see also* *Smith v. City of Dubuque*, 376 N.W.2d 602, 605 (Iowa 1985) (holding that the City of Dubuque’s actions were not invalid simply because the City Council violated its own parliamentary rules).

252. *Moreau v. Flanders*, 15 A.3d 565, 579 (R.I. 2011) (“After considering the arguments raised by the parties, we hold that the separation of powers doctrine is a concept foreign to municipal governance.”); *see also* *Citizens for Reform v. Citizens for Open Gov’t, Inc.*, 931 So. 2d 977, 989–90 (Fla. Dist. Ct. App. 2006) (following cases “from other jurisdictions holding that the concept of Constitutional separation of powers simply does not exist at the local government level” and citing law of twelve other states).

council-manager and “weak mayor”—council systems, where the mayor expressly has no executive powers of his or her own, but is also true in many “strong mayor”—council systems.<sup>253</sup> In the words of Richard Briffault,

At the local level there is often a complete blurring of the distinction between executive and legislature. Many localities do not even have a chief executive. They may be governed by a multimember commission or council rather than a single executive. In these settings, lawmaking and administration, and legislation and regulation, are fused.<sup>254</sup>

Defenses of this unified government arrangement vary, but an important move is to emphasize the reduced powers of a locality—that simply less is at stake.<sup>255</sup>

In a governmental system in which the division between executive and legislative powers is broken down, it seems less problematic that a core executive officer such as a police chief would have a role in proposing legislation. Thus, there is no appearance of impropriety when a council allows for a chief to sponsor an offense—the meeting is a group of government officials all working to solve “problems” together.<sup>256</sup> Moreover, institutional

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253. Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 601–02 (2017) (“At the local level, there is a wide variety of executive structures . . . . [F]or the majority of local governments, the executive branch is housed within the legislative branch. Even for local governments with a recognizable chief executive, whether mayoral or otherwise, many such chief executives have quite limited, or even no, formal appointment and removal power over the heads of administrative agencies.”).

254. Richard A. Briffault, *Beyond Congress: The Study of State and Local Legislatures*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 23, 29 (2004); see also Kellen Zale, *Part-Time Government*, 80 OHIO ST. L.J. 987, 1001 (2019) (“[U]nlike at the state and federal levels of government, there is no constitutionally mandated separation of powers at the local level.”); Noah M. Kazis, *Service Provision and the Study of Local Legislatures: A Response to Professor Zale*, 81 OHIO ST. L.J. ONLINE 1, 4 (2020) (“Separation of powers [in local governments] is relatively rare: most local governments use a council-manager form that intermingles legislative and executive functions . . .”).

255. See Davidson, *supra* note 253, at 601 (“Justifications range from the ‘mere’-ness of local governments, to the idea that checks and balances are unnecessary at the local level, to the empirical observation that states have the legal-structural latitude to choose not to separate out executive from judicial and legislative functions in local governments.”); see also Bd. of Cnty. Comm’rs of Cnty. of Bernalillo v. Padilla, 804 P.2d 1097, 1102 (1990) (echoing these arguments).

256. Recent work serves as a defense of local delegations from legislatures to executives as a way of solving the collective action problems of legislatures that lack partisan organization. See David N. Schleicher & Roderick M. Hills,

actors and third-party observers might be less concerned about police involvement in local offense-creation because of the limited power of local governments. Less seems at stake if the government is only empowered to create misdemeanors.<sup>257</sup>

All the above observations help to contextualize what may seem initially to be a surprising phenomenon. When one considers the popularity of problem-oriented policing and its embedded program of proposing new offenses, and when one considers the informality of local legislative meetings and the lack of local separation of powers, these occurrences of police sponsorship make more sense.

#### IV. EVALUATING POLICE SPONSORSHIP

While the primary goal of this Article is to describe and explain the phenomenon of police sponsorship, I will also undertake an evaluation of the practice from the standpoint of liberal democratic political theory. Such a theory expects that a representative legislature will decide the often difficult and controversial normative evaluations that are required before the state can legitimately restrict individual autonomy by prohibiting conduct.<sup>258</sup> While bureaucratic experts may play a valid role in influencing the legislature's deliberation, this influence is unwarranted when the official opines on matters outside his or her expertise, and it is corrupting if the official lacks neutrality. Both concerns can be present in cases of police sponsorship, making the influence police exert over legislatures (and the deference those bodies give to police) pernicious.

In what follows, I will first describe the basic claim that in a liberal democratic polity, it is the legislature that must decide

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Jr., *Local Legislatures and Delegation*, 102 TEX. L. REV. 495 (2024). Schleicher and Hills' argument highlights the democratic bona fides of the executive who is elected on a jurisdiction-wide mandate. They do not consider the specific case of criminal and civil offenses, or the specific role of the police department as an agency. To the extent that one accepts Hills and Schleicher's prescriptions for increased delegations to executives and the agencies they administer, my arguments in the next Part provide reason to make an exception in the case of local offenses that are enforced by the police department.

257. I am aware of no state that permits localities to create felonies. See MARTINEZ, *supra* note 247, § 11:27 (describing express limitations in some jurisdictions).

258. See Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. IRVINE L. REV. 855, 897–905 (2020) (providing this principle as a foundational assumption of liberal theories of government).

what conduct is and is not prohibited. Then, I will explain how bureaucratic experts can legitimately influence this kind of deliberation when they act within certain constraints—especially that they be neutral governmental actors, and that they opine only within the confines of their actual expertise. Finally, I will apply these principles to the case of police sponsorship, noting the risk that police will influence deliberation in a way that violates the constraints of neutrality and expertise.

A. THE IDEAL PREMISE: LEGISLATIVE OFFENSE DEFINITION

Whenever the state creates an offense, it prohibits conduct. In a liberal democratic political community such as ours, this coercive restriction on individual autonomy requires (at a minimum) that this decision be made by a democratically legitimate institution. “Equal political liberty” writes Amy Gutmann, “entails the right of adult members of a society to share as free and equal individuals in making mutually binding decisions about their collective life.”<sup>259</sup> This requirement is normally satisfied by the creation of a representative legislature. “[T]he basic norm of democracy is empowered inclusion of the community of those affected in collective decisions and actions,” write Dario Castiglione and Mark E. Warren, and “[i]n all but directly democratic venues (and even sometimes then), this norm of democratic inclusion is achieved through representation.”<sup>260</sup> Moreover, in a modern, pluralistic society, fundamental disagreement about the proper use of state power should be expected, and it is a majoritarian legislative assembly that can accommodate such diversity. In the words of Jeremy Waldron, “The point of a legislative assembly is to represent the main factions in society, and to make laws in a way that takes their differences seriously rather than in a way that pretends that their differences are not serious or do not exist.”<sup>261</sup>

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259. See Amy Gutmann, *Rawls on the Relationship Between Liberalism and Democracy*, in THE CAMBRIDGE COMPANION TO RAWLS 168, 173 (Samuel Freeman ed., 2003).

260. Dario Castiglione & Mark E. Warren, *Rethinking Democratic Representation: Eight Theoretical Issues and a Postscript*, in THE CONSTRUCTIVIST TURN IN POLITICAL REPRESENTATION 21, 24 (Lisa Disch et al. eds., 2019).

261. JEREMY WALDRON, LAW AND DISAGREEMENT 27 (1999). Such an assembly operates on the principle of majority vote as a matter of fairness, not a matter of correctness. See JEREMY WALDRON, POLITICAL POLITICAL THEORY:

Since the creation of offenses involves using one of the most potent tools of state power even against those who disagree with the conduct's prohibition, theorists rightly hold that offense-definition should be especially grounded in a legislative decision. Markus Dubber calls this the "legislativity" requirement of criminal law,<sup>262</sup> which is reflected in Model Penal Code § 1.05: "No conduct constitutes an offense unless it is a crime or violation *under this Code or another statute of this State.*"<sup>263</sup>

One of the most important doctrinal manifestations of the legislativity requirement is the "void-for-vagueness" doctrine, in which a court will invalidate a statute if it fails to "establish minimal guidelines to govern law enforcement."<sup>264</sup> Criminal laws cannot be written such that they "entrust[] lawmaking to the moment-to-moment judgment of the policeman on his beat,"<sup>265</sup> as such a law "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."<sup>266</sup> The key concept identified as beyond police authority is the resolution of "basic policy matters"—the fundamental decision of what conduct is worthy of regulation by criminal law. In a civil vagueness case, the Supreme Court spoke

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ESSAYS ON INSTITUTIONS 264 (2016) [hereinafter WALDRON, POLITICAL POLITICAL THEORY] ("In democratic theory, the most powerful case that can be made for [Majority Decision] is that it is required as a matter of *fairness* to all those who participate in the social choice. . . . Informally, people may be persuaded that [Majority Decision] is fair because, although they are losers this time around, they may be winners in the next political cycle. . . . Formally, we may defend [Majority Decision] as a way of respecting political participants as equals."); *see also* Jeremy Waldron, *Legislation by Assembly*, 46 LOY. L. REV. 507, 529 (2000) ("[L]aw may properly elicit allegiance only from those that the law respects, and you respect a person not just by taking their interests and views into account, but by taking *them* into account as active intelligences and consciences.").

262. *See* Markus Dirk Dubber, *The Historical Analysis of Criminal Codes*, 18 LAW & HIST. REV. 433, 436 (2000) (defining "legislativity" as necessary for the legitimacy of a criminal code because the origins of the principles and rules of criminal law reside with the people); *see also* Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 331–32 (2002) ("This requirement ensures that conduct can only be criminalized by an elected, representative body.").

263. MODEL PENAL CODE § 1.05(1) (emphasis added).

264. *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

265. *Id.* (quoting *Kolender*, 461 U.S. at 360).

266. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

of the demand that “state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values.”<sup>267</sup> Police have no claim to make such a choice, as this is a choice a community must make for itself—not one that it can have foisted upon it. The Court thus explicitly connected the doctrine of unconstitutional vagueness to “democratic self-governance” recently: “Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people’s ability to oversee the creation of the laws they are expected to abide.”<sup>268</sup>

Similar concerns were raised by dissenters in a case addressing the applicability of the nondelegation doctrine to administrative regulations backed by criminal sanctions.<sup>269</sup> In a dissenting opinion joined by two other Justices, Justice Gorsuch argued that:

To allow the nation’s chief law enforcement officer to write the criminal laws he is charged with enforcing . . . would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.<sup>270</sup>

Legislative criminalization, by contrast, works to make laws restricting liberty “few in number, the product of widespread social consensus, [and] likely to protect minority interests.”<sup>271</sup>

To say that legislatures alone can legitimately determine when conduct is prohibited does not exhaust the inquiry into an offense’s legitimacy, though. *How* the legislature made that decision also matters,<sup>272</sup> and certain influences on legislative deliberation can be understood as legitimacy-depriving (or legitimacy-conferring) in nature. In what follows, we will unpack the ways in which expert officials outside of the legislature can legitimately influence lawmaking despite their apparently non-democratic status.

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267. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984).

268. *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019).

269. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (highlighting where the dissent begins).

270. *Id.* at 2144–45.

271. *Id.* at 2135.

272. For example, no one would dispute that a legislative vote that was openly bought by bribes is illegitimate.

B. THE LEGITIMATE ROLE OF EXPERT OFFICIALS IN  
LEGISLATIVE DELIBERATION

There is a tension between bureaucratic expertise and democracy. “The idea that people ought to have equality of opportunity to contribute to deliberation on matters that affect them,” writes one theorist, “seems to be undermined by the inequalities in knowledge that are necessary for the analysis, regulation and management of social and technological problems.”<sup>273</sup> This tension is not unresolvable, though. Perhaps the most sophisticated attempts to reconcile these two values have been in the field of administrative law. Drawing from the lessons of agency involvement in legislation, I conclude that the democratic legitimacy of bureaucratic influence is predicated on, at a minimum, satisfaction of two conditions: (1) the neutrality of the agency, and (2) the agency’s expertise over the legislative subject matter.

First, we must lay the groundwork for these points by establishing that it is certainly not the case that bureaucratic experts have any claim to influence legislation as a matter of democratic inclusion. Here, the “bureaucratic” component deprives them of that. As political theorists Dario Castiglione and Mark E. Warren explain, “the basic norm of democracy is empowered inclusion of the community of those affected in collective decisions and actions.”<sup>274</sup> But interest groups of officials *internal* to the government are not part of the community that democratic inclusion must include in decision-making to be truly democratic. Rather, they are the targets or recipients of inclusion claims.<sup>275</sup>

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273. ALFRED MOORE, CRITICAL ELITISM: DELIBERATION, DEMOCRACY, AND THE PROBLEM OF EXPERTISE 10 (2017).

274. Castiglione & Warren, *supra* note 260, at 24.

275. This is never explicitly stated in the literature on democratic inclusion, I think, because it is presumed. Consider Archon Fung’s discussion of the “principle of affected interests”—“the most basic of democratic intuitions . . . that individuals should be able to influence decisions that affect them.” Archon Fung, *The Principle of Affected Interests: An Interpretation and Defense*, in REPRESENTATION: ELECTIONS AND BEYOND 236, 237 (Jack H. Nagel & Rogers M. Smith eds., 2013). In defending the principle, Fung argues that “we should interpret the principle as applying not only to legislatures but also to administrative agencies . . .” *Id.* Thus, official governmental entities are targets of the principle of affected interest but are not affected interests themselves. *See also* ROBERT DAHL, AFTER THE REVOLUTION? AUTHORITY IN A GOOD SOCIETY 49 (rev. ed. 1990) (defending “The Principle of Affected Interests,” which says that “everyone who is affected by the decisions of a government should have the right to

Such interests and actors may have a legitimate role in influencing legislation, but their claim to involvement and influence flows not from democratic inclusion, but from something else.

Again, the best answers for what constitutes this “something else” have been developed by theorists studying federal administrative agencies. A full discussion of the legitimacy of the “administrative state” is far beyond the scope of this Article, though, and I aim only to emphasize two features of administrative agencies that are thought to be at least *necessary* (but not sufficient) conditions to legitimize their influence over legislatures. Consider as foundational Jerry Mashaw’s argument that administrative law is legitimate because its “reason-giving” features facilitate both the aggregative and deliberative aspects of democracy.<sup>276</sup> Focusing on the latter, more significant aspect,<sup>277</sup> he writes that “legitimacy flows from a capacity to give public-regarding reasons that all might accept,” and that procedural constraints imposed by the Federal Administrative Procedure Act (APA) help to implement this requirement.<sup>278</sup> Embedded within this claim of legitimation through the APA are, I argue, at least two sub-requirements: neutrality and expertise.

### 1. Neutrality

Regarding neutrality, a federal agency must act in such a way that its legislative proposals will take a larger view of the public interest than the narrow goals of the agency’s components. Deliberative theorist Mark Seidenfeld cautions that the legitimizing feature of agency deliberation is undermined if

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participate *in that government*,” as “very likely the best general principle of inclusion that you are likely to find” (emphasis added)).

276. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY 163–73 (2018).

277. See Mark E. Warren, *A Problem-Based Approach to Democratic Theory*, 111 AM. POL. SCI. REV. 39, 40 (2017) (“[The deliberative model] is ‘now arguably the most productive research paradigm within democratic theory.’”).

278. MASHAW, *supra* note 276, at 168; see also Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1542, 1542 n.153 (1992) (“Administrators at least operate within a set of legal rules (administrative law) that keep them within their jurisdiction, require them to operate with a modicum of explanation and participation of the affected interests, police them for consistency, and protect them from the importuning of congressmen and others who would like to carry logrolling into the administrative process.” (quoting Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 99 (1985))).

agencies pursue regulators' "private interests" such as "power, prestige, convenience, and security."<sup>279</sup> "[O]fficials' self-interest also creates incentives for them to augment their regulatory authority," he writes, and therefore both Congress and the courts should push back against attempts to increase their power and jurisdiction.<sup>280</sup>

When proposing legislation, this tendency is counteracted by the diffusion of roles across the agency.<sup>281</sup> Agencies usually combine features of executive law enforcement, legislative rule-making, and also adjudication.<sup>282</sup> To the extent that an agency has police-like enforcement or investigative officials working for it, these officials are but part of a larger ecosystem of institutions within the agency aimed at a certain regulatory goal. For example, the Occupational Safety and Health Administration (OSHA) has a police-like arm of investigators called Compliance Safety and Health Officers who inspect workplaces, question employers and employees, and issue citations for violating OSHA rules.<sup>283</sup> But OSHA is also composed of Administrative Law Judges who adjudicate alleged violations impartially,<sup>284</sup> and also a Directorate of Standards and Guidance which proposes new regulations.<sup>285</sup> When an agency *qua* agency proposes a new statute to

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279. Seidenfeld, *supra* note 278, at 1563 n.253 (citing ANTHONY DOWNS, *INSIDE BUREAUCRACY* 84–85 (1967)).

280. *Id.* at 1564–65.

281. See Anthony O'Rourke et al., *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1393 (2021) (discussing the difficulty of transforming police agencies due to the diffusion of authority).

282. Linda D. Jellum, "Which Is to Be Master," *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 857 n.120 (2009).

283. See 29 C.F.R. § 1903.3(a) (2023) ("Compliance Safety and Health Officers of the Department of Labor are authorized to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; to inspect and investigate during regular working hours . . . all pertinent conditions . . . ; to question privately any employer . . . or employee; and to review records . . . which are directly related to the purpose of the inspection.").

284. See *id.* § 2200.67 ("It shall be the duty of the Judge to conduct a fair and impartial hearing, to assure that the facts are fully elicited, to adjudicate all issues and avoid delay.").

285. *Directorate of Standards and Guidance - Directory of Offices & Staff*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/contactus/byoffice/dsg> [<https://perma.cc/JD94-YXMH>]; see 29 C.F.R. § 1910.1(a) (2023) (authorizing OSHA to promulgate standards).

a legislature, such as those federal proposals coordinated through the Executive Office of the President,<sup>286</sup> the partisanship of the police-like component is mollified by the countervailing culture and disposition of the quasi-legislative and quasi-judicial components. High-level proposals from cabinet secretaries and agency heads are unlikely to be viewed by decision-making leaders as proposals coming from power-hungry investigators or enforcers. Such proposals take a broader view.

## 2. Expertise

The reason-giving that legitimates a federal agency's proposals must also be grounded in subject matter expertise. "[Agencies'] internal structure also encourages deliberative decisionmaking aimed at furthering public rather than private values," argues Seidenfeld, as "[a]t the core of almost every agency is a professional staff, chosen for its knowledge rather than for its political views or affiliations."<sup>287</sup> While expertise may not occupy the central place in contemporary thinking about administrative law that it once did,<sup>288</sup> that is probably because expertise is now simply assumed. Expertise alone may not legitimate agency influence, then, but it can be seen as a necessary condition. "While agency decisional legitimacy depends on more than expertise," Mashaw writes, "the expectation that agencies will act on the basis of knowledge is a core feature of acceptable administrative action."<sup>289</sup> Expertise is the Supreme Court's

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286. See Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 455–56 (2017) (introducing the process for agencies to propose legislation through the Executive Office of the President's Office of Management and Budget).

287. Seidenfeld, *supra* note 278, at 1554.

288. See Barry Sullivan & Christine Kexel Chabot, *The Science of Administrative Change*, 52 CONN. L. REV. 1, 41 (2020) ("While many scholars have found fault with expertise as a justification for delegations of power to administrative agencies in recent decades, the Justices have largely continued to demand that administrative change reflect expert judgment and the consideration of relevant scientific, technological, or economic evidence."). For a discussion of the intellectual history of the expertise rationale in the context of other rationales created by scholars, see Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2487 (2017) ("The common approach, in other words, attempts to ensure that the institutions of the administrative state do not display too much of any one value. Expertise, legalism, democracy, and political accountability — for each of my theorists, all these have their claims, but none can be allowed exclusive sway.").

289. MASHAW, *supra* note 276, at 106.

preferred justification for the involvement of administrative agencies in federal lawmaking.<sup>290</sup> In a recent plurality opinion regarding agency interpretive deference, Justice Kagan summarized this rationale: “Agencies (unlike courts) have ‘unique expertise,’ often of a scientific or technical nature, relevant to applying a regulation ‘to complex or changing circumstances.’”<sup>291</sup>

Expertise-based defenses of agency deference can be applied to support agency involvement in the legislative process. There is a formal process through which federal agencies may draft and propose legislation to Congress by coordinating their proposals through the Executive Office of the President.<sup>292</sup> In his empirical study of various actors’ views of an agency’s role in legislation, Jarrod Shobe reported, “Nearly all respondents emphasized that agencies have much more subject-matter expertise than congressional staff, and because of this, Congress is unable to draft legislation that is both detailed and effective without significant agency input.”<sup>293</sup> Agencies also influence legislation on the basis of expertise through the process of “technical drafting assistance,” which is not coordinated through the White House.<sup>294</sup>

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290. See Sullivan & Chabot, *supra* note 288, at 60 (“The Court’s application of the arbitrary and capricious standard of review has long assumed a baseline of deference to agency exercise of expert discretion in cases where the agency’s reasoned analysis reveals that such discretion has been exercised.”).

291. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (plurality opinion) (quoting *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 151 (1991)) (addressing and declining to overturn *Seminole Rock* deference); see also Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1286 (2008) (“Administrative agencies’ superior experience and expertise in particular regulatory fields offers a second popular justification for *Chevron* deference.”).

292. See Shobe, *supra* note 286, at 455–56 (describing the process agencies follow to propose federal legislation).

293. *Id.* at 456. This “[a]gency expertise allows agencies to control much of the legislative dialogue with Congress and important portions of the resulting legislative text.” *Id.* Shobe also reported that “[r]espondents generally said that this agency review is deep and substantive because agencies have superior subject-matter expertise.” *Id.* at 477.

294. See Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1377 (2017) (“In the shadows, agencies provide confidential ‘technical drafting assistance’ on legislation that originates with congressional staffers. This technical drafting assistance provides Congress with agency expertise on the subject matter, which helps Congress avoid considering legislation that would unnecessarily disrupt the current statutory scheme.”); see also Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 104 (2015) (“The functional reasons why both [members of Congress] and the

### C. THE DISANALOGY: POLICE OFFICIALS AS ADMINISTRATIVE AGENCIES

Having explained what I claim to be two necessary conditions for the legitimation of a bureaucratic interest group's influence over legislative deliberation—neutrality and expertise—the stage is set to assess police offense sponsorship using these criteria. Overall, I will argue that police sponsorship can create a risk of skewing deliberation illegitimately, depending on the nature of the claim that the police are making. Deference accorded to police officials in some cases is therefore unwarranted, and is effectively an abdication of the legislative duty.<sup>295</sup> Any analogy to federal administrative agencies,<sup>296</sup> then, falls apart in many cases of sponsorship. First, I will explain how police officials usually fail the test of neutrality. They are structurally partisan as they are enforcers representing one “side” in an adversarial system, and sociological work has demonstrated that a unique culture reinforces that partisanship.<sup>297</sup> Second, police officials usually fail the test of expertise. Offense sponsorship

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executive find executive branch authorship valuable are not surprising. First, members of the executive branch have considerable expertise in the subject areas they cover . . .”).

295. Scholars have paid great attention to the phenomenon of an excessive judicial deference to police on this basis. See Anna Lvovsky, *Rethinking Police Expertise*, 131 YALE L.J. 475, 486 (2021) (noting that judicial deference to police has received “extensive criticism” for its potential unconstitutionality and impracticality). Many of these observations seem equally applicable to legislative deference. Consider Lvovsky’s description of the former: “[S]uch deference echoes a longstanding intuition about the role of relative competency in governance: that the technology of government perfects itself, in essence, by entrusting public functions to those most knowledgeable and skilled in their performance.” *Id.* Judges defer, she argues, not only because of the perception of police officers’ “greater insight and experience,” but also because of their “impartiality.” *Id.* at 493–94.

296. When Maria Ponomarenko, citing Kenneth Culp Davis, writes that police departments are “[l]ike any other agency,” she is not making the analogy that I work to undermine in the following Section. See Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 2, 5 (2019) (citing KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 80 (1969)) (“Policing agencies do not—and may not—use rules in the same way [as federal agencies]. The police are not authorized to regulate the public through rules. When scholars argue in favor of police rulemaking, the sorts of rules they have in mind are rules that tell officers what they can and cannot do in enforcing the law. They are, in short, rules that policing agencies use to regulate *themselves*.” (footnotes omitted)).

297. See *infra* Part IV.C.1.

involves a multifaceted set of claims relating to the conduct that the offense seeks to prohibit, but police officers at most possess expert knowledge about empirical “conduct observation,” not normative “conduct evaluation.”<sup>298</sup> In sum, many instances of offense sponsorship create a risk of illegitimate legislative deference to police.

### 1. Lack of Neutrality

Legislatures presented with a police-sponsored offense are likely to be impressed by the source of the proposal as neutral or disinterested—perhaps like the federal agencies described above. But police are not neutral in their incentives or outlook.

#### *a. Structural Partisanship*

First, police are *partisan*. By this I do not mean that they owe allegiance to a specific political party, but rather that the criminal justice system has assigned them a role that is adversarial and which contemplates eventual litigation—litigation in which they are decidedly on one side of the “v.”<sup>299</sup> This is best described by the famous statement by Justice Jackson that “zealous officers” will not often “grasp” the purpose of constraints on their own power, as they are “engaged in the often competitive enterprise of ferreting out crime.”<sup>300</sup> The key word here is “competitive.” Officers, and the chiefs they work for, play an adversarial role in criminal law.<sup>301</sup> They investigate offenses and serve as witnesses *for the government*.<sup>302</sup> Speaking of the close relationship between police and the criminal defendant’s arch-adversary—the prosecutor—Daniel Richman writes, “[O]ne ought not underestimate the unifying influence of a shared commitment to ‘getting the bad guys,’ hardened by the adversarial process, [and] nurtured by mutual respect and need.”<sup>303</sup> Police

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298. See *infra* Part IV.C.2.

299. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 751 (2003) (describing the work of police officers as an extension of that of prosecutors).

300. *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

301. See Richman, *supra* note 299, at 751.

302. See *id.* (“[L]aw enforcement agencies . . . are primarily responsible for case selection and choice of investigative tactics.”).

303. *Id.* at 792 (footnote omitted) (citing Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 949–50 (1999)).

encounters with civilians on the street are therefore fraught with the potential of arrest and prosecution.<sup>304</sup> American police do not serve primarily as neutral truth seekers<sup>305</sup> as they would in countries (like some in Europe) with inquisitorial systems.<sup>306</sup> Powerful evidence for this is the authorization of police to lie to citizens,<sup>307</sup> and the recognition by the Supreme Court that even when they are acting in their non-criminal “community caretaking” capacity, the evidence police discover is often admissible.<sup>308</sup>

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304. See Anna Lvovsky, *The Two Lives of Police Professionalism* 28 (unpublished manuscript) (on file with Author) (discussing how the traits of police officers permeate into police encounters with civilians, including initiating unnecessary encounters and more easily perceiving guilt).

305. But see William J. Stuntz, Comment, *Inequality and Adversarial Criminal Procedure*, 164 J. INST. & THEORETICAL ECON. 47, 48 (2008) (“American police are more inquisitorial than adversarial: police forces are government-controlled investigative agencies whose job is to ascertain the truth and gather evidence for trial – often for both sides.”). Stuntz cites to *Brady v. Maryland* for the proposition that police gather evidence for both sides. *Id.* at 48 n.1; see also *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the prosecution’s suppression of evidence favorable to the defendant violated the Due Process Clause of the Fourteenth Amendment). But a duty to disclose exculpatory evidence that one happens to find while searching for incriminating evidence does not convert police into truth-seekers working for both sides. Moreover, the fact that police are “government-controlled” says little, since they are generally autonomous (as he states earlier in the piece), and with respect to litigation, they are controlled by prosecutors, who are surely adversarial.

306. For example, in France, police investigations are supervised by magistrates, although direct hands-on supervision is not common in practice. See Jacqueline Hodgson, *The Police, the Prosecutor and the Juge D’instruction: Judicial Supervision in France, Theory and Practice*, 41 BRIT. J. CRIMINOLOGY 342, 343 (2001) (“As magistrats, the procureur and juge d’instruction exercise a judicial role in the pre-trial supervision of investigations—even though the procureur is also responsible for the prosecution of offences.”). For a debate about the nature of continental investigative practices, see generally John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 YALE L.J. 1549 (1978); Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977).

307. See Julia Simon-Kerr, *Public Trust and Police Deception*, 11 NE. U. L. REV. 624, 634–35 (2019) (describing the “Reid technique,” an interrogation technique that recommends using “lies to help elicit confessions”).

308. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 405–07 (2006) (noting evidence admissible when confronted with ongoing violence); *Cady v. Dombrowski*, 413 U.S. 433, 449–50 (1973) (noting evidence admissible when aiding disabled vehicle after accident). But see *Caniglia v. Strom*, 593 U.S. 194, 199 (2021) (refusing to extend the *Cady* “community caretaking” exception to

With respect to high-level officials, even if they are not so concerned about conviction in an individual case, they are nevertheless motivated to demonstrate evidence of their effectiveness through increased arrest and citation numbers.<sup>309</sup>

Recall the example of OSHA from above, where legislative, executive, and judicial powers are combined, and where an agency's view is coordinated through its head and then through Office of Management and Budget.<sup>310</sup> When a police chief sponsors an offense, this is analogous to one entity in OSHA—the Chief Compliance Safety and Health Officer—going directly to Congress and proposing a new statute giving OSHA more power. The partisanship of the police-like component is passed, unfiltered, to the legislative body.

#### *b. Culture*

Beyond structural partisanship, there is a second reason to think that police are not the disinterested, neutral actors one might think of when thinking of an administrative agency: police culture. Sociologists have identified cultural traits among police that are inimical to healthy deliberation in a democratic institution.<sup>311</sup> These include an alienation from the public and a resistance to legal restraints and oversight.<sup>312</sup> Such traits, if they are as prevalent as the sociologists claim, distinguish police from administrative agencies, and suggest that they should have far less a role in proposing legislation.

Recent work by Anna Lvovsky has synthesized the voluminous literature on police culture and organizational

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homes). For a larger discussion of the doctrine pre-*Caniglia*, see generally Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261 (1998).

309. See Stuntz, *supra* note 1, at 538 n.133 (“[A]rrests, not convictions, are the most obvious objective measure of police performance, because arrests are within police control, while convictions are not.”). Jenny Carroll cautions against viewing police motivations regarding arrest rates as disconnected from the larger system. Jenny E. Carroll, *Safety, Crisis, and Criminal Law*, 52 ARIZ. ST. L.J. 769, 791 (2020).

310. See *supra* notes 283–86 and accompanying text.

311. See Lvovsky, *supra* note 304, at 44–46 (explaining how organizational shifts to professionalism in police agencies and their ideological understanding of their role create resistance to external opinions regarding procedures and potential reform).

312. See *id.* at 38, 44–46 (describing police agency cultural traits of alienation from the community and resistance to external influence).

psychology.<sup>313</sup> She claims that some of these traits are the unintended consequences of the move towards increased police professionalism that began in the mid-twentieth century.<sup>314</sup> A few of Lvovsky's observations are especially relevant for our purposes here.

First, sociologists describe a deep alienation of police from their communities.<sup>315</sup> Citing Jerome Skolnick's landmark study of the "working personality" of police officers, Lvovsky notes:

The typical police officer . . . is deeply suspicious, constantly on the lookout for "symbolic assailants" who, by their dress or attitudes, project a threat of violence—a judgment often triggered by any displays of unconventional behavior. He is extraordinarily jealous of his authority, eager to assert dominance in the face of skepticism and disrespect. Not least, the archetypical policeman is fiercely loyal to and protective of his fellow officers, who not only support him against threats in the field but also alone appreciate his burdens.<sup>316</sup>

One might summarize police alienation as a self-conception of being both separate from and above members of the general public, resulting in an expectation of deference and also an insular group loyalty.<sup>317</sup>

Police culture also resists oversight and legal constraints. Resistance to oversight stems from the false claim of expertise discussed above: "[T]he professionalized mindset presumes that 'ordinary citizens' simply cannot 'understand . . . and therefore should not question police activities.'"<sup>318</sup> This results in a chafing at legal constraints imposed externally by courts or legislatures, which "strike police officers as not just naïve but profoundly harmful."<sup>319</sup> Instead, officers expect to be afforded discretion,

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313. *Id.* at 3 (demonstrating the various sources *Lvovsky* used in her analysis).

314. *Id.* at 16.

315. *Id.* at 28.

316. *Id.* (footnotes omitted) (citing JEROME J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 42–57 (3d ed. 1994)).

317. *See id.* at 34 ("Critics have long observed that police-civilian encounters reflect an obsessive fixation on deference, a 'desire to maintain respect and . . . exert authority over others' that often sours into anger and hostility if unrequited." (quoting Robert P. McNamara, *The Socialization of the Police*, in *POLICE AND POLICING* 1, 10 (Dennis Jay Kenney & Robert P. McNamara eds., 2d ed. 1999))).

318. *Id.* at 45 (alteration in original) (quoting Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 630).

319. *Id.* at 47.

which he or she guards with “characteristic jealousy . . . as both a core component and core reward of his [or her] rarefied status.”<sup>320</sup>

These traits make the influence of police over legislation especially problematic—especially legislation that involves criminal punishment and the authorization of state-sanctioned violence in enforcement. While no interest group should be expected to be wholly altruistic, enlightened, and open-minded,<sup>321</sup> the traits identified above seem to be an unusually toxic brew. Healthy deliberation presumes some basic measure of concern for the larger community,<sup>322</sup> equal footing of voices,<sup>323</sup> and an anticipatory respect for the eventual outcome, even when one disagrees with it.<sup>324</sup>

## 2. Lack of Expertise

Police sponsorship can illegitimately skew legislative deliberation in a second way: the legislature may uncritically view police as experts in the subject matter of offense creation and drafting. As was said above, expert knowledge is a necessary condition for the legitimacy of expert influence over legislation, and most think that this condition is satisfied when federal

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320. *Id.* at 48.

321. Deliberative democratic theory need not assume this. See Brenner M. Fissell, *Rightsizing Local Legislatures*, 2023 UTAH L. REV. 393, 425 n.162 (describing “impartialist” vs. “non-impartialist” schools of deliberative theorists).

322. This flows from the principle of “reciprocity,” elaborated on by deliberative theorists Amy Gutmann and Dennis Thompson. See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 53 (1996) (“Because the results of democratic deliberations are mutually binding, citizens should aspire to a kind of political reasoning that is mutually justifiable. . . . [E]ven in the face of what we call deliberative disagreement, reciprocity calls on citizens to continue to seek fair terms of cooperation among equals.”).

323. See JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* 43 (2009) (“In addition [to equal share in voting], one might hope that there is some equality in each person’s opportunity to determine the views that are given equal consideration.”); see also *id.* at 34 (identifying “equal consideration” as one of five conditions of deliberation and defining it as “[t]he extent to which arguments offered by all participants are considered on the merits regardless of which participants offer them”).

324. Guttman and Thompson call this “accommodation.” See GUTMANN & THOMPSON, *supra* note 322, at 80 (“The principles of accommodation provide the standards for regulating those practices. They suggest how citizens who, after deliberation, still fundamentally disagree about an issue should treat one another with regard to that and related issues—even when their deliberations result in legislation that favors one side of the dispute.”).

agencies propose statutes to Congress.<sup>325</sup> Police do not similarly deserve deference as experts on offense creation—at least not in many cases.<sup>326</sup> Sponsorship includes multiple components: the identification of a social problem as worthy of response by the creation of a new civil or criminal offense, the drafting of the text of the offense, and the proposal of the offense draft to the local legislature.<sup>327</sup> Each of these steps involves different competencies, some of which the police possess, and many of which the police do not. The most significant distinction I will draw is between the descriptive observation of conduct, and the normative evaluation of conduct. Police may legitimately claim expert knowledge over the former, but not the latter.

*a. The Problem Identification Phase: Conduct Observation and Conduct Evaluation*

First, we should consider perhaps the most significant component of sponsorship: the identification of a social problem. This initial phase really involves multiple distinct sub-phases, though, and each involves different competencies. Identifying a social problem usually involves a descriptive judgment that something is happening in the community (this is simply the collecting of factual observations), but also a normative judgment that what is observed is harmful.

Regarding the descriptive observation of community events and interactions, we should concede that police are especially competent. They are “experts” in the sense that they are more fully aware of these facts than average civilians, and this is for multiple reasons. The police respond to complaints—thus they are fed a form of information by the public—and are privileged insiders in government, with access to non-public data and

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325. See *supra* notes 287–94 and accompanying text (introducing expertise as a necessary feature for legitimate bureaucratic influence over legislation).

326. Some have argued that the traditional conception of expertise employed here is inapposite when thinking about criminal justice. *E.g.*, Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2783, 2786 (2022) (arguing that traditional conceptions “understate the inherent politicization of expertise,” and advocating for expanded conceptions which include “expertise rooted in the lived experience of laypeople and those directly affected by the system”). Levin’s reframing of democratic viewpoints as “expert,” as well as his emphasis on the political underpinnings of even traditional expertise, are similar to the claim advanced here—that most policy decisions in criminal law are normative.

327. See *supra* Part II (illustrating sponsorship through case studies).

statistics.<sup>328</sup> Police departments also usually employ more people than other municipal departments,<sup>329</sup> and their patrol function causes them to regularly observe that which lay people will not.<sup>330</sup> As information gathering *conduct observers*, then, police have an advantage over the public and even the legislature.

Sponsorship initiation takes information that is gathered, though, and it evaluates the phenomena as socially harmful.<sup>331</sup>

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328. Michael D. Maltz, *Bridging Gaps in Police Crime Data*, BUREAU OF JUST. STAT. 3 (Sept. 1999), <https://bjs.ojp.gov/content/pub/pdf/bgpcd.pdf> [<https://perma.cc/32EM-EF3Q>].

329. This is true if public school employees are not considered part of a traditional municipal department. See Adam Grundy, *Education, Hospitals, Police Protection Are Largest Government Employment Categories*, U.S. CENSUS BUREAU (Oct. 7, 2020), <https://www.census.gov/library/stories/2020/10/2019-annual-survey-of-public-employment-and-payroll-is-out.html> [<https://perma.cc/84VE-P9D6>] (displaying the proportion of state and municipal employees by function).

330. See Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2073 (2017) (“[E]xperienced officers acquire some unique insights into crime, [which] . . . are a matter of factual interpretation: contextualizing subtle clues to infer criminal activity from seemingly innocuous behavior.”).

331. This Article uses the term “social harm” as an admittedly vague category of policy goals that a political community might seek to address through the prohibition of conduct. This avoids invoking the more precise philosophical categories that theorists use when evaluating the requirements for legitimate *criminalization*, such as “wrongfulness” and the “public” nature of the conduct, because the sponsorship discussed here includes both civil and criminal offenses. See R.A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 952–53 (2005) (“To say that one who creates an unjustified risk of harm does wrong is not yet to say that her conduct should be criminalized. To show that it should even in principle be criminalized, we would need to show that it is: (1) a matter that should concern the law at all, rather than being a purely private matter to be dealt with by those involved; and (2) that it should be a matter for the criminal law, rather than for the civil law (as a dispute between the endangerer and the endangered) or for a regulatory regime applying its own, non-criminal rules and penalties. This would involve showing that the conduct in question is not just (potentially) harmful, but wrong, and that the wrong is a ‘public’ wrong that merits recognition and condemnation by the polity . . .” (footnotes omitted)). This is also why I do not invoke theories of punishment in determining the competency of police as conduct evaluators. In any event, were one to isolate one’s analysis of sponsorship to the class of criminal offenses, one would conclude that the problems identified here are compounded—not mitigated. Criminalization adds a component of community censure beyond the hard treatment of the sanction. See Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400–01 (1965). Thus, the justificatory burden is even higher (and the moral evaluation even more controversial), and thus the police official finds

This is inherently normative in nature. It is the step in political life during which policy goals or ends are determined, as opposed to the means to achieve them. To identify certain conduct (or omissions) as damaging to the community requires moral judgment, and while much conduct will be unambiguously viewed as harmful, in other cases this will be highly controversial. The police chief and the average person will likely agree that vehicle collisions are harmful, but what about the acceptable noise level for social gatherings in a campus-adjacent neighborhood? Here, police have no special competence: they are not experts in *conduct evaluation*.<sup>332</sup>

This is not because police officers are especially bad at ethical reasoning, or that legislators are especially good at it, but because ethical reasoning and the moral evaluation of conduct is not a task that lends itself to specialized professionals.<sup>333</sup> This

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herself in an even more tenuous position than in the case of civil offense sponsorship.

332. Indeed, the normative evaluation of conduct or omissions is likely to be more controversial for localities than for states, since localities are not tasked with addressing serious felony-level societal harms. These are the type of harms that are more likely to be covered by overlapping consensuses. “An ‘overlapping consensus’ refers to an agreement on certain norms among people from different moral, religious, or cultural backgrounds, even if the individuals disagree with each other about the reasons for endorsing such norms.” Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 108 (2007).

333. In ethical theory, this claim is called the “asymmetry thesis”—that “morality differs from other domains of inquiry. . . insofar as deference is problematic in the moral domain.” Karen Jones & François Schroeter, *Moral Expertise*, in THE ROUTLEDGE HANDBOOK OF METAETHICS 459, 459 (Tristram McPherson & David Plunkett eds., 2018) (identifying the asymmetry thesis before critiquing it). I do not attempt here to resolve the substantial philosophical debate about this point, and instead rely on the thesis’s defenses among moral philosophers.

[E]ven if we can have justified moral beliefs about *our own* moral decisions, there is still a question of whether we could form such beliefs about others’ decisions, and, of significance for this volume, whether we could *expertly* advise others regarding their moral decisions. The prominent—perhaps dominant—answer of philosophers has been *no*. . . . C. D. Broad argued that moral philosophers have no “special information” about ethics that is not available to everyone else, and so “it is no part of the professional business of moral philosophers to tell people what they ought or ought not to do . . .”

Jamie Carlin Watson & Laura K. Guidry-Grimes, *Introduction* to MORAL EXPERTISE: NEW ESSAYS FROM THEORETICAL AND CLINICAL BIOETHICS 1, 3 (Jamie

stage of offense initiation is simply not expertise-apt.<sup>334</sup> This is especially true with respect to evaluation that conduct should be criminalized. Consider this assessment by Douglas Husak:

[T]he most basic question to be answered by a theory of criminalization is: *For what conduct may the state subject persons to punishment?* . . .

This inquiry plunges us directly into one of the deepest quagmires in the history of political and legal philosophy: the justification of state punishment. . . . Disagreement among philosophers is profound, is radical, and takes place at the deepest level of moral intuition.<sup>335</sup>

The controversiality of normative conduct evaluation remains, albeit to a lesser extent, when the conduct is being prohibited and sanctioned by a civil offense.<sup>336</sup> There can be no

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Carlin Watson & Laura K. Guidry-Grimes eds., 2018) (quoting C.D. BROAD, *ETHICS AND THE HISTORY OF PHILOSOPHY* 244 (1952)); *see also* Alvin I. Goldman, *Expertise*, 37 *TOPOI* 3, 7 (2018) (“Many writers express doubts that deference to moral expertise is a plausible, sensible, or legitimate maneuver.”).

334. Consider Bernard Harcourt’s critique of the “systems-analytic” method that gained currency in the twentieth century as attempts at “scientific, objective, and neutral tools” of public policy decision-making. Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 *J. LEGAL STUD.* 419, 419–21 (2018). Systems analysis “identified a particular problem to address within a particular social sphere—or what was called a system—and defined the system’s objectives. With those objectives in mind, the decision maker would then set the proper criteria to evaluate promising policy alternatives.” *Id.* at 424. As Harcourt demonstrates, though, at every step of the process there are fundamentally normative or political choices being made as to the scope of the system, its objectives or problems, and the available solutions. *Id.* at 433. Defenders of police expertise at the problem identification stage commit an error similar to this “systems fallacy” identified by Harcourt: “choice of scope is never neutral, objective, or scientific but inherently normative and has deep political implications that are masked precisely by the purported scientific nature of the method.” *Id.*

335. DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 82 (2008).

336. When an offense is civil, the effects of state power exercised against the individual are lessened, but not eliminated, and therefore much of the controversiality will remain.

When offenses are fully decriminalized—reclassified as civil with no possibility of arrest, incarceration, or criminal stigma—defendants do indeed face lesser formal punishments. But much of decriminalization is only partial, leaving uncounseled defendants unprotected against the significant punitive effects of decriminalized offenses. And in fact, even where offenses have been fully decriminalized and reclassified as civil, the consequences of being labeled an ‘offender’ do not disappear, and defendants may be further punished in informal and unauthorized ways due to the sloppy, punitive nature of the misdemeanor system more generally.

Natapoff, *supra* note 22, at 1078.

“expertise” regarding what conduct is socially harmful—at least not once one moves beyond the stage of observing factual phenomena and one begins assessing them normatively.<sup>337</sup>

Once one recognizes all this, problem-oriented policing appears rather naïve—or at least far narrower in its applicability than one might initially think. Only in areas of conduct that are universally held to be socially harmful may police safely identify it as a problem, and this category is not a large one.<sup>338</sup>

*b. The Regulatory Response Phase*

Sponsorship of offenses is also more than a moral evaluation, though: it is a determination that a legal response is appropriate, and that the form such a response should take is the creation of a new civil or criminal offense. Sponsorship takes a “problem” and purports to devise a solution. However, like with conduct evaluation, this determination is mostly a normative one that is not amenable to expert reasoning—and especially not by the police.<sup>339</sup>

Consider the first aspect of this process: the decision to respond to socially harmful conduct through the instrument of law. This is not a trivial or uncontroversial decision, and it may be made for many reasons. There are many bad things that people do to each other, or that happen to them in the world, that a

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337. Thus, the most significant issue regarding moral expertise for our purposes is not whether the phenomenon exists or not—an issue debated by the moral philosophers cited above—but whether reliance on deference to such expertise in the face of widespread moral disagreement is politically illegitimate. This critique, then, is ultimately grounded in a commitment to political liberalism that disclaims appeals to moral truths as bases for political actions. See Sharon Street, *Constructivism About Reasons*, in 3 OXFORD STUDIES IN METAETHICS 207, 212 (Russ Shafer-Landau ed., 2008) (“[Liberal theory] offers no account of the truth of judgments about justice . . . but rather limits itself to proposing an account of the reasonableness of these judgments.”). For an analysis of political liberalism and its incompatibility with authoritative moral truths in politics, see generally John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

338. Again, the core categories of antisocial conduct—say, murder, rape, arson, theft—will be state-level felonies. Conduct addressed by local governments is often less clearly a public wrong, and thus the moral evaluation is more controversial. See Fissell, *supra* note 43, at 860–67 (describing types of conduct criminalized by local misdemeanors).

339. See Lvovsky, *supra* note 330, at 2073 (“[C]ourts must recognize that the police’s professional knowledge, seen even in its best light, is poorly suited to the task of filling gaps in penal statutes.”).

political community does not believe to be either an appropriate or worthy subject of legal regulation. The reasons for restraint might be because of resource constraints and competing priorities, a thought that non-coercive private solutions are better suited to addressing the problem, or due to weighty countervailing interests such as individual privacy or autonomy. For example, most would probably agree that the divorce of parents of young children produces a variety of harms that affect the wider community.<sup>340</sup> Nevertheless, the law has steadily gotten out of the business of keeping marriages together against the wishes of the spouses, and now nearly all states permit “no-fault” divorces.<sup>341</sup> The point is that a choice to regulate (or not) is a normative choice that cannot be made on the basis of expert knowledge. Thus, Anna Lvovsky insists that “questions of *policy*” involving whether conduct is “sufficiently inimical to the public welfare to demand state intervention” are not matters on which any police expertise can be brought to bear: “Those decisions involve a complex weighing of interests surrounding the use of state power: the elimination of undesirable behaviors, on the one hand, against the expenditure of state resources and intrusion on individual rights, on the other.”<sup>342</sup> “[T]he police’s experience,” she writes, “hardly prepares them for the legislature’s task of weighing public interests.”<sup>343</sup>

Even after finishing the hard normative work of deciding in favor of a legal response, though, the legislator must then decide what that response looks like. This is also inescapably normative

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340. See, e.g., Hyun Sik Kim, *Consequences of Parental Divorce for Child Development*, 76 AM. SOCIO. REV. 487, 487 (2011) (“A majority of studies in the literature on divorce find adverse effects of parental divorce on children’s development.” (footnote omitted)).

341. See NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 212, 224 (2000) (describing the government’s eased marriage and divorce requirements coexisting with a continued societal respect for marriage).

342. Lvovsky, *supra* note 330, at 2073. Her arguments are made in the specific context of a criticism of a number of judicial decisions permitting vague statutes to stand because of an expectation of police expertise in enforcement. See *id.* at 2043–44 (noting decisions upholding vague statutes on the basis of police expertise as a sufficient check). The Supreme Court opinions reviewed earlier should make clear that these lower court decisions are hopelessly wrong, and Lvovsky’s work ably explains why. See *generally id.* (arguing the judicial presumption developed too broadly and poses constitutional concerns).

343. *Id.* at 2074–75 (“[Deferring to police on matters of what conduct should be punished] imports a factual judgment about police competence into a structural debate about democratic governance.”).

for the most part, and thus outside the realm of any expertise the police may have. The creation of offenses that prohibit (or compel) conduct is the most severe form of state regulation.<sup>344</sup> Thus, before a political community turns to the creation of offenses, it should consider a multitude of alternatives,<sup>345</sup> such as taxes, tort remedies, and state-funded publicity campaigns.<sup>346</sup> For example, even if all agree that public camping by the unhoused deserves a legal response, it is far less clear that this response should take the form of an offense sanctioning the camper. Countervailing concerns might include a recognition of the person's need for a space to live,<sup>347</sup> as well as the futility of

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344. Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 234 (2004) ("The criminal law is different and must be evaluated by a higher standard of justification because it burdens interests not implicated when other modes of social control are employed."). See generally Nils Jareborg, *Criminalisation as Last Resort* (Ultima Ratio), 2 OHIO ST. J. CRIM. L. 521, 527–30 (2005) (discussing six legitimate arguments relevant to criminalization decisions). With respect to the prohibitory effect of an offense, this is also true for civil offenses. See Husak, *supra*, at 214–15 (indicating that distinctions between criminal and non-criminal offenses may be difficult to draw in applying the last resort principle).

345. JOEL FEINBERG, HARM TO OTHERS 22 (1984) ("For every criminal prohibition designed to prevent some social evil, there is a range of alternative techniques for achieving, at somewhat less drastic cost, the same purpose."). Feinberg's example is smoking: one could prohibit it, but one could also tax it. See *id.* at 23–25.

346. See AP SIMESTER & ANDREAS VON HIRSCH, CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION 193–95 (2011) (suggesting regulatory alternatives to criminalization when they would be sufficiently effective). The last of these illustrates an important larger point—that the political community can respond to social harms with positive incentives as well as negative ones. On this distinction, see generally Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341 (2013). Modern theorists of prison abolition argue along these lines when they claim that criminality can be reduced more successfully by reinvesting in communities than by incarcerating offenders. Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 269 (2023) ("The abolitionist policy playbook is therefore devoted to addressing what abolitionists see as the societal ills that lead people to harm one another. Some of these measures would require financial investments in education, housing, health care, and the like.").

347. See *Johnson v. City of Grants Pass*, 50 F.4th 787, 807 (9th Cir. 2022) ("*Martin* held the Cruel and Unusual Punishment Clause 'prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.' A local government cannot avoid this ruling by issuing civil citations that, later, become criminal offenses."

imposing a monetary penalty on a judgment-proof person. A reasonable legislature might therefore conclude that creating an offense is either unjust or simply not worth it. Such weighing of tradeoffs is fundamentally normative and political, and outside the realm of expertise, and accordingly outside the purview of, police competency.

*c. The Drafting Phase*

The last step in police sponsorship—just before the chief proposes the offense to the legislature—is the drafting phase. Having observed conduct, evaluated it as socially harmful, determined that a legal response was justified and that the legal response should take the form of a new offense, he or she must write that offense. Unlike these previous steps, which involve normative judgments that are not expertise-apt, offense drafting is indeed amenable to technical expertise. It involves consideration of the twin goals of providing notice to civilians but also guidance to adjudicators,<sup>348</sup> with the expectation that an offense will be amenable to precise element analysis.<sup>349</sup> This endeavor has occupied a primary place in the minds of criminal law scholars for generations,<sup>350</sup> and Robinson, Cahill, and Mohammad

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(quoting *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir. 2019))), *amended and superseded on denial of reh'g en banc*, 72 F.4th 868 (9th Cir. 2023), and *cert. granted*, 144 S. Ct. 679 (2024).

348. See Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 3–4 (2000) (describing two functions of a criminal code to be (1) the “rule articulation function,” and (2) the “adjudication function.”). The rule articulation function requires criminal code to “define and announce the conduct that is prohibited (or required) by the criminal law.” *Id.* at 3. The adjudication function “decide[s] whether the violation merits criminal liability and, if so, how much.” *Id.*

349. See generally Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983) (arguing the importance of clear elements in criminal statutes to allow the “element analysis” approach of the Model Penal Code).

350. Code reform, and the re-drafting of the offenses contained in codes, occupied much of the energy of criminal law intellectuals in the mid-twentieth century, and culminated in the Model Penal Code. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323–24 (2007) (summarizing the extensive, decades-long process that led to the Model Penal Code). Robinson and Dubber describe a grim status quo from which the American Law Institute began its work: “A typical American criminal code at the time was less a code and more a collection of ad hoc statutory enactments, each enactment triggered by a crime or a crime problem that gained public interest for a time.” *Id.* at 323.

conclude their study of American criminal codes with the following observation: “If nothing else, our study reveals that the creation and maintenance of a sound code demands two things: *expertise* and *vigilance*. A team of criminal-law specialists was needed to draft the Model Penal Code, and even that code, in our view, is not flawless.”<sup>351</sup>

Good offense drafting requires expertise, but the police do not have it.<sup>352</sup> Police drafting, as non-specialist drafting, compounds problems that necessitated the work of the Model Penal Code reformers.<sup>353</sup> Police training in law or in the interpretation of statutes, if it takes place at all, is limited.<sup>354</sup> While lay legislators may also lack expertise in this area, they should rely on consultation with city attorneys, and not the police, to remedy this.<sup>355</sup>

#### D. THE ANALOGY: POLICE AS MILITARY OFFICIALS

While the previous Section worked to establish that comparing the police with administrative agencies results in a disanalogy (due to the absence of neutrality and expertise),<sup>356</sup> in what follows we will briefly consider how another institution far more analogous to that of police provides relevant lessons: the military. The military, like the police, is authorized to use violent force with legal justification—an authorization that gives rise to

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351. Robinson et al., *supra* note 348, at 63.

352. See Lvovsky, *supra* note 295, at 495–97 (explaining the arguments that police lack expertise generally).

353. See *supra* note 350 and accompanying text (illustrating the ad hoc nature of criminal statutes before the Model Penal Code was drafted and enacted across states).

354. Yuri R. Linetsky, *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. REV. 1, 3 (2018) (“An empirical analysis of training requirements in state police academies shows that the number of hours devoted to legal topics is, on average, surprisingly low: about 12% of total academy hours.”).

355. This Article’s study of police involvement in legislation identified many instances in which police were directed to work with city attorneys in drafting offenses. See, e.g., Joseph D. Bryant, *Kincaid Says City Attorney Working to Regulate Arcades*, BIRMINGHAM NEWS, Nov. 8, 2006, at 3, 2006 WLNR 19470589 (“City Attorney Tamara Johnson said her office has met with the district attorney, police chief and the city’s finance department to draft the ordinance that will be ready for a vote by end of the year.”). This practice is preferable to offenses written solely by the police.

356. See *supra* Part IV.C (challenging the analogy of police as an administrative agency).

a danger, and a concomitant safeguard.<sup>357</sup> This safeguard from civilian-military relations theory—a very strong norm of *civilian control* over the military—implies that police should be similarly subordinate to local officials.<sup>358</sup> Put another way, police are within a particular class of executive branch actors whose unique features make their influence over policymaking especially concerning.

### 1. Civilian Control over the Military

In American political and legal thought, the principle of civilian supremacy over military affairs is universally accepted.<sup>359</sup> It is interesting not so much in whether or not it is true or valuable, which it obviously is, but in its implications for institutional design.<sup>360</sup> The eminent historian and theorist of military affairs, Richard Kohn, describes the issue in this way:

For democracy, civilian control—that is, control of the military by civilian officials elected by the people—is fundamental. Civilian control allows a nation to base its values, institutions, and practices on the popular will rather than on the choices of military leaders, whose outlook by definition focuses on the need for internal order and external security. The military is, by necessity, among the least democratic institutions in human experience; martial customs and procedures clash by nature with individual freedom and civil liberty, the highest values in democratic societies.<sup>361</sup>

Civilian control is, as I said above, “obviously” valuable, then, because without it democracy is conceptually vitiated. If an authoritarian and violence-centered institution determines political outcomes, then there is no longer a political community of free and equal citizens who deliberate together and decide action based on majority will.<sup>362</sup> As Kohn puts it, militarism and

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357. See Trent Steidley & David M. Ramey, *Police Militarization in the United States*, SOCIO. COMPASS, Apr. 2019, at 1, 3 (“The police and military share a theoretically fundamental relation to the *state* and its legitimate monopoly on the use of violence.”).

358. See *infra* Part IV.D.1.

359. See Risa A. Brooks, *Integrating the Civil–Military Relations Subfield*, 22 ANN. REV. POL. SCI. 379, 385–88 (2019) (surveying the scholarship focused on civilian control of the military).

360. See *id.*

361. Richard H. Kohn, *How Democracies Control the Military*, 8 J. DEMOCRACY 140, 141 (1997).

362. This claim imports a number of components of democratic theory. See, e.g., Nadia Urbinati & Mark E. Warren, *The Concept of Representation in*

democracy are “inherently adversarial.”<sup>363</sup> One might add that the violence-centeredness of the military adds a threat not only to citizens’ democratic lives, but to their physical wellbeing.<sup>364</sup>

But what does the principle of civilian control demand? Certainly the decision of *whether* a military force may be used is one that must be exclusively reserved to civilian authorities,<sup>365</sup> but what should the military’s role be in leading up to that formal decision? In a mature democracy such as the United States, where a military coup is somewhat unthinkable, it is these questions of *influence* that most preoccupy theorists. As Samuel Huntington wrote in 1957, “the problem in the modern state is not armed revolt but the relation of the [military] expert to the politician.”<sup>366</sup>

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*Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 395 (2008) (“[D]emocratic autonomy or simply self-government . . . enables us to avoid reduction of ‘democracy’ to any particular kind of institution or decision-making mechanism.”); WALDRON, POLITICAL POLITICAL THEORY, *supra* note 261, at 258–68 (discussing four justifications for the use of majority decisions in political theory); James Burk, *Theories of Democratic Civil-Military Relations*, 29 ARMED FORCES & SOC’Y 7, 8 (2002) (“This is a problem because military values and practice are not the same as liberal democratic values and practice and so it is not always clear how their conflicting demands can be met. What values are at risk? One is that reliance on coercion as opposed to reason and persuasion should be minimized as a method for resolving conflicts. Another is that sovereignty of and respect for people who live within a democratic jurisdiction should be institutionalized.” (footnote omitted)).

363. Kohn, *supra* note 361, at 142; *see also* Peter D. Feaver, *Civil-Military Relations*, 2 ANN. REV. POL. SCI. 211, 220 (1999) (“The spheres are necessarily analytically distinct—a distinction that derives from democratic theory and the agency inherent in political community . . .”).

364. Feaver claims that this gives rise to what he calls the “civil-military problematique . . . : because we fear others we create an institution of violence to protect us, but then we fear the very institution we created for protection.” Peter D. Feaver, *The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control*, 23 ARMED FORCES & SOC’Y 149, 150 (1996).

365. This basic protection is constitutionalized in the War Powers Clause. *See* U.S. CONST. art. I, § 8, cl. 11 (“Congress shall have Power . . . [t]o declare War.”).

366. SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 20 (1957); *see also* Burk, *supra* 362, at 8 (“To be sure, democratic values include the idea that those with authority ought to be the elected representatives of the people, and that these representatives ought to exercise ultimate authority over the uniformed military elite. But this issue should not be at the center of a normative theory about civil-military relations in mature democracies. In these countries, there is no realistic expectation that the military will intervene to overthrow civilian rule or even that the military will influence a civilian government to pursue a more aggressive military policy than it otherwise would.”).

A line of civil-military relations thought coalesces on the following proposition: the military may advise civilian authorities, but ought not transform into advocates on issues of policy. In the words of two early commentators, “The principle of civilian control requires not only that the military not be policymakers but also that they not be seen (nor see themselves) as a separate constituency whose interests are to be considered in policy debates.”<sup>367</sup> While they have a legitimate role in consulting and advising,<sup>368</sup> military officials must respect that this is limited.<sup>369</sup> Feaver gives concrete examples:

[T]he military may be best able to identify the threat and the appropriate responses to that threat for a given level of risk, but only the civilian can set the level of acceptable risk for society. The military can say we need such and such level of armaments to have a certain probability of being able to defend successfully against our enemies, but only the civilian can say what probability of success society is willing to pay for. The military can describe in some detail the nature of the threat posed by a particular enemy, but only the civilian can decide whether to feel threatened and so how or even whether to respond. The military quantifies the risk, the civilian judges it.<sup>370</sup>

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367. Kenneth W. Kemp & Charles Hudlin, *Civil Supremacy over the Military: Its Nature and Limits*, 19 ARMED FORCES & SOC’Y 7, 9 (1992).

368. Kohn, *supra* note 361, at 149 (“Military advice and cooperation are crucial to the quality and effectiveness of policy . . . . The public expects that ‘the experts’ will be involved and that their judgment, depending on the situation and personalities, will receive proper weight.”).

369. Ashton Baldwin Carter et al., *To Support and Defend: Principles of Civilian Control and Best Practices of Civil-Military Relations*, WAR ON ROCKS (Sept. 6, 2022), <https://warontherocks.com/2022/09/to-support-and-defend-principles-of-civilian-control-and-best-practices-of-civil-military-relations> [<https://perma.cc/3CFG-V6Q6>] (joining other former Secretaries of Defense and Chairmen of the Joint Chiefs of Staff to argue that while “[t]he military has an obligation to assist civilian leaders in both the executive and legislative branches in the development of wise and ethical directives . . . civilians have the right to be wrong, meaning they have the right to insist on a policy or direction that proves, in hindsight, to have been a mistake”).

370. Feaver, *supra* note 364, at 154; *see also* YEHUDA BEN MEIR, CIVIL-MILITARY RELATIONS IN ISRAEL 25 (1995) (identifying three roles of the military in political affairs which align with civilian supremacy—advisory, representative, and executive implementation—and two roles that may challenge civilian supremacy—advocacy of policies and substantive attempts to overturn policy). One might also see this as an implication of Samuel Huntington’s influential theory of “objective civilian control.” *See* HUNTINGTON, *supra* note 366, at 84 (“Objective civilian control . . . render[s] [the military] politically sterile and neutral.”).

In other words, normative and political judgments are presumptively left to the civilians, with military officials limited to the provision of technical advice.<sup>371</sup> Having no independent constituency or interests of their own, military officials ought not seek to influence political judgments as an advocate, and should instead merely elucidate and inform the decision-makers. One scholar calls this the “unequal dialogue.”<sup>372</sup>

## 2. The Police-Military Analogy and Civilian Control

There are important lessons one can glean from all this for evaluating police sponsorship of offenses. The similarities between the police and the military have long been recognized. Most centrally, they share a feature that very few other institutions share: they are authorized to use violence.<sup>373</sup> This has been ably described by scholars of police militarization, who have also noted how police in recent decades have grown even more similar along other axes of comparison.<sup>374</sup> In the words of Trent Steidley and David Ramey:

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371. Scholars in the field are of course not unanimous in their endorsement of such a division of labor, and I identify here only the predominant view. For a competing view, see the work of Peter Roman and David Tarr, who view military officials as having a more legitimate role in determining policy goals. See Peter J. Roman & David W. Tarr, *Military Professionalism and Policymaking: Is There a Civil-Military Gap at the Top? If so, Does It Matter?*, in *SOLDIERS AND CIVILIANS* 403 (Peter D. Feaver & Richard H. Kohn eds., 2001).

372. ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* 208 (2002).

373. Arguably they are the *only* institutions permitted to do so by law, if one conceives of corrections institutions as subsets of police.

374. See, e.g., Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 23 *MICH. J. RACE & L.* 105, 110 (2018) (“Police militarization is usually viewed through the lens of four parameters: material, cultural, organizational, and operational. The material lens focuses on the types of weapons, uniform, technology, and equipment police use. The cultural lens examines the type of language, style, appearance, and values used by the police. The organizational lens views the way the police choose to organize themselves in terms of hierarchy, special units, and forces. Finally, the operational lens looks at the patterns of police action in the various areas of its operation.” (footnote omitted)); Fanna Gamal, Note, *The Racial Politics of Protection: A Critical Race Examination of Police Militarization*, 104 *CALIF. L. REV.* 979, 1004 (2016) (“Military-style tactics are also becoming conventional police strategies.”); Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 *POLICING* 501, 503 (2007) (“After all, the foundation of military and police power is the same—the state sanctioned capacity to use physical force to accomplish their respective objectives . . .”).

The police and military share a theoretically fundamental relation to the *state* and its legitimate monopoly on the use of violence. Both the military and the police are state actors exercising the state's license for violence to implement social control. While the military embodies the state's use of violence against actors outside the state, the police embody the state's capacity to use violence to pacify populations and produce social control within its borders.<sup>375</sup>

The same feature that police share with the military, then, is the same feature of the military that gave rise to the strong norm of civilian control.

By implication, police too ought to be subject to a strong norm of civilian control and its corollary: a presumption against advocacy in politics. The dangers of military advocacy in relation to military policy are very similar to those presented by police sponsorship of offenses. Indeed, given that police violence is deployed internally (unlike the military), they may be even more pressing. In a liberal democracy, an institution authorized to use violence against its citizens ought not be permitted to advocate for an expansion of its own authority.<sup>376</sup> Its authority to act must be determined externally, untainted by the self-interest of the armed group. One might be concerned about OSHA expanding its authority by lobbying Congress, but such concern pales in comparison to the Joint Chiefs of Staff lobbying for a new war. The point is that police look more like the latter than the former, and we should extend our civilian control norms accordingly.<sup>377</sup>

## CONCLUSION

Police are writing laws that they enforce. In doing so, they are expanding the footprint of the mass misdemeanor system while also increasing the scope of their own power. There is a

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375. Steidley & Ramey, *supra* note 357, at 2 (citations omitted); Sam Bieler, *Police Militarization in the USA: The State of the Field*, 39 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 586, 586 (2016) ("Only two arms of the American state, the police and the military, are generally permitted to use force to execute policy and only the police can use this power domestically.").

376. In a forthcoming article, I expound further on the normative underpinnings of civilian control and their implication for the military's role in political influence. Brenner M. Fissell, *The Military's Constitutional Role*, 103 N.C. L. REV. (forthcoming 2025).

377. Many scholars call for community control of the police, although I have not discovered any who ground their claims in an analogy to the military. *See, e.g.,* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 792 (2021) (arguing to "open up the terrain of reform to ideas and communities that are too often excluded from the conversation").

great risk that this influence on legislative deliberation will be self-interested and non-expert, but that local legislatures will uncritically defer nonetheless. To avoid this, these institutions must re-claim their role as lawmakers, and resist the incentives to outsource or delegate the task of defining what conduct is or is not prohibited in their communities—a task that represents the most significant exercise of their power.

The observations made in this Article also suggest that scholars must re-double their efforts to understand the effects of local government institutions on the criminal justice system. Excessive attention on the federal system, with its limited jurisdiction and carceral footprint, has come at the expense of the nearly 40,000 general-purpose localities that govern our daily lives. As Alexandra Natapoff reminds us, “misdemeanor cases are the vehicles through which most Americans experience the criminal justice system.”<sup>378</sup> This Article helps to further show that if one peers below the state level, one can quickly find troubling yet unexamined aspects of institutional relationships.

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378. Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648, 1695 (2019) (reviewing KOHLER-HAUSMANN, *supra* note 25). The DOJ’s Ferguson Report documented well the power of local ordinances, stating that the municipal code of Ferguson “addresses nearly every aspect of civic life for those who live” there. U.S. DEP’T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 7 (2015) [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/6SRY-HZ8L>].

APPENDIX: FULL DATASET OF JOURNALISTIC  
ACCOUNTS

Year	State	Locality	Subject Matter
2022	Washington	Edmonds City	Red flag <sup>379</sup>
2022	Oregon	Astoria	Homelessness <sup>380</sup>
2020	Nebraska	North Platte	Youth vaping <sup>381</sup>
2020	Texas	Willis	Homelessness <sup>382</sup>
2020	California	Santa Cruz	Homelessness <sup>383</sup>
2019	North Carolina	Henderson	Youth curfew <sup>384</sup>
2019	Oklahoma	Oklahoma City	False alarms <sup>385</sup>
2019	Washington	Bremerton	Massage parlors <sup>386</sup>
2019	Illinois	Hinsdale	Dogs <sup>387</sup>
2018	Oklahoma	Oklahoma City	Parking <sup>388</sup>
2018	North Carolina	Fayetteville	Noise <sup>389</sup>

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379. *Edmonds City Council Set to Meet in Committees Tuesday, Followed by Vote on Budget Amendments*, MY EDMONDS NEWS (Feb. 6, 2022), <https://myedmondsnews.com/2022/02/edmonds-city-council-set-to-meet-in-committees-tuesday-followed-by-vote-on-budget-amendments> [<https://perma.cc/ZYG8-QVDZ>].

380. Nicole Bales, *Astoria Looks at Menu of Options to Address Quality of Life Concerns*, ASTORIAN, Feb. 19, 2022, 2022 WLNR 5189429.

381. Von Kampen, *supra* note 14.

382. Ellsworth, *supra* note 84.

383. Jessica A. York, *Santa Cruz Working to Define Homeless, Public Space Rules*, SANTA CRUZ SENTINEL, Feb. 15, 2020, 2020 WLNR 4679215.

384. Charlotte Wray, *Council Tables Downtown Curfew Debate*, HENDERSON DAILY DISPATCH, Aug. 14, 2019, 2019 WLNR 24753105.

385. *Oklahoma City Police Propose Ordinance to Curb False Alarm Calls*, KFOR NEWS, Apr. 9, 2019, 2019 WLNR 11152886.

386. Christian Vosler, *Crackdown on Massage Parlors Eyed*, KITSAP SUN, July 30, 2019, at A2, 2019 WLNR 23248240.

387. Kimberly Fornek, *Dog Attack in Hinsdale Could Lead to Tightening of Dog Control Laws*, DOINGS, May 16, 2019, at 7, 2019 WLNR 15040657.

388. Brian Brus, *Drivers Face Learning Curve with Downtown OKC Street-car*, J. REC., Aug. 21, 2018, 2018 WLNR 26095405.

389. Monica Vendituoli, *City Council Joins with County on Baseball Stadium, Parking Deck Funding*, FAYETTEVILLE OBSERVER, Feb. 6, 2018, 2018 WLNR 3775976.

2017	Idaho	Pullman	ATVs <sup>390</sup>
2017	California	Weed	Animals <sup>391</sup>
2017	Minnesota	Austin	Wildlife feeding <sup>392</sup>
2016	Carbondale	Illinois	Nuisance parties <sup>393</sup>
2016	Indiana	Fort Wayne	Nuisance property <sup>394</sup>
2015	North Carolina	Charlotte	Zones of exclusion <sup>395</sup>
2015	Arizona	Tucson	Large events <sup>396</sup>
2014	Indiana	Terre Haute	Graffiti <sup>397</sup>
2014	Missouri	Kirksville	Drugs <sup>398</sup>
2013	Illinois	Orland Park	Traffic & parking <sup>399</sup>
2013	Pennsylvania	Hazleton	Vendors <sup>400</sup>

390. Taylor Nadauld, *No Decision Made on Whispering Hills Paths Requirement*, MOSCOW-PULLMAN DAILY NEWS, Mar. 1, 2017, 2017 WLNR 6432336.

391. Liz Pyles, *Weed Moves Forward on Medical Cannabis Dispensaries*, MT. SHASTA HERALD, June 21, 2017, at A1, 2017 WLNR 19518233.

392. Mike Stoll, *Proposed Ordinance Would Prohibit Feeding Deer, Geese; Offense Would Result in Petty Misdemeanor*, AUSTIN DAILY HERALD, June 8, 2017, 2017 WLNR 17702475.

393. Bill Lukitsch, *Carbondale City Council, Community Members Discuss Fining Landlords for ‘Chronic Nuisance’ Homes*, DAILY EGYPTIAN (Aug. 31, 2016), <https://dailyegyptian.com/58110/news/city-council-community-members-discuss-fining-landlords-for-chronic-nuisance-homes> [<https://perma.cc/PC8A-6UPF>].

394. *Fort Wayne Police Department Proposes Chronic Problem Property Ordinance to Enhance Public Safety Efforts*, CITY OF FORT WAYNE (Sept. 26, 2016), <https://www.cityoffortwayne.org/latest-news/3116-fort-wayne-police-department-proposes-chronic-problem-property-ordinance-to-enhance-public-safety-efforts.html> [<https://perma.cc/7XLZ-9DC7>].

395. Stephanie Toone, *Charlotte’s Proposed Public Safety Zones Face “Constitutional Hurdles,”* AM. CITY & CNTY., Oct. 16, 2015, 2015 WLNR 31063285.

396. Becky Pallack, *City Backs off Plan to Control Crowds*, ARIZ. DAILY STAR, Mar. 17, 2015, at A, 2015 WLNR 39050510.

397. Arthur Foulkes, *Graffiti Ordinance Closer to Passing*, TRIB. STAR, Apr. 11, 2014, 2014 WLNR 9801122.

398. Taylor Muller, *Pseudo Ephedrine Law on Track*, KIRKSVILLE DAILY EXPRESS, Jan. 7, 2014, at 1, 2014 WLNR 816819.

399. Michael Holtz, *Orland Park Outlines Traffic Regulations for Triangle*, CHI. TRIB., July 25, 2013, at 1, 2013 WLNR 18258950.

400. *City Approves New ‘Quality’ Ordinance*, STANDARD-SPEAKER, July 20, 2013, 2013 WLNR 17720748.

2013	Illinois	St. Charles	Liquor control <sup>401</sup>
2013	California	Lodi	Dogs <sup>402</sup>
2012	North Carolina	Charlotte	Public protests <sup>403</sup>
2012	Montana	Kalispell	Cellphone use while driving <sup>404</sup>
2012	Texas	San Antonio	Tow trucks <sup>405</sup>
2012	Texas	Corpus Christi	Parking <sup>406</sup>
2012	South Carolina	Clemson	Drugs <sup>407</sup>
2012	Florida	Brooksville	Drugs <sup>408</sup>
2011	Kentucky	London	Pawn shops <sup>409</sup>
2011	Illinois	Batavia	Crime-free rentals <sup>410</sup>
2011	Texas	Corpus Christi	Scrap metal <sup>411</sup>
2010	Texas	Cibolo	Sex offenders <sup>412</sup>

401. Stephanie K. Baer, *St. Charles Discusses Late-Night Liquor License Changes*, CHI. TRIB. (Oct. 22, 2013), <https://www.chicagotribune.com/2013/10/22/st-charles-discusses-late-night-liquor-license-changes> [https://perma.cc/H9UN-AMDQ].

402. *Lodi Police Are Working to Draft New Dog Ordinance*, LODI NEWS-SENTINEL, Oct. 4, 2013, 2013 WLNR 24887302.

403. Susan Stabley, *Charlotte City Council to Vote Jan. 23 on Security Rules for Democratic National Convention*, CHARLOTTE BUS. J., Jan. 4, 2012, 2012 WLNR 1630273.

404. Tom Lotshaw, *Council Members Divided over City Cellphone Ban*, DAILY INTER LAKE (Nov. 27, 2012) <https://dailyinterlake.com/news/2012/nov/27/council-members-divided-over-city-cellphone-6> [https://perma.cc/S5XK-7N5S].

405. Vianna Davila, *Rules for Towing Companies Differ, City to City*, MY SAN ANTONIO (Aug. 27, 2012), <https://www.mysanantonio.com/news/local/article/rules-for-towing-companies-differ-city-to-city-3816907.php> [https://perma.cc/N9BE-TPAZ].

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409. Magen McCrerey, *Police Chief to Propose Pawn Shop Ordinance*, SENTINEL ECHO, Nov. 1, 2011, 2011 WLNR 22602316.

410. Susan Sarkauskas, *Looking Again at Crime-Free Housing Law*, CHI. DAILY HERALD, July 6, 2011, at 4, 2011 WLNR 13517276.

411. Steven Alford, *Metal Crooks Targeted*, CORPUS CHRISTI CALLER-TIMES, June 19, 2011, at B001, 2011 WLNR 28540591.

412. David DeKunder, *Cibolo Seeking Water Rights from Old New Braunfels Mill*, SAN ANTONIO EXPRESS-NEWS, Jan. 21, 2010, 2010 WLNR 1351728.

2010	Iowa	Logan	Snow <sup>413</sup>
2008	California	Montebello	Tobacco <sup>414</sup>
2008	Colorado	Denver	Protests <sup>415</sup>
2008	Washington	Spokane	Graffiti <sup>416</sup>
2007	Nevada	Reno	False alarms <sup>417</sup>
2007	Illinois	Elburn	Graffiti <sup>418</sup>
2007	Virginia	James City	Traffic cameras <sup>419</sup>
2007	Missouri	Fairview Heights	Youth curfew <sup>420</sup>
2006	Idaho	Nampa	Dogs <sup>421</sup>
2006	Arizona	Chandler	False alarms <sup>422</sup>
2006	Maine	Lincoln	Drug-free zone <sup>423</sup>

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413. Mary Darling, *Lagoon, Well Project Discussed at Council Meeting*, LOGAN HERALD-OBSERVER & WOODBINE TWINER, Oct. 21, 2014, 2010 WLNR 28167592.

414. Amanda Baumfeld, *Montebello Ponders Tighter Rules on Tobacco Sales to Minors*, SAN GABRIEL VALLEY TRIB. (Dec. 17, 2008), <https://www.sgvtribune.com/2008/12/17/montebello-ponders-tighter-rules-on-tobacco-sales-to-minors> [<https://perma.cc/XW2Q-YDDL>].

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419. Kimball Payne, *Red-Light Cameras Need Green Light*, DAILY PRESS, Apr. 12, 2007, at A1, 2007 WLNR 7021689.

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422. *Chandler May Hike Fines for False Alarms*, ARIZ. REPUBLIC, Nov. 16, 2006, at 4, 2006 WLNR 25189379.

423. Nick Sambides Jr., *Lincoln Panel OKs Safe Zones*, BANGOR DAILY NEWS, Mar. 15, 2006, at B3, 2006 WLNR 4381302; Nick Sambides Jr., *"Safe Zones" Get Tentative Approval*, BANGOR DAILY NEWS, Jan. 10, 2006, at B2, 2006 WLNR 581558.

2006	Oregon	Prairie City	Restricted zones <sup>424</sup>
2005	Arizona	Glendale	Motorized skateboards <sup>425</sup>
2005	Ohio	Columbus	Scrap metal <sup>426</sup>
2005	Ohio	Columbus	Traffic cameras <sup>427</sup>
2004	Minnesota	Hopkins	Alcohol & youth <sup>428</sup>
2004	Indiana	Porter	False alarms <sup>429</sup>
2004	Massachusetts	Sutton	Silly string <sup>430</sup>
2004	Colorado	Denver	Forfeiture <sup>431</sup>
2004	Washington	Pasco	Food vendors <sup>432</sup>
2003	California	Gilroy	Hotels <sup>433</sup>
2003	Ohio	Garfield Heights	Gambling <sup>434</sup>
2002	Texas	Corpus Christi	Towing <sup>435</sup>

424. *Ordinance Would Assist City Police*, BLUE MOUNTAIN EAGLE, Feb. 15, 2006, 2006 WLNR 27203727.

425. *Go-Ped Bans Moving Forward*, ARIZ. REPUBLIC, Nov. 14, 2005, at B1, 2005 WLNR 26888634.

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434. Patrick O'Donnell, *Gambling Operator Pleads No Contest; Garfield Hts. Ponders Tightening Law*, CLEVELAND PLAIN DEALER, Aug. 29, 2003, at B5, 2003 WLNR 15884584.

435. Sara Lee Fernandez, *City Drafting Rules for Wreckers*, CORPUS CHRISTI CALLER-TIMES, Oct. 10, 2002, at B1, 2002 WLNR 16094425.

2002	Kansas	Topeka	ATVs <sup>436</sup>
1997	West Virginia	Huntington	Animal control <sup>437</sup>

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436. *Juror's Snore Prompt Mistrial*, TOPEKA CAP.-J., June 21, 2002, at CC, 2002 WLNR 16329315.

437. *Back in Time*, HERALD-DISPATCH, July 27, 2022, at A3, 2022 WLNR 23569389 (noting that, in 1997, "Sheriff Kim Cecil propose[d] leash law at County Commission meeting").