Criminal Municipal Courts

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Municipal courts are the lowest and least scrutinized echelon of the U.S. criminal system. Largely ignored by judicial theorists, municipal governance scholarship, and criminal jurisprudence alike, these courts operate on the intellectual sidelines; even basic public information about their dockets and operations is scarce. This Article aims to integrate municipal courts into the broader legal discourse, offering the first comprehensive analysis of the enormous municipal court phenomenon. Nationwide, there are over 7,500 such courts in thirty states, and they collectively process over 3.5 million criminal cases every year. Created, funded, and controlled by local municipalities, these courts—sometimes referred to as “summary” or “justice” or “police” courts—are central to cities’ ability to police, maintain public safety, and raise revenue. Over the decades, the U.S. Supreme Court has excused them from some basic criminal procedural constraints: judges need not be attorneys, judges may simultaneously serve as city mayor, proceedings are often summary and not of record, many defendants lack the right to counsel. Conceptually, these are hybrid institutions: stand-alone local courts which are also arms of municipal government operating under reduced procedural constraints as they mete out criminal convictions. As such, they create numerous tensions with modern norms of due process, judicial independence, and other traditional indicia of criminal court integrity.

This Article explores the conceptual complexity of this lowest tier of American criminal justice through a variety of scholarships -- on the judicial function and local government as well as criminal law. This interdisciplinary analysis provides numerous insights. First, municipal courts resist the classic model of courts as neutral, independent guardians of law. They are also intimately related to the ways in which cities express their political autonomy and redistribute wealth, and thus constitute underappreciated engines of local governance. As criminal adjudicators, they threaten the integrity of some foundational features of the criminal process, even as they represent a potential opportunity to render criminal institutions more locally responsive. Finally, their localism and lack of resources have substantively altered the governing jurisprudence and thus reveal an influential dynamic at the bottom of the penal pyramid: low-status cases and institutions exert a gravitational force over law itself. In sum, municipal courts are widely influential, jurisprudentially challenging, and democratically interesting. It is time they took their rightful place in the modern scholarly conversation.

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I. Introduction

Far from the marble halls of the U.S. Supreme Court lurks a judicial animal of a completely different character: the lowly municipal court. Local courts in the United States go by a variety of names, including “municipal,” “town,” “summary,” “justice,” “mayor,” and “police” courts. Created and operated independently by cities and towns, these are courts of limited jurisdiction that hear misdemeanors, local ordinance violations, and sometimes civil claims involving small amounts. A few such courts are large: the Seattle municipal court filed over 10,000 criminal cases last year\(^2\), but many are small—just a room in the local municipal building or police station where the judge might preside once or twice a month. In the aggregate, municipal courts

comprise a substantial percentage of U.S. judicial operations. There are over 7,500 such courts in 30 states scattered across the country; they adjudicate over three and half million criminal cases every year; and they collect tens of millions of dollars for their local jurisdictions. They are central to the authority of cities to police, to maintain public safety, and to raise revenue. And yet they are commonly ignored or underestimated by scholars who study courts, cities, and criminal law.

The local criminal court phenomenon has almost entirely slipped beneath the radar of legal theory, although historians and sociologists have occasionally engaged with them. The vast scholarship theorizing the nature of courts, adjudication, and the judicial role barely mentions them. No leading casebook on municipal governance devotes a section to municipal courts, and most do not discuss them at all. In the past 50 years, there have been a mere handful of substantive law review articles analyzing any aspect of this type of criminal court, even though these courts have been around since before the nation’s founding. At the same time, or perhaps by way of explanation, data on these courts are scant. No centralized authority collects

3 See Part I infra.
5 Frug, Ford & Barron, Local Government Law: Cases and Materials (6th ed.) (no section and no discussion); Briffault & Reynolds, Cases and Materials on State and Local Government Law (no section and no discussion); Baker & Gillette, Local Government Law, Cases and Materials (no section and no discussion); see also Osborn M. Reynolds, Hornbook: Local Government Law, Ch. 24 (Local Controls on Criminal Activity) (discussing municipal ordinances, law enforcement, and defendants’ procedural rights, but not municipal courts).
6 The only contemporary legal scholar to devote focused attention to the local court phenomenon is Ethan Leib. Ethan J. Leib, Localist Statutory Interpretation, 161 U. Pa. L. Rev. 897 (2013); Ethan J. Leib, Local Judges and Local Government, 18 N.Y.U. J. Legis. & Pub. Pol’y 707 (2015). In the first of two articles, Leib proffers a theory of how local courts (including but not limited to municipal courts) engage in the interpretation of local statutes. In the second, Leib interviews 23 town and village court judges in New York in order to explore how local judges view themselves and their roles in local and state government. Wayne Logan is one of few scholars to write about municipal criminal law promulgation by local legislatures, although he does not write about courts. See Wayne A. Logan, The Shadow Criminal Law of Municipal Governance, 62 Ohio St. L.J. 1409, 1436 (2001) (analyzing municipal authority to pass criminal codes and noting, but not exploring, that such codes are enforced by municipal courts); see also Wayne A. Logan & Ronald F. Wright, Mercenary Criminal Justice, 2014 U. Ill. L. Rev. 1175 (documenting the municipal use of criminal fines and fees to raise revenue). A few additional scholars have examined local courts in specific jurisdictions. See Annie Decker, A Theory of Local Common Law, 35 Cardozo L. Rev. 1939, 1957-67 (2014) (describing the array of local courts in New York city and state and locating them against the historical backdrop of British and colonial courts); Welsh & Hamilton, No Justice In Utah’s Justice Courts, 2012 Utah L. Rev. Onlaw 27, 46 (2012) (criticizing Utah’s justice court system); Julia Lamber Mary Lee, City and Town Courts: Mapping Their Dimensions, 67 Ind. L.J. 59 (1991) (describing Indiana’s town and city courts).
comprehensive information about them, how many there are, and the size of their dockets. Some individual states publish such information; many do not.

This inattention might make sense if municipal courts were materially indistinguishable from the lowest tier of state trial courts which also adjudicate low-level crimes. Those state trial courts—typically referred to as “district courts,” “superior courts,” or sometimes “county courts”—are part of integrated state judicial systems, created by the state and managed by a central state authority. Their dockets and operations are, for the most part, a matter of routine public reporting, and as trial courts they receive a modicum of attention. These lower state courts process the majority of misdemeanor cases in the United States, and have been increasingly criticized for their hurried, dehumanizing, and sometimes unconstitutional processing of minor offenses. Municipal courts are sometimes included in, and conceptually subsumed under this more general umbrella of the “lower court.”

But municipal courts exhibit special structural features and political dynamics that distinguish them from lower state courts in significant, and sometimes startling ways. They are created, funded, and occasionally dissolved by city officials who have deep interest in and influence over how their courts operate, especially with respect to the amount of revenue they generate. Sometimes municipal courts report to the state central judicial authority, sometimes they do not. Judges may be appointed by local city councils or by mayors. Sometimes the mayor is the judge. Sometimes the judge is not a lawyer. Prosecutors may be part-time lawyers running their own private practices with strong connections to the judge, to the police, or to city businesses. Sometimes those prosecutors also serve as judges in other cities. Sometimes there is no professional prosecutor and the prosecutorial role is filled by the arresting police officer. In many of these courtrooms, defense counsel are scarce to nonexistent. In other words, these courts routinely lack the usual indicia of impartiality, independence, and due process that conventionally characterize the judiciary and on which criminal law in particular relies for much of its integrity. These courts are often run in informal fashion by interested parties, or by parties

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7 The National Center for State Courts (NCSC), a non-profit organization, collects partial data from most states on their limited jurisdiction courts, but not all courts provide data to the NCSC. Court Statistics Project, Nat’l Ctr. For State Courts, http://www.courtstatistics.org/.
8 ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL at Tbl. 3 (Basic Books, 2018) (documenting state data reporting practices regarding their municipal courts).
9 See Andrew Manuel Crespo, Systemic Facts: Toward Institutional Awareness in Criminal Courts, 129 Harv. L. Rev. 2049, 2052 (2016) (noting “academic tendency to discount the role of trial courts in studies of judicial administration, adjudication, and institutional design”); see also Stephen C. Yeazell, Courting Ignorance: Why We Know So Little About Our Most Important Courts, 143 Daedalus 129 (2014) (describing historical lack of data on state trial courts due to their local origins).
11 Appendix (documenting states where municipal courts do not report to the AOC); see also Yeazell, supra note xx, at 135-136 (describing the history of state court unification during the early 20th century in which most, but not all, states assumed supervision over and funding responsibility for what had been local courts and thereby converted local courts into state district courts).
whose salary and tenure depend on satisfying local political and economic interests.\textsuperscript{13} They perform work closely associated with city officials, law enforcement, and even tax collectors. This is not how we usually conceptualize criminal courts or the process demands of criminal adjudication.

Municipal courts also present a variety of functional challenges, some of which they share with state lower courts, some which flow from their unique structural features. As the 2015 U.S. Department of Justice Ferguson Report revealed, the revenue from municipal courts may supply a substantial percentage of a municipality’s budget.\textsuperscript{14} Because municipal court judges are selected locally, they may have political relationships with local officials, law enforcement, and city elites that influence individual cases, or that fuel inequitable practices. In courts where judges are not attorneys, there may be a little or no legal expertise in the courtroom at all, resulting in illegal or inaccurate outcomes. While many of these functional and due process concerns characterize lower courts more generally, municipal court structures will often magnify them.

This Article offers the first comprehensive description and analysis of the modern criminal municipal court phenomenon in the United States. Because municipal courts have been largely ignored in the legal literature, no previous work has documented how many there are nationwide, the size of their dockets, how they operate, or their aggregate impact on the U.S. criminal process. Part II and the Appendix provide this data as a first cut at an empirical description of the phenomenon. Part II further provides a taxonomy of basic municipal courts features including their informality, their reliance on incarceration to collect fines and fees, and the types of financial and institutional conflicts that plague key legal actors.\textsuperscript{15} The municipal court in Ferguson is an especially troubling example of these challenges, but Ferguson is just one of many possible stories: other municipal courts exhibit the kinds of positive qualities that have kept these courts popular for centuries, including their local political responsiveness and their flexibility to experiment with criminal justice reforms.

Part III maps the unique legal character of modern municipal courts. They have a long constitutional pedigree and special status as local institutions, which partially explain why the Supreme Court has given them special procedural dispensations: lack of jury trials, limited rights to defense counsel, non-attorney judges, unique appellate procedures, and room to engage in a high degree of informality. They are also exempt from the constraints of separation of powers. As a result, their peculiar interbranch relationships—for example, when the judge also happens to be the mayor--have given rise to their own, more permissive doctrine of adjudicatory conflict and judicial neutrality. In these ways, municipal courts test and sometimes alter the regulatory constitutional boundaries that typically constrain and define criminal courts.

\textsuperscript{13} See, e.g., Brucker v. City of Doraville, No. 1:18-CV-02375-RWS, 2019 WL 3017606, at *6 (N.D. Ga. July 9, 2019) ("The more substantial the percentage of revenues, the more reasonable it is to question the impartiality of the judge . . . ."). See also Caperton v. A.T. Massey Coal, 556 U.S. 868, 881-86 (2009) (due process violated when state justice failed to recuse himself from case involving major financial contributor to his election campaign).


\textsuperscript{15} The Appendix contains more detailed data for each of the 30 states that maintain local courts.
These descriptions reveal how city-run courts create various tensions with judicial norms, due process, and other traditional indicia of criminal court legitimacy. Part IV proposes a framework for making sense of these courts and their normative implications. Municipal courts are hybrid governance institutions: they are simultaneously courts and municipal governance entities. Their close relationships to their parent cities can resemble relationships between administrative adjudicators and their parent agencies; more broadly, their structures and practices test the boundaries of the neutral adjudicator model. Collectively, they are a major engine of low-level misdemeanor criminalization, the criminalization of poverty, and local mass incarceration. Although municipal courts have for the most part been left out of these scholarly discourses, they have much to offer conversations around the nature of courts and adjudication, the democratic role of cities, and the spread of criminal law.

This Article focuses on criminal municipal adjudication. Although some city courts also perform civil functions, city courts are primarily criminal institutions both historically and in practice. More fundamentally, it is in the exercise of criminal jurisdiction that their influence and peculiarities are most problematic. Courts are the traditional, primary defense against law enforcement overreach, the bulwark that stands between the vulnerable defendant and the coercive arm of the state. Criminal procedure, so often weakened in municipal court, is one of the legitimating features of modern criminal authority, a primary protection against state coercion, discrimination, and disrespect of the systems’ perennially vulnerable subjects. The criminal-civil line in particular—often blurred in municipal court—is an important regulator: a great deal of doctrine distinguishes between civil penalties and criminal punishment as a way of titrating state power. Accordingly, when municipal courts issue convictions and criminal sentences, they push the legitimating boundaries of criminal court adjudication in the riskiest ways.

Specifically, municipal courts are a problematic species of court. They often operate without the kinds of neutrality, independence, and formality that scholars have long associated with the judicial function. By exploring the theoretical discourse on the nature of that function, the Supreme Court’s recent musings on “judicial character,” and insights from the administrative context, this Article reveals how municipal courts fit uneasily within existing normative judicial frameworks.

Just as importantly, municipal courts are created and run by cities. Although these municipal entities are central to city governance, they have received little attention from the local government literature. Part VI deploys some of that literature to better identify the special local governance and economic functions of municipal courts, and to suggest how they could become

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16 See Edwards supra (describing how low status criminal law was left to post-Revolutionary local courts while commercial civil law was regularized and centralized). But see Amalia D. Kessler, Arbitration and Americanization: The Paternalism of Progressive Procedural Reform, 124 Yale L.J. 2940, 2946 (2015) (noting that early 20th century municipal courts were one of the primary institutional contexts in which Progressives sought to develop the use of civil arbitration).
17 E.g., Antonin Scalia, The Rule of Law as A Law of Rules, 56 U. Chi. L. Rev. 1175, 1180 (1989) (“[Judges’] most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of [the] popular will.”).
a more prominent part of existing conversations around cities, localism, and urban economic development.

Municipal courts are also criminal justice institutions, and this Article considers the role they might play in the newly invigorated debate over criminal justice localism. On the one hand, municipal courts exhibit many localist dangers of parochialism, informality, and opacity that threaten their integrity as independent neutral adjudicators. On the other hand, they are deeply rooted local institutions that offer the possibility of improved local control over, and responsiveness to, the unique criminal justice needs of individual communities. Even as they pose democratic risks, they offer potential democratic benefits. Although they are not currently a meaningful part of the criminal justice debate over localism and democratization, they should be.

This multi-faceted analysis of municipal courts--simultaneously judicial, municipal, and criminal in character--offers several insights. It reveals the complexities of the municipal court phenomenon and brings it within the ambit of longstanding discourses regarding the forms of authority that governance entities do and should exercise. In so doing, it invites a more critical stance towards the convictions produced by those local courts, and asks whether such criminal courts should be held to higher standards of impartiality, accountability, and transparency than they currently are. The Article does not insist on any particular policy solution, although many are implicated by the discussion below. Rather, the aim is to promote a more rigorous conversation about the very lowest echelons of the American criminal process.19

More broadly, municipal courts reveal structural legal compromises that have been made for centuries at the lowest levels of the criminal system. Modern misdemeanor processing is increasingly criticized for its legal flouting and cavalier erosions of many aspects of rule of law.20 But for municipal courts, the phenomenon is more complex than mere lawlessness. Rather, the law governing municipal courts affirmatively accommodates the pettiness of their cases, their local character, and their presumed lack of resources, by ratcheting down traditional due process requirements. Out of respect for these courts’ historical informalism and unique institutional posture, the Supreme Court has affirmatively validated the lack of jury trials, the lack of counsel, the lack of legally trained judges, and the summary quality of proceedings. One might say that municipal courts have been partially exempted from the Warren Court criminal procedure revolution.21 Criminal law is different here: the inferior status of municipal court courts a gravitational pull on the law itself. In this sense, municipal courts resemble other low status institutions such as juvenile courts, immigration proceedings, and family courts where

19 I have attempted to initiate this conversation with respect to misdemeanors more broadly. See NATAPOFF, supra note xx; see also Alexandra Natapoff, Misdemeanors, 85 S. CAL. L. REV. 1313 (2012); Alexandra Natapoff, Aggregation and Urban Misdemeanors, 40 FORDHAM URB. L.J. 1043 (2013) (on the erosion of the individual fault model in misdemeanor processing); Alexandra Natapoff, Gideon Skepticism, 70 WASH. & LEE L. REV. 1049 (2013) (on structural barriers to effective misdemeanor representation); Alexandra Natapoff, Misdemeanor Decriminalization, 68 VAND. L. REV. 1055 (2015) (on the inequitarian effects of decriminalization); Alexandra Natapoff, Gideon’s Servants and the Criminalization of Poverty, 12 OHIO ST. J. CRIM. L. 445 (2015) (on the welfarization of crime around petty offenses); Alexandra Natapoff, The Penal Pyramid, in THE NEW CRIMINAL JUSTICE THINKING 71-92 (Sharon Dolovich & Alexandra Natapoff eds., 2017) ( theorizing the erosion of rule of law at the bottom of the penal pyramid where offenses are pettiest).

20 A criticism that I have often made myself. See supra note xx.

greater informality is officially sanctioned. At the bottom of the penal pyramid, rule of law is thus not merely flouted: it is substantively rewritten.\footnote{See Natapoff, The Penal Pyramid, supra note xx. In practical political terms, that devolution is often cemented by the socio-economic disadvantages of the defendant pool, which is particularly ill-equipped to resist erosions of due process, protective rights, and individual dignity. Id.}

For all these reasons, municipal courts are important to the larger criminal justice governance project. They generate a substantial portion of the U.S. criminal docket and constitute a powerful engine of low-level overcriminalization. They also represent a sizeable fraction of the U.S. judiciary: those 7,500 courts deserve to be brought out of obscurity and into dialogue with the foundational disciplines, not only of criminal law and procedure, but of judicial theory and local government law. Each of these fields offers new insights into this centuries-old penal practice, and each could be enriched by engagement with the municipal court phenomenon. At the same time, this low-level world of criminal processing illuminates the deep workings of the bottom of the penal pyramid, revealing how criminal law sometimes affirmatively rewrites itself in order to accommodate low status cases and institutions.

II. The Modern American Municipal Court

The National Center for State Courts (NCSC) defines municipal court “as a stand-alone trial court of limited jurisdiction that may or may not provide jury trials and that is funded largely by a local unit of government.”\footnote{https://www.ncsc.org/Topics/Special-Jurisdiction/Municipal-Courts/Resource-Guide.aspx; see also Municipal Courts: An Effective Tool for Diverting People with Mental and Substance Use Disorders from the Criminal Justice System, at 2, U.S. Dep’t of Health and Human Services, Substance Abuse and Mental Health Services Administration (2015) (quoting NCSC definition).} Thirty states maintain municipal courts—or comparable “justice courts” or “magistrate courts.”\footnote{See Appendix for details on all 30 states. See also NCSC Methods of Judicial Selection: Limited Jurisdiction Courts, http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm?state=. There are approximately 20,000 cities and 16,000 towns in the U.S. Number of Municipal Governments & Population Distribution, Nat’l League of Cities, https://www.nlc.org/number-of-municipal-governments-population-distribution.} All but three have criminal jurisdiction over local criminal ordinance violations.\footnote{Wisconsin and Indiana municipal ordinances are civil, as are the majority of Tennessee’s. See Appendix & text accompanying notes infra.}

The key characteristic of these courts is that they are “stand-alone.” Every state has an array of trial-level district or county courts which comprise the lowest tier of the integrated state-wide judicial system. Like municipal courts, these trial courts often have limited jurisdiction and preside over misdemeanors, traffic cases, and small civil claims. These trial courts are not stand-alone: they are created and supervised by the state and are part of the state judicial branch.\footnote{Although local governments may be required to pay for them. See U.S. Comm’n on Civil Rights, supra (listing state local courts that self-fund).} By contrast, municipal courts are typically created by, managed by, and located in a particular city or town. They may or may not have any organizational relationship to the state judiciary; their institutional status, as discussed below, is murky. There are over 7,500 such courts nationwide: Colorado has 225; Mississippi has over 300; Kansas has 385. At the high end, New York State
has over 1,200 town and village courts; at the low end, Michigan has four municipal courts. No centralized authority tracks these court dockets so there are no definitive data on their scale, but based on 2015 data contained in the Appendix, I estimate that at least 3.5 million criminal cases are filed in municipal courts every year.\(^{27}\)

A. Municipal Court Characteristics

Municipal courts vary widely from state to state and from city to city. Some are large, well-resourced, relatively formal, and nearly indistinguishable from their state trial-court counterparts. Others, by contrast, seem like throwbacks to an earlier era when criminal justice was meted out informally, off the record, by local lay justices of the peace.

The Appendix to this Article contains the first and only compilation of national data on municipal court characteristics: the number of such courts in each of the 30 states that have them (over 7,500 total), their respective caseloads (at least 3.5 million total), methods of judicial selection (about half elected and half appointed), whether judges must have law degrees (mostly not), maximum penalties for municipal ordinance violations (typically between 30 days and 6 months incarceration), whether municipal courts are unified with their state’s judiciary (about half and half), and whether the state has a two-tier system of de novo appellate review (almost all do). But the aggregate data do not quite capture the unique flavor of individual jurisdictions, or how these various characteristics intersect—sometimes controversially—on the ground. The following descriptions offer a more detailed window into the nuances of municipal court culture.

South Carolina, for example, is a case study in municipal court informality. Its 400 municipal and magistrate courts—collectively referred to as summary courts—are speedy and often lacking in due process. Cases are commonly brought and prosecuted by the arresting police officer, not by attorney prosecutors; judges are not required to have law degrees; and defense counsel is typically lacking even where defendants are constitutionally entitled to representation.\(^{28}\) As a series of critical reports by the NACDL and the ACLU point out, many defendants are thus convicted summarily and jailed with no attorneys present in the courtroom at all. When asked in 2007 about the routine failure to appoint counsel—in clear violation of the Supreme Court’s mandate in *Alabama v. Shelton*\(^{29}\)—the Chief Justice of the South Carolina Supreme Court was unapologetic:

*Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would have the right to counsel probably … by dragooning lawyers out of their law offices to take these cases in every magistrate’s court in South Carolina, and I have simply told my magistrates that we just don’t have the resources to do that. So I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.\(^{30}\)

\(^{27}\) See Appendix (documenting 3,496,409 filings). For 10 states, I was unable to obtain data on municipal court criminal filings, so the actual total is higher.

\(^{28}\) See Boruchowitz et al., Minor Crimes, at 15 (documenting South Carolina’s flouting of the right to counsel).


\(^{30}\) Minor Crimes, at 15 (quoting Chief Justice Jean Hofer Toal).
Summary courts constitute the primary criminal adjudicators in South Carolina. While caseloads are not publicly reported on the state court website, a 2016 records request revealed that South Carolina summary courts process over 200,000 criminal cases every year, representing the majority of criminal cases filed in the state.\(^3\)\(^1\)

By way of contrast, Seattle’s enormous municipal court has undergone a series of reforms in the past decade making it a relatively formal, transparent, high functioning institution. Caseloads and other court data are publicly accessible from a comprehensive website.\(^3\)\(^2\) The court runs numerous specialty and diversion programs. According to the National Center for State Courts, the court maintains one of the best public defense systems of any large urban area.\(^3\)\(^3\)

Since Ferguson, perhaps the most prominent public criticism of municipal and other lower courts is their heavy use of incarceration to raise revenue and extract payment, the so-called “new debtor’s prison.” New Jersey’s municipal courts have been excoriated in this regard. A committee convened by the state Supreme Court expressed “profound[] concern[] with the excessive imposition of financial obligations … [that] ultimately have little to do with the fair administration of justice.”\(^3\)\(^4\) The committee also criticized the courts’ “excessive use of bench warrants and license suspensions as collection mechanisms,” and “the excessive use of discretionary contempt assessments.” In Ohio, a 2013 ACLU report described municipal and mayor’s courts’ financial practices as “illegal” and “draconian.”\(^3\)\(^5\) Courts in Colorado, Georgia, Louisiana, Wisconsin, and Texas, among others, have been criticized in this same vein.\(^3\)\(^6\)

Municipal courts are not the only lower courts that self-fund through fines and fees: some state district courts are funded by local revenues as well.\(^3\)\(^7\) But municipal courts provide some of the

\(^{31}\) Diane DePietropaolo Price, Summary Injustice: A Look at Constitutional Deficiencies in South Carolina’s Summary Courts (NACDL & ACLU, 2016); Alisa Smith et al., Rush to Judgment: How South Carolina’s Summary Courts Fail to Protect Constitutional Rights (NACDL, 2017), 10.


\(^{35}\) The Outskirts of Hope: How Ohio’s Debtors’ Prisons Are Ruining Lives and Costing Communities 5 (ACLU of Ohio, 2013) (documenting how Ohio mayor’s courts routinely incarcerate defendants for failure to pay fines and fees in violation of both federal and Ohio constitutional law).

\(^{36}\) Justice Derailed: A case study of abusive and unconstitutional practices in Colorado city courts, ACLU Colorado (Oct. 2017) (“Municipal courts lack central oversight, are subject to no meaningful data collection or reporting requirements, are minimally regulated by statute and court rules, and have no unified public defender system.”); Bannon et al., Criminal Justice Debt; In for a Penny: The Rise of America’s New Debtors’ Prisons (Washington, D.C.: American Civil Liberties Union, October 2010) (on debtor’s prison practices in Georgia, Louisiana, Michigan, Ohio, and Washington); John Pawasarat and Marilyn Walzak, Cited in Milwaukee: The Cost of Unpaid Municipal Citations (Milwaukee: Justice Initiatives Institute, June 2015); Kendall Taggart & Alex Campbell, People in Texas get thrown behind bars just because they can’t afford their traffic tickets, Buzzfeed, Oct. 7, 2015;

most extreme examples. Missouri municipalities like the one in Ferguson are heavily reliant on their courts for revenue, as are towns in Louisiana, Texas, Georgia, and Oklahoma, which receive 10 percent or more of their budgets from fines and fees. All of these states have municipal courts. By contrast, the average U.S. city collects only two percent of its operating budget from fines and fees.

Municipal reliance on fines and fees is a regressive redistributive policy: by definition it impacts the poor more heavily than the wealthy. It also has racial implications. The U.S. Civil Rights Commission found that “[m]unicipalities that rely heavily on revenue from fines and fees have a higher than average percentage of African American and Latino populations relative to the demographics of the median municipality,” and that in practice, “[m]unicipalities target poor citizens and communities of color for fines and fees.”

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

Conflicts arise even when the mayor is not sitting as judge. Arizona, for example, has 82 city courts which process over one million civil and criminal cases every year, more than half of Arizona’s total judicial docket. City court judges are appointed by mayors and city councils; they do not need to be lawyers. A series of 2017 reports by the Goldwater Institute criticized the politicization of these local courts, pointing out that “city court [] judges [are] completely beholden to the political branch of government: the city council, which not only appoints and retains them, but can fire them at any time if council members determine there is sufficient cause.” As a result, judges may be under pressure to raise revenue or to provide special treatment to city insiders.

38 Nick Sibilla, Nearly 600 Towns Get 10% Of Their Budgets (Or More) From Court Fines, Forbes, Aug 29, 2019.
39 Sibilla, at 3. See also U.S. Comm’n on Civil Rights (median city with population over 5,000 receives less than 1 percent of revenue from fines and fees); Mark Flattten, City Court: Money, Pressure and Politics Make it Tough to Beat the Rap 2 (Goldwater Institute, 2017) (average Arizona city collects 3% of its operating budget from fines and fees).
40 Natapoff, supra note xx (discussing misdemeanor fines and fees as a form of regressive taxation).
41 Targeted Fines and Fees Against Low-Income Communities of Color: Civil Rights and Constitutional Implications, 4-5, U.S. Comm’n for Civil Rts., Sept. 2017; see also Dan Kopf, The Fining of Black America, Priceonomics, June 24, 2016, https://priceonomics.com/the-finishing-of-black-america/ (“[T]he] use of fines as a source of revenue is not a socioeconomic problem, but a racial one. The cities most likely to exploit residents for fine revenue are those with the most African Americans.”).
42 Ohio Rev. Code Ann. § 1905.20(A)&(C) (West) (“The mayor of a municipal corporation has, within the corporate limits, all the powers conferred upon sheriffs to suppress disorder and keep the peace.”).
44 Mark Flattten, City Court: Money, Pressure and Politics Make it Tough to Beat the Rap 2 (Goldwater Institute, 2017); Mark Flattten, City Court: City Court: Elections Protect Judges from Good-Old-Boy System of Appointment 2-3, Goldwater Institute 2017. See also Municipal Court Governance Roles and Responsibility (Ariz.
In a similar vein, until 2008 Utah justice court judges were appointed by cities and under overt pressure to raise revenue for their municipalities.\textsuperscript{45} The State Court Administrator in Utah relates that judges would complain to him about the pressure: “My mayor told me I got to get the revenue up,” said one judge.\textsuperscript{46} Reforms created a county-wide judicial selection committee and retention elections in order to lessen the conflict.\textsuperscript{47}

The appearance of conflict can also arise because municipal court legal actors maintain multiple legal roles and political relationships. In New Jersey, for example, the judge in one court may serve as a part-time prosecutor in another, or as a state legislator. A recent newspaper headline proclaimed, “Municipal courts: Local lawmakers who profit from them could derail reform.”\textsuperscript{48} The article documented state lawmakers who opposed legislative court reforms while they received additional salaries as municipal court prosecutors and public defenders. Similarly in New York, some village judges “admitted that as long as the party in control of the legislature and in control of the court was the same, there was informal and casual contact between the court and other [municipal] officials” that could lead to “collaboration as well as some advocacy.”\textsuperscript{49}

No discussion of municipal court would be complete without acknowledging the powerful and opaque role of the court clerk. In some courts, clerks are permitted to set bail, issue warrants, and take guilty pleas.\textsuperscript{50} They may issue legal advice—sometimes incorrect---to defendants regarding their right to counsel.\textsuperscript{51} They may communicate with defendants, police, prosecutors, judges, and counsel in ways that parties are not permitted to do, and that can alter case outcomes. In other words, court clerks perform all sorts of functions that, in other courts, are treated as quintessentially judicial.\textsuperscript{52} In many jurisdictions they wield enormous influence that make them central to municipal court’s informal culture.

\textsuperscript{45} Welsh & Hamilton, at 51-53 (describing official commission concerns with justice court revenue generation).
\textsuperscript{46} Flatten at 5, 24.
\textsuperscript{47} Welsh & Hamilton, No Justice In Utah’s Justice Courts, 2012 Utah L. Rev. Onlaw 27, 50 (2012); see id. at 53 (describing continued post-reform pressures on judges to generate revenue).
\textsuperscript{48} Kala Kachmar and Susanne Cervenka, Municipal courts: Local lawmakers who profit from them could derail reform, Ashbury Park Press, Aug. 8, 2018.
\textsuperscript{49} Leib, Local Judges, at 721.
\textsuperscript{50} Justice Derailed: Colorado City Courts, at 13-14 (defendants are expected to plead guilty to clerks in violation of Colorado court rules); Jennifer Turner, A Pound of Flesh: The Criminalization of Private Debt at 16 (Washington D.C.: American Civil Liberties Union, 2018) (court clerk threatened defendant with arrest if he did not pay); see Shadwick v. City of Tampa, 407 U.S. 345, 348 (1972) (authorizing municipal clerks to issue warrants).
\textsuperscript{51} Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice (Chicago: American Bar Association, 2004), at 25 (clerks instruct defendants to sign counsel waiver form or their cases will not be called).
\textsuperscript{52} See, e.g., Petuskey v. Cannon, 1987 OK 74, 742 P.2d 1117, 1122 (1987) (enjoining clerk from his practice of collecting fines and fees without a judicial hearing and holding that “district court clerk has no authority to act in a judicial capacity and demand payment of fines, fees and costs, until there has been an adjudication that the person must pay”). Such informal reallocation of judicial functions is not limited to clerks. In one Washington municipal court, for example, attorneys report that judges do not control the appointment of counsel--defendants must ask the police for a public defender. Conversation with Robert Boruchowitz, Feb. 26, 2019.
B. Ferguson

The poster child for municipal court failure is the court in Ferguson, Missouri, whose high-profile dysfunctions put the municipal court revenue collection issue on the political map. In 2015, the U.S. Department of Justice issued a scathing report in the aftermath of the fatal police shooting of Michael Brown, an unarmed African American teenager. The report described the Ferguson police department, prosecutorial practices, and the local court system as collectively filled with rampant constitutional violations, intentional racism, and the crass pursuit of revenue. The Report concluded that Ferguson’s law enforcement practices are shaped by the City’s focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson’s police department, contributing to a pattern of unconstitutional policing, and has also shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community.

The Ferguson court was not an outlier. That same year, the New York Times Editorial Board wrote that “the evidence strongly suggests that Ferguson is not even the worst civil rights offender in St. Louis County and that adjacent towns are also systematically targeting poor and minority citizens for street and traffic stops to rake in fines, criminalizing entire communities in the process.” Civil rights lawsuits were filed against 13 municipal courts in the same St. Louis county for operating in substantially the same fashion.

Missouri’s municipal court system reflected some of the most problematic municipal court characteristics. For example, Missouri permitted its part-time municipal court judges to serve simultaneously as prosecutors, defense attorneys, and practicing lawyers in other county courts. These multiple roles and relationships created obvious conflicts of interest. The Ferguson judge, in particular, used his position as the judge in another municipality to fix a speeding ticket issued to a Ferguson police officer. That same judge asked the Ferguson prosecutor, who also served as prosecutor in another city, to dismiss the judge’s own traffic ticket incurred in the other city.

Missouri’s municipal courts have historically operated against the backdrop of opacity and lack of centralized oversight. Until 2015, the state itself did not know how many courts were in Missouri. As the National Center for State Courts put it at the time, “no one was quite sure how many municipal courts existed [in Missouri] since cities can abolish and create them at will.” In 2015, in response to national scrutiny, Missouri passed sweeping municipal court reform. Municipal courts lost some, but not all of their criminal jurisdiction; fines and revenues are

53 Ferguson Investigation, supra. Since 2015, the Ferguson court system has been substantially altered as a result of multiple lawsuits, legislative reform, and court orders.
54 Investigation of the Ferguson Police Dep’t, at 2.
57 Joy, at ___ (citing Ferguson Report).
Criminal Municipal Courts

capped; there are new conflict rules for judges; and local courts are under stronger supervision from the central state judicial administration.59

C. Municipal Court Political Responsiveness

This litany of concerns about municipal courts, conflict, and money is hardly new: for over a century, local courts have been criticized for their legal informality and provincialism.60 At the same time, these courts have also been sites of political responsiveness and reform. During the early 20th century, for example, Chicago engaged in a “widely copied effort to modernize and socialize its municipal court system,” bringing the city “international renown as a model for new approaches to criminal justice and social governance.”61 Historian Michael Willrich explains that during this period, “at the local level, American courts were the true laboratories of progressive democracy, flexible instruments of public welfare and social governance on a scale not matched again until the New Deal.”62 Cleveland, New York, and other cities also engaged in similarly sweeping and high-profile municipal court reforms.63 To be sure, in retrospect these reforms were not always successful,64 or even benign,65 but they reflected a widely shared understanding of the political possibilities of municipal court.

Echoes of these responsive reform efforts can be seen in today’s municipal and other local courts. Judge Andra Sparks is the Presiding Municipal Court Judge in Birmingham, Alabama. He describes how the court diverted money from its budget to create a literacy program for defendants because, in his words, “it turns out that the single biggest problem with people getting their licenses fixed is that they can’t read.”66 In Craighead County, Arkansas, two judges ran for election in 2016 to the local district court and won on a platform to eliminate court reliance on extortionist private probation companies.67 In Harris County, Texas, high-profile controversies

59 Mo. Ann. Stat. § 479.353 (“The [municipal] court shall not sentence a person to confinement, except the court may sentence a person to confinement for any violation involving alcohol or controlled substances, violations endangering the health or welfare of others, or eluding or giving false information to a law enforcement officer.”). See also S.B. No. 5, 98th Gen. Assem. (Mo. 2015), https://www.senate.mo.gov/15info/pdf-bill/tat/SB5.pdf; Robert Patrick and Stephen Deere, ‘Sweeping’ court reform comes as Nixon signs bill to cap cities’ revenue, end predatory habits, St. Louis Post-Dispatch, July 10, 2015.
60 Edwards supra note xx; Provine supra note xx; JOHN A. ROBERTSON, ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS (Little Brown & Co., 1974).
62 Willrich, supra note xx, at xxvi.
63 Kessler, supra note xx, at 2966-72 (describing early 20th century reforms in Cleveland).
64 Reginald Heber Smith and Herbert Ehrmann, The Municipal Court of Cleveland, in ROUGH JUSTICE, supra note xx (describing persistent failures even after reform).
66 Panelist, Judicial Responsibility for Justice in Criminal Courts, Hofstra University Maurice Deane School of Law, April 6, 2017 (public remarks).
over bail reform led to the sweeping ouster of Republican local misdemeanor judges in the 2018 election and resulted in the unprecedented election of 19 African American women judges. In other words, the very same localism and informality that make these criminal tribunals problematic also hold out the possibility of political accountability and reform.

III. Mapping the Legal Terrain of Criminal Municipal Courts

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

A. Where Do Municipal Courts Come From? State Authority to Create and Empower Municipal Courts

States have wide powers to create courts and invest them with various kinds of authority. Unlike federal courts which are constrained by Article III, state courts are limited only by the Fourteenth Amendment’s due process and equal protection requirements, the federal Bill of Rights, the Supremacy Clause, and their own state constitutions. This leaves states with broad authority to define their own judicial power. As the Supreme Court wrote in 1879 regarding state power to establish its own courts,

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

Municipal courts are largely creatures of state constitutional law and of state statute. In each of the 30 states with municipal courts, a constitutional provision and/or statute authorizes, or

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68 Olivia Exstrum, Harris County’s New Progressive Judges Are Upending the Bail System, Mother Jones, March 15, 2019.
69 See infra Part VI.C infra discussing conflicts within criminal justice localism and democratization.
71 State of Missouri v. Lewis, 101 U.S. 22, 30 (1879); see also id. at 30 (“Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government.”).
CRIMINAL MUNICIPAL COURTS

sometimes mandates, municipalities to create their own courts.\textsuperscript{72} Jurisdiction is typically limited to enforcing local municipal codes but some courts also have authority over state misdemeanors committed within their territorial boundaries. Statutes may specify municipal court subject matter jurisdiction, territorial jurisdiction, and permissible penalties for ordinance violations. The Colorado constitution, for example, confers upon cities and towns “all [] powers necessary, requisite or proper . . . to legislate upon, provide, regulate, conduct and control . . . [t]he creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof.”\textsuperscript{73} In Ohio, the mayor’s court statute provides that in any city with a population over 200, “the mayor of the municipal corporation has jurisdiction . . . to hear and determine any prosecution for the violation of an ordinance of the municipal corporation . . . .”\textsuperscript{74} In Montana, state law provides that “a local government may fix penalties for the violation of an ordinance that do not exceed a fine of $500 or 6 months’ imprisonment or both.”\textsuperscript{75}

In 27 states, stand-alone municipal courts have criminal jurisdiction over locally defined crimes, meaning that they have authority to adjudicate the violation of local criminal ordinances and to impose convictions and criminal punishment. Not all of them have authority to incarcerate. In Texas, for example, the 900 municipal courts have limited jurisdiction restricted to Class C misdemeanors, which are fine-only and therefore do not carry incarceration although state law still deems them criminal.\textsuperscript{76} In three other states, municipal courts have limited criminal jurisdiction. All Wisconsin ordinance violations are civil and Wisconsin municipal courts, in turn, are limited to adjudicating those civil municipal ordinance violations.\textsuperscript{77} Indiana municipal

\textsuperscript{72} See, e.g., Wash. Stat. § 39-34-180 (“Each county, city, and town is responsible for the prosecution, adjudication, sentencing, and incarceration of misdemeanor and gross misdemeanor offenses committed by adults in their respective jurisdictions.”); City of Spokane v. Cty. of Spokane, 158 Wash. 2d 661, 671–72 (2006).

\textsuperscript{73} Colo. Const. Art. 20 § 6; see Town of Frisco v. Baum, 90 P.3d 845, 846 (Colo. 2004) (Colorado Constitution authorized town council of home rule city to vest its municipal court with “exclusive original jurisdiction over all matters arising under [it’s Town] Charter, the ordinances, and other enactments of the Town”).

\textsuperscript{74} Ohio Rev. Code Ann. § 1905.01 (West), cited in Ward, 409 U.S. at 82.

\textsuperscript{75} Mont. Code Ann. § 7-5-109 (West). See Appendix for state-by-state penalties.

\textsuperscript{76} Tex. Loc. Gov’t Code Ann. § 54.001 (ordinance penalties: $500 default max; $2,000 max for municipal ordinance violation concerning “public health”); Tex. Penal Code Ann. § 12.41 (West) (defining fine-only offenses as “Class C misdemeanor”); Tex. Penal Code Ann. § 12.03(b)-(c) (“An offense designated a misdemeanor in this code without specification as to punishment or category is a Class C misdemeanor” and “Conviction of a Class C misdemeanor does not impose any legal disability or disadvantage.”). Texas law deems Class C misdemeanors criminal. See Tex. Crim. Proc. Code Ann. § 4.14(a)(1)-(2) (conferring municipal court jurisdiction over all municipal ordinance violation fine-only “criminal cases”); State v. Chacon, 273 S.W.3d 375, 377 (Tex. App. 2008) (municipal ordinance violations are criminal cases); see also Reese v. City of Hunter's Creek Vill., 95 S.W.3d 389, 391 (Tex. App. 2002) (fine-only violations was a “penal statute” and therefore civil district court lacked jurisdiction to address its validity). See also Texas Courts: A Descriptive Summary 3 (Tx. Judicial Branch, Sept. 2014), http://www.txcourts.gov/media/994672/Court-Overview.pdf.

\textsuperscript{77} Wis. Const. art. VII, § 14 (Municipal court “jurisdiction limited to actions and proceedings arising under ordinances of the municipality in which established”); State ex rel. Keefe v. Schmiege, 251 Wis. 79, 80, 28 N.W.2d 345, 346 (1947) (localities lacked authority to create misdemeanors). But see Dunn v. Mayor & Council of City of Wilmington, 59 Del. 287, 289, 219 A.2d 153, 154 (1966) (finding that municipalities possess power to create crimes “by necessary implication in . . . [Delaware law] which empowers the City Council generally ‘to do all those matters and things for the well being of the said city’); see also id. at 290 (concluding that with respect to its limitation on municipal authority to create crimes “the Keefe case appears to stand alone”). See also Milwaukee Code of Ordinances § 106-1; John Pawasarat and Marilyn Walzak, Cited in Milwaukee: The Cost of Unpaid Municipal
ordinances are likewise civil, but municipal courts also have concurrent jurisdiction over state criminal misdemeanors. And in Tennessee, there are 14 home rule cities that have authority to pass criminal misdemeanor ordinances, but the vast majority of Tennessee municipalities are limited to fine-only ordinances; for the most part, Tennessee municipal courts have jurisdiction over whatever type of ordinance their respective city is authorized to pass.

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

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

Citations (Milwaukee, WI: Justice Initiatives Institute, June 2015) (Milwaukee municipal court possesses only civil jurisdiction but failure to pay triggers incarceration).

Ind. Code Ann. § 33-35-2-3 (municipal court jurisdiction over ordinance violations, misdemeanors and infractions); 2015 Indiana City/Town Courts: Indiana Trial Court Statistics by County (32,043 misdemeanor cases filed and 48,190 ordinance violations filed), https://publicaccess.courts.in.gov/ICOR/.

Tenn. Code Ann. § 16-18-302 (municipal court possess civil jurisdiction only except for cities with population greater than 150,000).

Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907). But see Gerald E. Frug, The City As A Legal Concept, 93 Harv. L. Rev. 1059, 1109 (1980) (explicating and criticizing the history through which cities came to be constructed as subordinate entities to the state). See also Saiger, supra note xx, at 443 (describing Dillon’s Rule, the rule of construction under which delegations of authority from the state to localities are construed narrowly, as the “polar opposite” of Chevron deference).

43 states confer some form of home rule. 1 Antieau on Local Government Law § 21.01, at 21-3 (2d ed. 2000). See Barron, A Localist Critique, at 391-392 (“Home rule provisions serve the important function [] of enabling local governments to operate and exercise authority in the absence of a particularized grant of state power. They are a kind of mini-Article I for local governments, in the sense that they enumerate their authority over local or municipal affairs.”).

Home Rule Cities Have Authority to Define Municipal Court Jurisdiction, 22 No. 7 MUNI-LR 5, McQuillin Municipal Law Report.

To the extent that legal scholars have addressed municipal criminal law, the focus has largely been on the interpretation of city ordinances. Leib, Statutory Interpretation (local court interpretation of statutes); Logan, Shadow Law (legislative passage of criminal ordinances); Diller, A Theory of Local Common Law (interpretations of local law). McQuillin devotes an entire 800-page volume to the municipal police power and to ordinances, MUNICIPAL POLICE POWER AND ORDINANCES, 6A McQuillin §§ 24:1-197.12.

See 9A McQuillin Mun. Corp. § 27:2 (“A district attorney’s authority to prosecute under the state’s criminal statute does not supersede the authority of the city prosecutor to prosecute under the city ordinance proscribing the same conduct.”).

Logan at 1449.
[I]t often escapes attention that [munipalities] enjoy considerable authority to enact
criminal laws pursuant to their expansive home rule and police powers. A sample of
independent municipal criminal laws includes: pick-pocketing; disturbing the peace;
shoplifting; urinating in public; disorderly conduct; disorderly assembly; unlawful
restraint; obstruction of public space; harassment over the telephone; resisting arrest;
obscenity; nude dancing; lewdness, public indecency, and indecent exposure;
prostitution, pimping, or the operation of “bawdy” houses; gambling; graffiti and the
materials associated with its inscription; littering; aggressive begging and panhandling;
vandalism; trespass; automobile “cruising”; animal control; nuisances; excessive noise;
sale or possession of drug paraphernalia; simple drug possession; possession of weapons
other than firearms; possession of basic firearms and assault-style firearms; discharge of
firearms; sleeping, lying, or camping in public places; driving under the influence of
drugs or alcohol; carrying an open container of alcohol; underage drinking; and public
drinking and intoxication.86

These criminal cases fill municipal courts. They may also comprise a substantial portion of
overall state dockets. In South Carolina, summary courts generate the majority of the state’s
criminal docket.87 New Jersey’s municipal courts file more than 90 percent of the state’s total
criminal docket.88 Nationwide, municipal courts generate over one-quarter of the 13 million
criminal misdemeanor cases filed annually.89

B. The Constitutional Pedigree of Municipal Courts

Municipal courts have long been deemed constitutional. The Supreme Court has upheld their
various idiosyncrasies including the lack of jury trials, trials by non-lawyer judges, and
convictions imposed by mayors. As city courts, they do not fit neatly into federal jurisprudential
categories regarding the separate branches.90 For example, most courts hold that municipal courts
are not subject to separation of powers constraints and therefore their close ties to the executive
branch or to city councils are constitutionally unproblematic. Nevertheless, as described below,
many courts may be treated as part of the state judiciary for purposes of double jeopardy,
sovereign immunity, and section 1983.91

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86 Logan, at 1414, 1427-29. See also id. at 1425-26 (“[M]unicipalities enjoy enormous power to legislate
against social disorder independent of state jurisdiction.”). See also text accompanying notes infra on the quasi-
criminal character of some ordinances.
87 Rush to Judgment, at 10.
88 NCSC Court Statistics Project (50,539 cases filed in New Jersey’s general jurisdiction courts in 2017
compared to 689,072 cases filed in limited jurisdiction courts).
89 NATAPOFF, supra note xx, at 40-41 (estimating national misdemeanor docket of 13 million filings); see also
Mayson and Stevenson (same); Appendix (estimating a municipal court criminal caseload of approximately 3.5
million).
90 Many local entities do not. Nestor Davidson, Localist Administrative Law, at 601-603 (on the local inter-
branch “blend,” noting that many city councils appoint an executive city manager and that courts often review
Colum. L. Rev. 1303, 1380 (2018) (pointing out that state courts also have a “quasi-legislative role, as drafters of
their states’ Rules of Criminal Procedure”).
91 Waller v. Florida, 397 U.S. 387, 393 (1970) (holding that Florida municipal courts were part of the state
court process for double jeopardy purposes thereby preventing dual prosecutions in municipal and state court: “the
judicial power to try petitioner on the first charges in municipal court springs from the same organic law that created
Part of this doctrinal flexibility is a matter of historical pedigree: local courts are centuries old and pre-constitutional. Stephen Yeazell dates judicial localism back to the founding era, pointing out that:

Unlike the federal judiciary, the desirability of state courts occasioned no political controversy at the nation’s founding. The fateful decision of that period, which also seems never to have been debated, was that the state courts should be creatures not of the state governments themselves, but of counties, towns, and cities.92

Historian Laura Edwards describes the post-Revolutionary period as dominated by local courts and informal localized justice: centralized state legal systems did not come into their own until the early 19th century. Even then, those statewide court systems were relatively elite institutions, addressing themselves primarily to civil, commercial, and appellate matters, leaving lower status criminal matters to be resolved at the local level.93

The legacy of those local, informal courts has retained a powerful influence on constitutional doctrine. In 1888, the Supreme Court upheld the power of police and summary courts to enforce criminal municipal ordinances without a jury trial and in summary fashion, as long as defendants had the right to appeal.

In England, notwithstanding the provision in the magna charta [], which declares that no freeman shall be taken, imprisoned, or condemned but by lawful judgment of his peers, or by the law of the land, it has been the constant course of legislation in that kingdom, for centuries past, to confer summary jurisdiction upon justices of the peace for the trial and conviction of parties for minor and statutory police offenses.94

The Court also noted that state supreme courts had come to the same conclusion. It quoted the New Jersey Supreme Court approvingly as writing: “‘Extensive and summary police powers are constantly exercised in all the states of the Union for the repression of breaches of the peace and

The state court of general jurisdiction in which petitioner was tried and convicted for a felony.”); Justice Network Inc. v. Craighead Cty., 931 F.3d 753, 765 (8th Cir. 2019) (finding that local judges were state employees, not city or county employees, as a matter of state law pursuant to new legislation creating state-funded district courts); Holland v. City of Gary, No. 2:10-CV-454-PRC, 2011 WL 6782101, at *3 (N.D. Ind. Dec. 27, 2011), aff’d, 533 F. App’x 661 (7th Cir. 2013) (city court judge and employees were judicial, not executive officers and therefore not amenable to suit under § 1983); Eggar v. City of Livingston, 40 F.3d 312, 314 (9th Cir. 1994) (Montana municipal judge was “included in the hierarchy of the state judicial system” and therefore not a city policymaker for §1983 purposes). In addition, the Sixth Circuit concluded that an Indiana lower court (confusingly labeled a “municipal court”) was entitled to immunity from suit under the Eleventh Amendment because it was created by the state legislature and paid for by the state and thus “part of the judicial branch of the State of Indiana.” It arrived at that conclusion largely by distinguishing it from Indiana “city” courts which, unlike municipal courts, are created, operated, and paid for by individual cities. Kelly v. Mun. Courts of Marion Cty., Ind., 97 F.3d 902, 908 (7th Cir. 1996) (describing variety of ways that “Indiana law distinguishes between a municipal court and a city court”).

92 Yeazell, supra note xx, at 134.
93 Edwards, supra note xx.
petty offenses.” The Court framed the matter not just as a question of constitutional law but also of municipal governance, quoting “Mr. Dillon in his work on Municipal Corporations” as follows:

Violations of municipal by-laws proper, such as fall within the description of municipal police regulations, as, for example, those concerning markets, streets, water-works, city officers, etc., and which relate to acts and omissions that are not embraced in the general criminal legislation of the state, the legislature may authorize to be prosecuted in a summary manner, by and in the name of the corporation, and need not provide for a trial by jury.

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

Much has changed since these cases were decided. Individual justices of the peace were largely replaced by more formal institutionalized municipal courts. Most states unified their judiciaries during the early 20th century, assuming supervision over and funding responsibility for some or all local trial courts. Modern criminal procedure has also deeply altered the nature of the U.S. criminal process, creating among other things the misdemeanor right to counsel, an array of discovery and trial rights, and new constitutional recognitions for and constraints on plea bargaining. In many states, these various changes have eliminated municipal courts and/or their characteristic practices altogether. Nevertheless, much of the municipal court phenomenon persists, often in tension with the new modern legal infrastructure. Those persistent features, including non-lawyer judges, special appellate processes, mayoral judges and the concomitant absence of separation of powers, are considered in the sections below.

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95 Id. at 553; see also id. (“This constitutional provision does not prevent the enforcement of the by-laws of a municipal corporation without a jury trial.”).
96 Id. at 553 (citing Dillon 1 Municipal Corps. §§ 433, 439).
97 Lawton v. Steele, 152 U.S. 133, 142 (1894) (comparing constitutionality of summary courts with the summary abatement of nuisances, in this case the destruction of illegal fishing nets without judicial process). See also Tumey v. State of Ohio, 273 U.S. 510, 534 (1927) (“It is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him cannot be said to violate due process of law.”)
98 Although many municipal courts are in essence still comprised of a single nonlawyer judge.
C. Non-Lawyer Judges

Although lay judges and police magistrates are probably more familiar from Oliver Twist than from modern criminal jurisprudence, they remain common and constitutional.\footnote{Chapter 11: Treats of Mr. Fang the Police Magistrate; and Furnishes a Slight Specimen of his Mode of Administering Justice, in \textit{Charles Dickens, Oliver Twist} (1838). The term “police magistrate” or “police judge” can be misleading: such judges are not themselves police officers but rather an “officer of the state, or some municipal division of the state, invested with authority, executive or judicial, relating to the administration of police or municipal laws.” 48A C.J.S. Judges § 13.} In 1976, in \textit{North v. Russell}, the Supreme Court upheld Kentucky’s use of non-lawyer police judges in the local police courts, as long as defendants retained the right to appeal and obtain a new trial de novo before a lawyer-judge in circuit court.\footnote{North v. Russell, 427 U.S. 328 (1976)} The Court rejected the proposition that inferior court judges must be lawyers, reasoning that judicial qualifications turn on the substantive need for judges to exercise “independent, neutral, and detached judgment,” qualities that in the Court’s opinion did not require those judges to be attorneys. The Russell Court borrowed its neutral-and-detached standard from the warrant cases, including \textit{Shadwick v. City of Tampa} under which municipal court clerks who were not attorneys were permitted to issue warrants for breaches of municipal ordinances.\footnote{Id. at 337 (citing Shadwick v. City of Tampa, 407 US 345 (1972) (municipal court clerks, who were authorized by city charter to issue warrants for arrest of persons charged with breach of municipal ordinances, qualified as ‘neutral and detached magistrates’ for purposes of Fourth Amendment)).} The Court also cited \textit{Coolidge v. New Hampshire} which held, by contrast, that law enforcement officials such as police and prosecutors are too inherently conflicted to issue warrants, even when they simultaneously serve as justices of the peace and thus have the authority to issue warrants in that capacity.\footnote{Id. at 337 (citing Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971) (warrant issued by the Attorney General, who also happened to hold the office of justice of the peace, did not meet the “neutral and detached” requirements of the Fourth Amendment and was therefore invalid)).}

The Court distinguished the judicial functions of municipal court judges from those in higher courts, based largely on the minor nature of the offenses being adjudicated:

\begin{quote}
[T]here is a wide gap between the functions of a judge of a court of general jurisdiction, dealing with complex litigation, and the functions of a local police court judge trying a typical “drunk” driver case or other traffic violations.\footnote{Id. at 334.}
\end{quote}

Minor crimes trigger less complicated processes and less burdensome punishments: “Proceedings in the inferior courts are simple and speedy,” wrote the Court, “and . . . the penalty is not characteristically severe.” Where incarceration is available, “the process commands scrutiny,”\footnote{Citing Argersinger v. Hamlin, 407 U.S. 25 (1972), in which the Court required the appointment of counsel for misdemeanants who receive a sentence of incarceration. The Argersinger Court acknowledged that misdemeanor cases can be legally complicated, writing “We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.” Argersinger, at 33.} but even where defendants face incarceration these courts are subject to diminished procedural expectations.\footnote{Where incarceration is not available, there is even less due process concern. 9A McQuillin Mun. Corp. § 27:4 (3d ed.)} Indeed, just four years prior to \textit{Russell}, the Court mused that
“inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses.”

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

Nonlawyer judges are central to the historical identity of municipal courts. In Judging Credentials, political scientist Doris Marie Provine traces that history: non-lawyer judges were the norm before and after the Revolution, giving way slowly to the lawyer-judge model as the legal profession assumed a larger role in newly centralized state legal systems in the early 1800s. The battle over judicial credentials also mirrored the larger tension between local, informal justice models and the more professionalized, uniform approach to law demanded by centralized systems. Localists argued that lawyers—and their demand for centralized legal rules—were too remote from community norms and relationships to provide substantive justice. They also complained that lawyers and formal institutions were expensive and out of reach for many low-resource communities. By contrast, centralizers maintained that only trained lawyers could meaningfully provide consistent adherence to rule of law. Many of these longstanding disputes over the role of formality, uniformity, and cost still pepper the modern conversation around the cost of adjudicating misdemeanors, and the non-lawyer judge phenomenon continues to garner substantial criticism.

Non-lawyer judges are part of a larger tolerance for legal informality in misdemeanor courts generally and municipal courts in particular. Fourteen states permit police officers to file and prosecute cases directly in lower courts without an attorney-prosecutor present.

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110 Id. at 339-43 (Stewart, J., dissenting).
111 Provine, supra note xx.
112 See Scott v. Illinois, 440 U.S. 367, 373 (1979) (worrying that extending the right to counsel to all misdemeanor defendants would “impose unpredictable, but necessarily substantial, costs on 50 quite diverse States”); Erica J. Hashimoto, The Price of Misdemeanor Representation, 49 Wm. & Mary L. Rev. 461, 466 (2007) (arguing that states should redepoly scarce public defense resources away from misdemeanors and towards felonies).
113 See, e.g., No Justice in Utah Justice Courts, supra note xx; Glaberson, Reviled Courts, supra note xx; Rush to Judgment, supra note xx. See also Annie Decker, A Theory of Local Common Law, at 1951 (describing irregularities in New York town courts, including “a village justice who refused to issue a protective order and later said to a clerk, ‘[e]very woman needs a good pounding every now and then,’” and another judge [who] explained that “I just follow my own common sense . . . And the hell with the law.”). Some states have rejected Russell’s reasoning and require judges to be attorneys under their own state constitutions. City of White House v. Whitley, 979 S.W.2d 262, 267-68 (Tenn. 1998) (finding nonlawyer adjudication of cases punishable by incarceration to violate Tennessee constitution's Due Process Clause).
114 At least seven of these police-direct-file states have municipal courts. Andrew Horwitz, Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases, 40 Ariz. L. Rev. 1305, 1343 & n.230 (1998).
Approximately half of these police-prosecutor states also maintain municipal courts, and in at least four (Delaware, New Mexico, New York, and South Carolina), the judge need not be an attorney either.115 Defense counsel in municipal court are also rare. In fine-only cases, defendants have no right to representation, and even where defendants are constitutionally entitled to counsel, numerous studies have shown that counsel is often not appointed.116 As a result, in these low level courts, defendants may be held on bail, convicted of crimes, subject to heavy fines, and sentenced to jail without a single lawyer in the courtroom.

D. Special Appellate Processes

The non-lawyer municipal judge is twinned with, and rendered constitutional by, special appellate processes. Almost all municipal courts are part of a two-tiered system like the one in Russell in which municipal court convictions are appealed to state trial courts which hold new trials de novo.117 This structure is a response not only to lay judges, but to municipal courts that are not courts of record and do not maintain the recordings or transcripts of proceedings necessary for a conventional appeal.

In Russell, the court approved this type of two-tier system, holding not only that it legitimated the use of lay judges, but that the Equal Protection Clause is not violated by the provision of different adjudicative and appellate institutions to different sized cities.118 The Court also justified the Kentucky two-tiered appellate scheme on practical and cost-efficiency grounds, recognizing the “increasing burdens on state judiciaries and the interest of both the defendant and the State, to provide speedier and less costly adjudications.”119 Harkening back to the legacy of local lay justices of the peace who made legal redress available to frontier and rural communities, the Court reasoned: “it is a convenience to those charged to be tried in or near their own community, rather than travel to a distant court where a law-trained judge is provided, and to have the option, as here, of a trial after regular business hours.”120

De novo appeals are just one of various appellate innovations and limitations in this arena.121 Montana has taken the reasoning of Russell a step further, making only a standard appeal, not a

(documenting states that either expressly or implicitly permit the practice, including Delaware, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia); see also Summary Injustice, supra note xx (no lawyer in the courtroom); Alexandra Natapoff, Op-Ed, When the Police Become Prosecutors, N.Y. Times, Dec. 26, 2018.

115 See Appendix.


117 See Appendix for appellate processes for each state.

118 Russell, at __. See also Colten v. Kentucky, 407 U.S. 104, 117 (1972) (upholding two-tiered scheme and finding it permissible to punish defendant for disorderly conduct conviction more harshly after second de novo trial where the penalty increased from $10 to $50, or approximately $60 to $300 in today’s dollars).

119 Russell, at 336, quoting Colten v. Kentucky (1972)

120 Id.

121 King & Heise, supra note xx, at 10-12 (describing variety of misdemeanor appellate mechanisms and restrictions).
de novo trial, available to defendants convicted before non-lawyer judges in justice courts.\textsuperscript{122} Other states make further appellate review discretionary and not as of right.\textsuperscript{123} Some municipal court convictions are not appealable at all. For example, the Delaware constitution and state law limit appeals from Justice of the Peace Courts to cases involving sentences of more than one month in jail or fines greater than $100.\textsuperscript{124}

The two-tiered system can also affect the authority of the trial court holding the de novo proceeding. In Kansas, for example, the state Supreme Court held that the district court (a court of record) was in effect acting as a police magistrate court (not a court of record) when conducting a de novo trial. As a result, the ensuing conviction did not trigger the state’s disbarment statute, even though disbarment would have been automatic had the district court issued the conviction in its regular non-appellate, court-of-record capacity. As the Court explained,


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“It is true that the judgment finally entered against the respondent was rendered by the district court on an appeal from the police court. In the district court the case, however, was tried as a violation of a city ordinance and while that court was trying the case it was acting as a police judge and was required to try the case in the same manner it should have been tried before the police judge. Its sentence as imposed was essentially a judgment of the police judge and cannot be treated as one rendered by a court of record within the meaning of the statute.”\textsuperscript{125}

The two-tiered system has been both lauded and excoriated. \textit{Russell} held that it was necessary to preserve the constitutionality of municipal court convictions, and advocates in Montana argue that the state has deprived defendants of due process by moving from the de novo model to conventional appellate review of non-lawyer judges.\textsuperscript{126} Conversely, commentators have long pointed out that de novo trials insulate municipal courts from appellate scrutiny, effectively permitting them to continue misapplying the law.\textsuperscript{127}

Such methodological disagreements aside, the appellate process remains central to legitimating the peculiarities of municipal court—nonlawyer judges, failure to maintain records, and the generally summary nature of the proceedings.\textsuperscript{128} That legitimation, however, is almost entirely

\textsuperscript{122} The Montana Supreme Court upheld the change; the U.S. Supreme Court denied certiorari. State v. Davis, 383 Mont. 281 (Mont. 2016) (upholding trial and conviction before a non-lawyer justice of the peace in which only a standard appeal, not a de novo trial, was available), Petition for a Writ of Certiorari, 2016 WL 4010822 (July 22, 2016), \textit{cert denied} in Davis v. Montana, 137 S. Ct. 811 (2017).

\textsuperscript{123} See, e.g., State v. Eby, 244 P.3d 1177, 1178–79 (Ariz. Ct. App. 2011) (confirming right to appeal judgment of justice court to superior court but no right to subsequent appeal to Arizona Court of Appeals, even when superior court appeal is a de novo trial).

\textsuperscript{124} Del. Const., Art. 4, § 28; Del. Code Ann. tit. 11, § 5920 (2018) (granting de novo appeal of right only for cases involving sentences of more than one month in jail or fines greater than $100).

\textsuperscript{125} In re Sanford, 117 Kan. 750, 232 P. 1053, 1054 (1925) (attorney’s conviction for violation of a municipal ordinance in police court does not trigger the disbarment statute).

\textsuperscript{126} Davis v. Montana, Petition for a Writ of Certiorari, 2016 WL 4010822 (July 22, 2016).

\textsuperscript{127} Rough Justice, supra note xx, at xvii.

\textsuperscript{128} A role often played by the appellate process more generally. See Richard Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915 (1988) (arguing that “searching appellate review” of legislative courts and administrative agencies is both necessary and sufficient to validate them under Article III).
theoretical since misdemeanor appeals rarely occur. In 2019, Nancy King and Michael Heise conducted the first and only empirical examination of misdemeanor appeals nationwide, both conventional and de novo, and found that misdemeanor appeals are vanishingly rare. Less than 1 in 100 convictions are appealed in two-tiered systems, and only 1 in 1,200 misdemeanor convictions are appealed to state appellate courts. King and Heise conclude that appeals are rare for a variety of reasons, including the limited appellate procedures, lack of access to counsel, high plea rates, and the typically short duration of incarcerative sentences. Accordingly, Russell notwithstanding, the practical reality is that municipal court convictions are typically insulated from error correction and legal scrutiny.

E. Conflicts of Interest

The most robust constitutional restrictions on municipal courts sound in the vein of conflict of interest. Defendants have a due process right to a “disinterested and impartial” adjudicator, which may be threatened by a judge’s pecuniary or institutional interest in the outcome of a case. In three separate decisions, the Supreme Court has outlined the extent to which a mayor or other official with a potential conflict of interest can directly wield the judicial powers of a municipal court.

In Ward v. Village of Monroeville, in 1972, the Supreme Court invalidated an arrangement in which a town mayor held the post of municipal court judge, and in that capacity assessed fines and fees that comprised a substantial portion of the town’s budget. The due process test, wrote the Court, “is whether the mayor’s situation is one ‘which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused.’” The Court found the temptation in Monroeville too strong because of the mayor’s “wide executive powers” and because “[a] major part of village income is derived from the fines, forfeitures, costs, and fees imposed by him in his mayor’s court.” The arrangement gave rise to

See also Martin H. Redish & Kristin McCall, Due Process, Free Expression, and the Administrative State, 94 Notre Dame L. Rev. 297, 302 (2018) (musing that “the due process problem [of administrative adjudication] could arguably be solved simply by providing for de novo judicial review of agency action). I am indebted to Richard Re for this elaboration.


Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877 (2009) (due process violated by West Virginia judge’s failure to recuse himself when the party before him had contributed $3 million to his election); id. at 877 (due process requires recusal when the “probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable”).
the impermissible “situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial.”

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

As *Ward* makes clear, these are functional, not formal conflicts. The due process violation arises not because the judge is the mayor, but because he or she has a specific, “partisan” interest in the collection of revenue from particular cases that would interfere with his or her impartial decision-making. As the court wrote in *Tumey* in 1927, “[i]t is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him cannot be said to violate due process of law.” In this functional vein, the Sixth Circuit has limited the *Ward* principle to criminal trials. Mayors presiding as judges may accept no-contest and guilty pleas, even where they have a pecuniary interest that would otherwise preclude them from presiding over a trial.

Since Ferguson, local courts have seen a wave of *Ward*-based litigation challenging the judicial collection of fines and fees. These cases typically aim, not at mayoral judges, but at judges whose court resources, salary, tenure, or reappointment may be influenced by their revenue collection. This past August, the Fifth Circuit held that the New Orleans criminal court magistrate could not constitutionally decide bail cases where the criminal court received a percentage of bail fees to fund various judicial expenses. In Georgia, the U.S. District Court found that the appointed judge of the Doraville Municipal Court potentially suffered from an unconstitutional conflict of interest because the $3 million raised from court fines and fees comprised between 17 to 30 of the city’s revenue, and because the mayor was dependent for his job on the good will of the city council. “The more substantial the percentage of revenues,”

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132 Ward, at 60. See also Connally v. Georgia, 429 U.S. 245 (1977) (invalidating arrangement where judge’s salary depended entirely on how many warrants he issued); *Tumey v. Ohio*, 273 U.S. 510 (1927) (invalidating arrangement where judge received conviction fee in addition to salary).
134 Ward at 61.
135 But see *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971) (finding inherent conflict where police and prosecutors who were also justices of the peace issued warrants so that they could not meet the “neutral and detached” requirements of the Fourth Amendment); cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 534, 535 (2004) (citizen held as an enemy combatant is entitled to a hearing before a variously termed “neutral decisionmaker,” “independent tribunal,” and “impartial adjudicator” although those due process rights might be satisfied by a hearing before a “properly constituted military tribunal”).
137 *Micale v. Vill. of Boston Heights*, 113 F.3d 1235 (6th Cir. 1997) (“[A] defendant who contests the charges against him is entitled to adjudication by a judge who does not have a pecuniary interest in the case. A guilty plea or a no contest plea, on the other hand, are ministerial functions which a mayor-even one with a pecuniary interest-may carry out”).
reasoned the court, “the more reasonable it is to question the impartiality of the judge, even if that judge has little to no executive authority.”

The conflict cases perform an inter-branch policing function that can be understood as a kind of substitute for separation of powers. The Supreme Court has never directly addressed whether municipal courts might be tested against separation-of-powers principles. Ward’s impartiality requirement is rooted in due process; the opinion expressly disavows any notion that the “mere union of the executive power and the judicial power” in a single official violates due process, and the term “separation of powers” does not appear in the opinion. The few state rulings on the subject, however, are relatively clear: they almost uniformly hold that municipal courts are not subject to separation of powers constraints at all. To state the obvious, this is a necessary predicate for the existence of most versions of the “municipal court,” namely, a judicial entity created, influenced, operated, and sometimes fully controlled by executive officials such as a mayor or a legislative entity like a city council.

Municipal courts are exempt from separation-of-powers doctrine due to the confluence of federalism and localism. Unlike the federal judiciary, state power to create courts is plenary. In the absence of Article III, state courts are not limited by federal rules of standing, the case-or-controversy requirement, or the prohibition against issuing advisory opinions. The

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140 See, e.g., Rose v. Vill. of Peninsula, 875 F. Supp. 442, 448 (N.D. Ohio 1995) (referring to mayor-judge conflict claim as an allegation that there is “not an adequate separation of powers”). By contrast, scholars have linked due process more tightly to separation of powers. See Barkow, at 1015 & n. 132 (noting that separation of powers is historically rooted in concerns about judicial conflicts of interest); Rebecca Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1516 (1991) (arguing that a central purpose of the separation of powers principle is to protect individual rights and that the principle itself should be understood as a form of due process); Nathan S. Chapman, Michael W. McConnell, Due Process As Separation of Powers, 121 Yale L.J. 1672, 1679 (2012) (“The meaning of ‘due process of law’ . . . evolved over a several-hundred-year period, driven, we argue, by the increasing institutional separation of lawmaking from law enforcing and law interpreting.”).

141 See Nestor M. Davidson, Localist Administrative Law, 126 Yale L.J. 564, 600–01 (2017) (“‘The prevailing view, at least as a formal matter, is that separation-of-powers principles simply do not apply at the local-government level.’”).

142 See David J. Barron, A Localist Critique of the New Federalism, 51 Duke L.J. 377, 378 (2001) (complicating the concept of local autonomy in relation to centralized authority); [?] Martinez, Local Government Law § 9:7 (West 2017) (discussing how states may choose to, but need not, create separate branches of local government through state statutes).

143 State of Missouri v. Lewis, 101 U.S. 22, 31 (1879) (“[T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory.”); Betts v. Brady, 316 U.S. 455, 458 (1942) (in deciding whether decision below “was that of a court,” “[a]nswer must be made in the light of the applicable law of Maryland”), overruled on other grounds by Gideon v. Wainwright, 372 U.S. 335 (1963); Nelson, at 574-75 (describing state authority to create more “informal” courts).

144 New York State Club Ass’n, Inc. v. City of New York, 487 U.S. 1, 8 n.2 (1988) (noting that absent the “special limitations” of Article III, “[t]he States are [] left free as a matter of their own procedural law to determine whether their courts may issue advisory opinions or to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual ‘case’ or ‘controversy’ be presented for resolution.”). Helen Hershkoff, State Courts and the "Passive Virtues": Rethinking the Judicial Function, 114 Harv. L. Rev. 1833, 1837 (2001) (charting the many ways that state courts diverge from the federal judicial model, including the placement of executive officials such as sheriffs in the judicial branch). See also Barkow, supra note xx (noting that various
extent to which state courts are constrained by separation of powers and its various operational manifestations thus turns primarily on state law.\footnote{146}{Rossi, at 1188 ("[T]he U.S. Constitution fails to dictate a specific form of separation of powers for state governments."). But see Michael Dorf, The Relevance of Federal Norms for State Separation of Powers, 4 Roger Williams U. L. Rev. 51, 54-59 (1998) ("[I]t is something of an overstatement to say that the [federal] principle of separation of powers has no application to the states.").}

Municipal courts, in turn, are distinguishable from state courts.\footnote{147}{Waller v. Florida, 397 U.S. 387, 393 (1970) (while states and the federal government are separate and dual sovereigns, cities are subsidiaries of their sovereign states and thus trigger Double Jeopardy protections against multiple prosecution by the same sovereign).} While state judiciaries are subject to state constitutional separation-of-powers doctrine, several supreme courts have held that local courts are not. For example, in \textit{Hubby v. Carpenter}, the West Virginia Supreme Court upheld a criminal conviction resulting from a trial conducted before a mayor-judge. In response to the defendant’s argument that his trial violated the West Virginia Constitution’s separation of powers clause, the court concluded that “in the absence of special circumstances, the doctrine of the separation of powers is not applicable to municipalities.”\footnote{148}{Hubby v. Carpenter, 177 W.Va. 78, 84 (1986); see W. Va. Const. Art. V § 1 (“The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time . . . .”).} The Delaware Supreme Court has held the same.\footnote{149}{Poynter v. Walling, 54 Del. 409, 415, 177 A.2d 641 (1962) (“[T]he rule appears to be that the constitutional requirement of separation of the three governmental departments applies to state government and not to the government of municipal corporations and their officers.”) \textit{Accord} Ghent v. Zoning Comm’n, 600 A.2d 1010, 1012 (Conn. 1991) (“The constitutional [separation-of-powers] provision applies to the state and not to municipalities, which are governed by charters and other statutes enacted by the legislature.”); Tendler v. Thompson, 352 S.E.2d 388, 388 (Ga. 1987) (“[T]he doctrine of separation of powers applies only to the state and not to municipalities or to county governments.”).} The Rhode Island Supreme Court has declared that “the separation of powers doctrine is a concept foreign to municipal governance.”\footnote{150}{Moreau v. Flanders, 15 A.3d 565, 579 (R.I. 2011) (upholding the collapse of municipal executive and legislative authority into a single state-appointed receivership).} By contrast, the Supreme Court of Maine has held that its state constitution’s separation-of-powers clause prohibits municipal officials from simultaneously holding both an executive and judicial position.\footnote{151}{Howard v. Harrington, 114 Me. 443, 96 A. 769, 771 (Me. 1916) (holding that the common law doctrine of the incompatibility of offices in conjunction with the separation of powers clause in the Maine constitution prohibited a justice of the peace from assuming the office of mayor), relied on by Lesieur v. Lausier, 148 Me. 500, 96 A.2d 585, 587 (Me.1953).} The court said that “in the absence of special circumstances, the doctrine of the separation of powers is not applicable to municipalities.”

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

This was so even though the city paid the salaries of those officials. Similarly, the Ninth Circuit has written: “Although city judges are defined as officers of Montana cities, city court jurisdiction and powers derive from the state statutes and they are included in the hierarchy of the state judicial system.”

In the face of all these variations, municipal court judges themselves appear conflicted with regard to their own branch status. Some perceive themselves as state judicial actors separate from their municipalities, whereas others consider themselves part of local government.

In the absence of separation of powers constraints, the Ward line of conflict cases is all the more central to the municipal court legal framework. Freed from conventional interbranch limitations, municipal courts are at greater liberty than most courts to blur the boundaries — institutional, financial, and political — with their parent cities and with executive or legislative officials. Instead, they are regulated by conflict cases like Ward, Dugan, and Tumey. Under these doctrines, the mere fact that a judge is a mayor, or might have an institutional or pecuniary interest in the outcome of a case, will not bar that judge from sitting in judgment. This substitution of conflict doctrine for separation-of-powers is yet another way that municipal courts have been permitted to bend the usual constitutional rules of criminal adjudication.

IV. A Hybrid Approach to Criminal Municipal Courts

What is a municipal court? Sitting quietly beneath every other tier of judicial institution, tucked away in small towns across America, it is literally the lowest court in the land. Sometimes it behaves like more visible higher-level courts, with lawyers and records and appeals, but often it does not. With its deep and broad local reach, the municipal court represents an enormous redundant layer of penalization that recriminalizes conduct that is usually already a state crime. Criminal procedure indulges its localism and lack of resources by adjusting constitutional constraints even while tolerating its tendency to overcriminalize. The municipal court is, in this sense, a quiet contributor to the practice and ethos of mass incarceration.

The municipal court is also an institutional hybrid. First and foremost courts, they are also institutions of municipal governance, created and run by cities. The judges who adjudicate

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153 Holland, at ___.

154 Eggar v. City of Livingston, 40 F.3d 312, 314 (9th Cir. 1994) (Montana municipal judge was “included in the hierarchy of the state judicial system” and therefore not a city policymaker for §1983 purposes).

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

156 See Barkow, supra note xx (on the importance of judicial independence and separation of powers in the criminal adjudication context).

violations of city ordinances are tightly associated with city executives and legislators; in this sense they resemble agency adjudicators who preside over violations of agency regulations. At the same time, these are criminal courts issuing convictions and punishments that, at least in theory, should trigger some of the most rigorous constitutional restraints on state power. The remainder of this Article represents an effort to bring America’s 7,500 municipal courts and their millions of criminal cases into larger scholarly conversations about courts, cities, and criminal justice.158

V. Testing Judicial Norms

Formally speaking, municipal courts are obviously courts. They are legally defined as courts by state law. They are presided over by judges who apply local law to the facts of specific cases and render legally binding judgments.159 No one disputes that they are courts.

And yet, at the extreme end of the spectrum of structure and practice, municipal courts operate in tension with many conventional understandings of what makes a court a “court.”160 Municipal court judges are often appointed by mayors or city councils and depend on them for tenure and salary, in violation of independence norms. Judges’ salaries may depend on their ability to collect fines and fees from defendants they convict, in violation of neutrality norms. When judges are not lawyers, they may not even know the law, in violation of legality norms. Many courts are not of record and produce no transcript or other record of the proceeding, in violation of publicity and transparency norms.161 In other words, while such courts have been consistently upheld as constitutional exercises of judicial power, they test the limits of many basic modern judicial tenets.

A. The Due Process Critique

To the extent that criminal municipal courts have received criticism as courts, it has been largely in the vein of due process failure. Proceedings are typically fast and lack individuation. Evidence is ignored. Legal issues go unaddressed. Defendants with the right to counsel often do not get lawyers. Fines and fees are disproportionately punitive, extortionate, and sometimes unconstitutional.162
Some of these criticisms date back decades to the historical and sociological literature on early low-level courts which emphasized their speed and informality. As Lawrence Friedman relates, the 19th century police court in Alameda County, California, disposed of twenty cases “in ten minutes—two cases per minute.” In 1954, Caleb Foote described a typical day in Philadelphia vagrancy courts as follows. “Four … defendants were tried, found guilty and sentenced in the elapsed time of seventeen seconds… In each of these cases the magistrate merely read off the name of the defendant, took one look at him and said, ‘Three months in the House of Correction.” In 1979, in his seminal work The Process is the Punishment, Malcolm Feeley described a New Haven lower court filled with “casualness and confusion . . . . Half of all defendants had no lawyer and [a]рестees were arraigned in groups and informed of their rights en masse . . . . While a few cases took up as much as a minute or two of the court’s time . . . the overwhelming majority of cases took just a few seconds.”

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

To the extent that municipal courts trigger concerns above and beyond such process failures, it is because of their unique structural characteristics. The first is the routine lack of legal expertise that flows from non-lawyer judges: by contrast, no state court permits its criminal judges to be non-lawyers. City courts also raise structural threats to neutrality and independence because including municipal courts); Jenny Roberts, Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts, 45 U.C. Davis L. Rev. 277, 288, 364 (2011); Robert C. Boruchowitz et al., Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts, NACDL (Apr. 2009).


Malcolm M. Feeley, The Process Is The Punishment: Handling Cases in a Lower Criminal Court (1979), at 10-13. Feeley’s description was not necessarily intended as critical. Feeley at __ (arguing that different forms of justice may be appropriate to different social tasks).

The phenomenon is not limited to misdemeanors. Amy Bach, Ordinary Injustice: How America Holds Court (2009) (describing similar practices in felony courts).


See notes xx, supra.


NCSC Methods of Judicial Selection: Limited Jurisdiction Courts (with the possible exception of Washington state),

http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm?state=
of these courts’ close relationship to their parent cities. Such characteristics might themselves cause various forms of process failure: non-lawyer judges are an invitation to legal error. Similarly, the intimate relationship between judges and other governmental branch officials can express itself as pro-government bias, inattention to evidence, or as a failure to honor the right to counsel. For example, one New Jersey attorney, who subsequently became a judge, concluded that because of close relationships between local courts and law enforcement, “many people believe somewhat cynically that it is nearly impossible to win a municipal court case involving an officer’s word against a private citizen’s word, no matter how many other credible witnesses testify in the defendant’s favor.”  

But legality, neutrality, and independence perform their own legitimating work above and beyond such instrumental concerns. They are integral to the way that we conceptualize courts and judging, and offer key structural protections to defendants. The next sections explore how judicial scholarship, and more recently the Supreme Court, engage such concepts in ways that illuminate the peculiar municipal court challenge.

B. The Democratic Role of Judging

The legal academy has long been preoccupied with the nature of courts and judging. Much of that discourse has been devoted to the highest tiers of judicial activity: appellate review and the judicial check on other branches of government.  

But judges do not only review: they are the initial legal decisionmakers and sometimes factfinders in specific cases, they preside over criminal trials and civil disputes, and they interpret the meaning and application of statutes. Their role is especially important in the criminal area because they stand between the all-powerful state and the often unpopular, vulnerable individual. As Justice Scalia once wrote,

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

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

For example, in defining the democratic role of judging, Judith Resnik focuses on independence, transparency, and public reasoning. The “classical view of the judicial role,” she writes, is one in which “judges are not supposed to have an involvement or interest in the controversies they adjudicate. Disengagement and dispassion supposedly enable judges to decide cases fairly and

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impartially.”

That classical role is intimately connected to democratic norms. “Democracies rely on the independence of their judiciaries as a consequence of democratic commitments . . . to the rule of law, the protection of individual liberties and to rights.” Resnick and Dennis Curtis write that “to judge is to ‘speak[ ] truth to power,’ to seek to hold and, on occasion, to exercise some form of jurisdiction beyond that given by or belonging to the sovereign, so as to have a measure of critical independence from the sovereign.” In these analyses, adjudication has public dimensions; the role of the court is not merely one of dispute resolution, but public law preservation. Or as Owen Fiss put it, “[a]djudication is the social process by which judges give meaning to our public values.”

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

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

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177 Judith Resnik, Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk, 81 Chi.-Kent L. Rev. 521, 530 (2006) (describing the public dimensions of adjudication and quoting Jeremy Bentham as saying “[p]ublicity is the very soul of justice”)


180 See, e.g., Lynn Mather, Epilogue, in EMPIRICAL THEORIES ABOUT COURTS 254, Keith O. Boyum and Lynn Mather eds. (Quid Pro Quo Books, republished 2015) (“[F]or the vast majority of civil and criminal cases [] the traditional model of court as a judge-dominated, formal adversary process of adjudication [does] not hold.”).


182 Marc Galanter, The Radiating Effects of Courts, in Empirical Theories About Courts, supra note xx, at 130 (“Courts produce not only decisions, but messages.”).
The doctrinal and normative messages sent by courts are particularly important for criminal law. As Caleb Nelson remarks, “our vision of the constitutional separation of powers is substantially more formalistic when the government is trying to lock someone up.”183 Criminal scholars have focused in particular on the heightened need for an independent judiciary. Rachel Barkow, for example, argues that there is a greater demand for judicial checks and balances in criminal cases because of the extraordinary power conferred on prosecutors by the plea bargaining regime.184 The institutional values protected by separation of powers are threatened, she argues, because prosecutorial decisionmaking is usually dispositive of case outcomes, highly discretionary, and subject to weak judicial review.185 Other criminal law scholars have emphasized the importance of a fair and impartial judiciary in promoting procedural justice. Judges who treat defendants fairly and respectfully enhance the public legitimacy of the entire criminal process, whereas judges who are perceived as partial to the government or otherwise biased destabilize the integrity of the process.186

In each of these various articulations, the public role of courts as independent, reasoned legal decisionmakers has democratic, expressive, and symbolic significance. Courts do not merely apply rules and decide cases; they assure the public of the state’s commitment to the impartial application of law. In the criminal context, they protect vulnerable defendants from the overreaching power of the penal state and its powerful prosecutorial officials. Municipal courts are rarely scrutinized through these lenses, or held to these measures of legitimacy. Indeed, some classic doctrinal measures such as separation of powers and the right to counsel have been intentionally relaxed.

C. Judicial Character: Ortiz v. United States

Although the Supreme Court has never considered whether a municipal court meets modern judicial standards, it recently offered a suggestive meditation on the nature of the judicial character. In 2018, in Ortiz v. United States, the Court decided that it possessed appellate jurisdiction to review a decision from the Court of Appeals of the Armed Forces (CAAF), the highest appellate court in the military court martial system.187 In affirming its own appellate jurisdiction, the Court focused in particular on the heightened need for an independent judiciary. This case sends a clear signal that “state-level prosecutors are more independent than their federal counterparts.”186

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184 Barkow, at 1025, 1046-48 (“The same prosecutor who investigates a case can make the final determination about what plea to accept. There is therefore no structural separation of adjudicative and executive power.”).
185 Id. at 1048. Barkow’s call for a strong judiciary is primarily a response to the scope of federal prosecution, but state prosecutorial power is similarly broad, as is municipal prosecutorial power. See Rachel E. Barkow, Federalism and Criminal Law: What the Feds Can Learn from the States, 109 Mich. L. Rev. 519, 538 (2011) (noting that “state-level prosecutors are more independent than their federal counterparts”).
186 Tracey L. Meares and Tom R. Tyler, Justice Sotomayor and the Jurisprudence of Procedural Justice, 123 Yale L.J. Forum 525, 526–27 (2014) (“The primary factor that people consider when they are deciding whether they feel a decision is legitimate and ought to be accepted is whether or not they believe that the authorities involved made their decision through a fair procedure, irrespective of whether members of the public are evaluating decisions made by the Supreme Court or by local courts.”).
187 Ortiz v. United States, 138 S.Ct. 2165 (2018). In order to have appellate jurisdiction, the Supreme Court had to conclude that it was reviewing a judicially-generated “case.” That issue, in turn, required it to decide whether CAAF and the entire court-martial system are indeed “courts” capable of generating cases, even though they are part of the executive branch and not Article III courts. Were they merely executive tribunals, Article III would have barred the appeal in much the same way that Marbury v. Madison famously barred William Marbury from seeking a writ from the Supreme Court to overrule James Madison’s executive decision to squelch Marbury’s commission.
jurisdiction, the Supreme Court relied heavily and repeatedly on the “essential judicial character” of the court-martial system. That judicial character consisted of various components. First, courts-martial “decide criminal ‘cases’ . . . in strict accordance with a body of federal law.” Second, “the procedural protections afforded to a service member are ‘virtually the same’ as those given in a civilian criminal proceeding.” Third, the judgments of such courts are final and binding with res judicata and Double Jeopardy effect. Fourth, the “jurisdiction and structure of the court-martial system [] resemble those of other courts,” especially because they “can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service.” Finally, the Court noted that “decisions of those tribunals are subject to an appellate process—what we have called an ‘integrated system of military courts and review procedures’—that replicates the judicial apparatus found in most States.”

Not all adjudicators have judicial character. The Ortiz Court contrasted the court-martial system with the Civil War-era military tribunal in Vallandigham, which was created, staffed, run, and controlled entirely by the general. That tribunal was “more an adjunct to a general than a real court” and thus “lacked ‘judicial character.’” By contrast, explained the Court, CAAF is a “permanent ‘court of record,’” it “stands at the acme of a firmly entrenched judicial system . . . and its own decisions are final.” In addition, the court martial system is functionally indistinguishable from territorial courts, the court system of the District of Columbia, and state courts, all of which are firmly subject to the Supreme Court’s appellate jurisdiction. The Court concluded that for all these reasons, the court-martial system “performs an inherently judicial role,” and exhibits sufficient “historical court-likeness” to make appellate jurisdiction appropriate.

Justice Alito, joined by Justice Gorsuch, dissented on the grounds that no amount of “judicial character” or “court-like” process could ever overcome the structural fact that courts-martial and the CAAF are executive entities and thus barred by Article III from issuing “cases” that could be reviewed on appeal.

Although Ortiz was decided in the shadow of Article III, and ultimately concerned an appellate rather than a trial court, its meditation on the nature of the “judicial character” is universal in tone. The majority implies that there is a transjurisdictional notion of judicial character uniting non-Article III courts such as courts-martial, territorial courts, courts in the District of Columbia, and state courts. A tribunal with that judicial character counts as a court, at least for the purposes of determining whether it decides “cases” that can eventually trigger Supreme Court appellate jurisdiction.

188 Ortiz at 2175.
189 Ortiz, at 2179.
190 Id. at ___.
191 “Suppose,” wrote Alito, “that [James] Madison’s decisionmaking process [regarding Marbury] had been more formal.” Even if Madison had created an executive tribunal to decide Marbury’s commission, held meetings in a courthouse, and dressed the adjudicators in black robes, he still could not have transformed the essential executive character of his decision into a judicial one. “No matter how court-like” the tribunal, Alito argued, Marbury v. Madison would still not have come out the other way. Id. at ___. Justice Alito did not dispute, or even engage the assertion that courts-martial and the CAAF are “court-like,” but rather maintained that being court-like is not enough to overcome the restrictions of Article III.
What happens when a tribunal flunks *Ortiz*’s “judicial character” test? Municipal courts raise the obvious question. Many of them are neither courts of record nor permanent; they do not provide the same procedural protections as their sister state courts. They may or may not decide cases in “strict accordance” with state and federal law. As stand-alone tribunals, their jurisdiction and structure often differ significantly from state district courts. Like *Valladignan*, critics often complain that they are mere “adjuncts” to mayors and city councils. And although *Ortiz* did not discuss impartiality, the trait belongs on the list of established judicial characteristics that are routinely violated in municipal court.

The conventional answer to such concerns lies in *North v. Russell*, which acknowledged that municipal courts lack many indicia of judicial integrity but concluded that they are saved by the availability of de novo appeal. They don’t really need to be court-like, as it were, because de novo appeal “is always available.” With modern insights unavailable in 1972, we should question that justificatory move. Appellate oversight is essentially a fiction: as King and Heise demonstrate, numerous structural barriers prevent appeals and render them exceedingly rare. The appellate structure thus does not meaningfully function to check municipal court decisions. Moreover, the historical justifications for permitting such uncourt-like behavior are greatly reduced in the modern world. The claim that punishment is too minor to matter recedes against the burdensome realities of widespread collateral consequences and debtor’s prison for the poor. The idea that local residents cannot manage to get to a centralized court that has more resources and more lawyers likewise fades in light of easy access to transportation and technology.

In accepting the court martial system as judicial, the *Ortiz* Court relied on the fact that the system’s legal pedigree is older than the Constitution. The same is true for municipal courts. But *Ortiz* also made clear that pedigree was not enough—courts-martial had to satisfy the substantive and structural requirements of “judicial character” even though they have been around for centuries. *Ortiz* thus opens the door to the notion that the state’s historic, plenary power to authorize the creation of local courts might be limited by more modern judicial norms. Less doctrinally, *Ortiz* suggests that judicial character arguments are fair game in the normative

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192 See Part II supra. See also LaFave 1 Subst. Crim. L. § 1.7(c) (3d ed.) (describing how defendants may be entitled to less protective procedures in municipal court).

193 See Diller, A Theory of Local Common Law, supra (describing how local courts generate their own local versions of law); see also Natapoff, supra note xx (describing various legal deviations that characterize low level courts).

194 Although the availability of de novo appeal did not cure the failure to provide a neutral adjudicator in *Ward*, 409 U.S. at __.

195 This argument has been around for a while. Chester H. Smith, The Justice of the Peace System in the United States, 15 Cal. L. Rev. 118, 118 (1927) (“Today with paved roads, automobiles and instant communication, all of which obtain, with but few exceptions, in the remotest rural communities, it is safe to say that the conditions which forced the creation and spread of the justice of the peace system in the United States have long since ceased to exist.”).

196 Natapoff, supra note xx (describing broad array of collateral consequences for minor offenses).

197 There may still be rural communities that lack lawyers. See Anna Burleson, Attorneys are scarce in rural North Dakota while business keeps growing, Grand Fork Herald, Mar. 23, 2014 (noting that most lawyers live in metropolitan areas and that only 85 of North Dakota’s 357 towns have lawyers with registered firm addresses).

198 *Ortiz* at __.
conversation about whether and when municipal courts should be deemed sufficiently court-like to issue criminal convictions in the ways that they currently do.

D. Learning from the Administrative Adjudicator Model

Much judicial theory revolves around the paradigmatic, independent Article III court. But other models of adjudication provide additional useful comparisons.\(^{199}\) For example, although municipalities are not administrative agencies,\(^{200}\) the judges in their courts bear strong family resemblances to administrative law judges (ALJs): they are adjudicative officials paid by, often selected by, and/or beholden to executive or legislative officials who rely on them to enforce local codes, in much the same way that agencies designate and maintain ALJs in order to enforce agency regulations.\(^{201}\)

More specifically, the independence and neutrality challenges surrounding municipal courts strongly resemble issues of independent agency adjudication that have been thoroughly excavated in the administrative law context.\(^{202}\) Indeed, administrative law routinely relies on *Ward v. Village of Monroeville* in order to evaluate adjudicator conflicts,\(^{203}\) and scholars have noted the strong similarities.\(^{204}\)

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199 Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559 (2007) (arguing that not all adjudication qualifies as “judicial” and describing historical distinction between the adjudication of public interests and private rights and liberties, only the latter of which requires true judicial authority).

200 The Model State Administrative Procedure Act specifically excludes “the Judiciary” from its definition of “agency.” Revised Model State Admin. Procedure Act § 1-102(3) (Nat'l Conference of Comm'r's on Uniform State Laws 2010).

201 Municipal governance has generally escaped the attention of administrative law scholarship. See, e.g., Saiger, at 424-25 (noting that local government scholars maintain they are not doing administrative law), and David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 563-64 (1999) (“A local community is not simply a type of state administrative agency to be shaped at will to serve the need of the central state.”). A few scholars have recently pushed back against this disciplinary state of affairs. See, e.g., Nestor M. Davidson, *Localist Administrative Law*, 126 Yale L.J. 564 (2017) (arguing that administrative law scholarship should turn its attention to local administrative entities such as health and zoning boards); Aaron Saiger, *Local Government As A Choice of Agency Form*, 77 Ohio St. L.J. 423 (2016) (proposing that a state’s decision to create a local government should be conceptualized as a choice of agency form).

202 See, e.g., *Giles v. City of Prattville*, 556 F. Supp. 612, 616 (M.D. Ala. 1983) (relying on APA case that found “unfairness of a procedure that commingled the prosecutorial function of the presiding inspector with his decision making function” in deciding that municipal court judge could not constitutionally serve simultaneously as prosecutor in his own court).

203 E.g., *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (citing *Ward* in finding that optometry board was biased and noting that “(m)ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.”); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (finding no disqualifying bias under *Ward* with respect to Medicare Part B hearing officers appointed by private insurance carriers who “serve in a quasi-judicial capacity, similar in many respects to that of administrative law judges”).

204 Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 Notre Dame L. Rev. 297, 319 (2018) (“Like the Mayors in Tumey and Ward, agency commissioners occupy two different positions, one partisan and one judicial.”); see also Saiger, supra note xx, at 440 (noting in passing that local courts enforce municipal ordinances in the same way that agencies enforce their own regulations); *Welsh & Hamilton, No Justice In Utah’s Justice Courts*, 2012 Utah L. Rev. Onlaw 27, 46 (2012) (“As organized, Utah justice courts essentially operate as an administrative agency.”).
Administrative law has long grappled with the structural risks of bias and undue influence triggered by agencies that select and influence their own adjudicators. Fueled by concerns about ALJ bias and agency interference with adjudication, a large body of law has arisen to emphasize the importance of adjudicator insulation against agency control. The Administrative Procedure Act (APA), for example, contains strong protections for ALJ independence against agency influence. Those protections include limitations on agency supervision and removal of ALJs, and prohibitions against ALJ communications with agency investigators or prosecutors.

In practice, municipal judge arrangements often violate these sorts of anti-bias and anti-influence protections. For example, judges appointed by city councils often do not enjoy meaningful tenure or salary security. As the Ferguson report made clear, many judges perceive their salaries and reappointment prospects to be contingent on their performance in collecting fines and fees. Judges commonly communicate with and rely on police and prosecutors: many municipal courts depend on local prosecutors for space, resources, and legal advice, especially when those judges are not themselves attorneys. Some judges are prosecutors in other jurisdictions with professional relationships with law enforcement. These practices suggest that Ward and the conflict cases do not guarantee adjudicator independence in the robust ways that separation of powers principles require for formal adjudications in the comparable agency context.

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

The comparison between municipal courts and ALJs is admittedly limited. Municipal governments are not administrative agencies. Federal agencies are constrained by separation of powers in ways that do not apply at the local level. ALJ decisions are not final. Nevertheless, municipal courts and ALJs both confront the obvious appearance of conflict and bias that arises when an adjudicator has deep institutional connections to the nonjudicial institution seeking enforcement of its own rules. In the administrative law context, ALJ independence is a touchstone, a central reference point relied on by courts and scholars alike that supports the notion that executive branch adjudication can meet basic due process and legitimacy standards. Indeed, Ward and the municipal court conflict cases have come to play an important role in fleshing out that administrative commitment to adjudicator neutrality. Perhaps ironically, many actual municipal court practices remain in tension with that commitment.

E. Municipal Courts Going Forward

These various meditations on the nature of courts, and municipal courts in particular, could send us in at least two different conceptual directions. We might accept the municipal court phenomenon as a longstanding, legitimate judicial practice that puts new pressure on the ways that we talk about courts and criminal adjudication. Municipal judges are not required to be financially neutral or politically independent. They are not even required to be trained in law. Their continued existence thus implies that neutrality, independence, and legal reasoning are not per se characteristics of courts and judging. Instead, they suggest that we should expand the discourse around the nature of the judicial function to better accommodate the extent to which

innocence in individual cases). See, e.g., United States v. Millis, 621 F.3d 914, 918 (9th Cir. 2010) (rule of lenity precluded defendant’s conviction for “littering” pursuant to Fish and Wildlife Services regulation).

Immigration ALJs have the power to detain, 8 U.S.C. § 1226, and Tax Court judges can punish contempt with incarceration. Lucia at 2054.


Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 626 (2007). See also id. (“[The] authoritative deprivation of an individual’s natural rights to life or physical liberty requires fully ‘judicial’ determination of the individualized adjudicative facts.”). See also Barkow, supra note xx; Scalia, supra note xx; Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (separation of powers “most assuredly envisions a role for all three branches when individual liberties are at stake”).

See Saiger, supra (admitting that they aren’t).

See text accompanying notes supra.

Lucia, at 2053-54 (describing agency review of ALJ decisions). While municipal judge decisions are final, de novo review and a new trial are typically available to any defendant wishing to challenge their conviction. Text accompanying notes supra.

Hershkoff, supra note xx, at 1913 (“No idealized conception of judicial capacity resolves what the shape or content of the judicial function should be in state courts.”).
many local courts diverge from the idealized Article III-based model of the impartial, independent legal adjudicator.

In the criminal context, however, there are good reasons to double down on neutrality, independence, and legal reasoning as normatively desirable characteristics of courts and judges. For the legally and politically vulnerable defendant, judicial character—and judicially-enforced due process—is a key protection against executive overreach and popular animus. In this light, the criminal municipal court looks more like a troubling phenomenon that has slipped between the jurisprudential cracks, permitted to operate in anachronistic ways that erode basic criminal justice norms. We might then rethink Ward, North v. Russell, and the rest of municipal court jurisprudence in order to bring these courts into greater compliance with modern practices and understandings.

Such a rethinking, however, requires more context: municipal courts are not solely judicial institutions but also integral to local governance and connected to the special role of cities. The next section turns to that intellectual landscape.

VI. Local Governance

Local government is a political arrangement central to U.S. history and democracy. Local governments effectuate their own brand of political participation, accountability, and transparency in ways that neither state nor federal power can fully replicate. As Gerald Frug wrote nearly forty years ago, “[c]ities have served—and might again serve—as vehicles to achieve purposes which have been frustrated in modern American life. They could respond to what Hannah Arendt has called the need for ‘public freedom’—the ability to participate actively in the basic societal decisions that affect one's life.”

Given the influence of localism in American democracy, it is surprising how little has been written about municipal courts from a local government perspective. For example, the leading 19-volume, 13,000-page treatise on municipal law, McQuillin, devotes a mere 28 pages to municipal courts: they are contained in a subsection in the chapter on “Actions to Enforce Police Ordinances.” Imagine for a moment the incredulous scholarly response to a treatise that subsumed the federal judiciary under a section heading entitled “Actions to Enforce Federal Law.” Similarly, one of the few leading casebooks on local government law to address the separation of powers devotes a chapter to the subject: that chapter discusses the legislative and

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220 See Part VI infra on informality in criminal law.
221 Gerald E. Frug, The City As A Legal Concept, 93 Harv. L. Rev. 1059, 1068 (1980). See also Michelle Wilde Anderson, Dissolving Cities, 121 Yale L.J. 1364, 1400 (2012) (excavating the fraught communal values that motivate the decision to dissolve a city).
222 For example, Anderson, Barron, Briffault, Davidson, Diller, Frug, and Shragger, are leading local government scholars whose work has not addressed municipal courts. See supra notes xx. See also Leib, Local Judges, at 708 (“[I]t seems quite rare to see [local government scholarship] focused on . . . the local courts.”). Leib is one of the few legal scholars who has. See id. (interviewing 23 local New York judges). Cf. Logan, The Shadowy Criminal Law of Municipal Governance, supra note xx, at 1436 (discussing local legislative authority to enact criminal laws and noting in passing that “local authority typically entails the use of ‘municipal courts,’ the summary and ‘slap-dash methods’ of which have been a source of concern for decades”).
executive branches of city government, but does not engage the judicial branch.\textsuperscript{224} Again, picture the chilly academic reception to an article on separation of powers that never mentioned the courts. Put differently, the absence of local courts in the municipal government literature would be intellectually countercultural in many other spheres.

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

A. Political Localism

Local government law and scholarship are centrally concerned with community authority and autonomy. City governments in particular are viewed as crucial vehicles for democratic self-expression. Through this lens, municipal courts might be appreciated as unique expressions of official responsiveness, local political will, and community-informed substantive justice.\textsuperscript{225} Indeed, this responsiveness is central to their historical legacy. Edwards writes that post-Revolutionary local justices of the peace—the precursors to modern municipal courts—represented “not some quaint, folksy exception to a formalized rational body of state law” but rather a profound expression of local democratic impulses and Revolutionary commitments to legal and political accountability.\textsuperscript{226} Willrich writes that, a century later, “Progressive legal mandarins such as Roscoe Pound and . . . Louis Brandeis saw the reconstruction of city courts as absolutely central to the larger process of making law more responsive to modern social needs.”\textsuperscript{227}

Today, New York state maintains over 1,200 town and village courts presided over by elected, mostly non-lawyer judges.\textsuperscript{228} The arrangement has withstood decades of criticism: legislative reform, electoral referenda, and judicial challenges have all failed in the face of persistent local and powerful political support for the courts. “You boys from New York City have never seen a justice court,” remarked one state senator and defender of the system in 1959. “These justices are the backbone of honest-to-God human justice in our state.”\textsuperscript{229}

\textsuperscript{224} Baker et al., Local Government Law, Cases and Materials 759-822 (5th ed. 2014) (“The central question this chapter asks is whether the familiar institutional design features of the federal government—separation of powers between a legislature and an executive branch, an executive with administrative law powers that are deferred to by courts—make sense in the context of local governments.”).

\textsuperscript{225} Leib, Local Judges, at 734 (“Local courts are surely designed at least in part to afford citizens justice that makes sense in their communities.”). See also Logan, Shadow, at 1411-13 (connecting localism debate to municipal authority to enact criminal ordinances).

\textsuperscript{226} Edwards, at 5.

\textsuperscript{227} Willrich, supra note xx, at xxvii.

\textsuperscript{228} William Glaberson, How a Reviled Court System Has Outlasted Critics, N.Y. Times, Sept. 27, 2006.

\textsuperscript{229} Id.
Thirty years after Provine’s survey of New York local judges,\(^\text{230}\) Ethan Leib went back and interviewed 23 New York town and village judges and asked them about their relationship to the state. Their answers revealed strong localist loyalties:

A majority felt primarily “of the locality,” not of the state. Judges said things like the following: “As a local judge, I don’t see the state;” “We aren’t funded by the state, so I am accountable mostly to the locality;” “I don't think of myself as related to the state; I serve a local community;” “I am part of the town on parking, zoning, and building issues. There I want the town to thrive. I feel for the locals and want the town to thrive in tough economic times;” “I don't have much concern about ‘the state’ as such. I worry about the kids in our community;” “I do not feel I am an arm of the state or an apparatus of the state. I am an elected official for the village. I don't identify as a state guy;” “I don't . . . consider myself a part of the state system;” “I am of the community and paid by the locality;” “I am ‘totally local;’” “I don't feel integrated into the state system at all.” One judge stated, “The state does not have much say in my life at all.”\(^\text{231}\)

This localist perspective brings municipal courts into the long-standing conversation about elected judiciaries and the methods of their selection and retention.\(^\text{232}\) Elected judges are well understood to provide benefits of democratic accountability alongside the risks of politicization and undue influence.\(^\text{233}\) Municipal judges—some of whom are elected and some of whom are appointed—could be seen as paradigmatic exercises in this compromise, although there is scant empirical data and the phenomenon is not well understood. One unpublished study, for example, reports that elected municipal judges rely more heavily on fines and fees than their appointed municipal counterparts.\(^\text{234}\) By contrast, a 2017 Arizona report concluded that local elections better insulate municipal court judges from “good-old-boy” pressures emanating from appointment commissions, pressures “to raise revenue through fines, allow questionable practices that are priorities of the [city] council, or to give special treatment to influential city insiders.”\(^\text{235}\) Similarly, Utah concluded that its municipal court judges were under pressure to raise revenue precisely by virtue of the local judicial appointments process. Utah thus eliminated local appointments and moved to a hybrid system in which municipal court judges are initially recommended by the city, appointed by a state-wide commission, and then stand for local election.

\(^{230}\) Provine, supra note xx.

\(^{231}\) Leib, Local Judges, at 725-26.


\(^{233}\) A few scholars have explored the impact of judicial electoral pressures on criminal case outcomes. See Carlos Berdejo, Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing, 95 Rev. Econ. Stat. (2010) (finding that judges sentenced more harshly as elections approached).

\(^{234}\) Siân Mughan, Fine and Fee Revenues, Local Courts and Judicial Elections: The Role of Financial and Political Institutions in Extractive Revenue Practices in U.S. Cities, unpublished paper, available at ssrn…. (finding also that fine and fee collections vary with the racial composition of the municipal electorate).

\(^{235}\) Mark Flatten, City Court: City Court: Elections Protect Judges from Good-Old-Boy System of Appointment, Goldwater Institute 2017.
retention re-election. In 2015, when DOJ identified the heavy political pressures on Ferguson judges to raise revenue, Ferguson municipal court judges were being selected by the City Council.

In sum, municipal courts are an understudied experiment in local political democracy in ways that have yet to be fully appreciated in the legal literature. These courts can enrich our discourse around political accountability, around methods of judicial selection, and around the meaning and aims of democratic judging.

B. Economic Localism

Municipal courts might also occupy a greater place in the scholarly discourse about cities as sites of economic decision-making and wealth distribution. State fiscal crises, recessions, and instabilities in the housing market have profoundly impacted U.S. cities. Many are grappling with lack of resources, cutting services, and even bankruptcy. As Michelle Wilde Anderson explains, many of the poorest cities have “been struggling with deindustrialization for decades . . . Widening inequality among individuals has imprinted itself in space, and these cities lie within the lowest strata of cities ranked by property values, crime rates, and educational outcomes.”

Many core forms of urban decision-making exert broad economic influence: nearly thirty years ago, Richard Briffault identified the “close connection between local legal and political autonomy and issues of distributive justice” in the arenas of education and zoning.

If there is one arena in which municipal courts have gained substantial recognition, it is in connection with their role in raising local revenue through the imposition of fines and fees. An enormous new wave of litigation, advocacy, and scholarship—much but not all of it post-Ferguson—is devoted to the problem of fines and fees, debtor’s prison, and the problematic incentives of governments, police, and courts to use law enforcement to raise money. As Beth Colgan points out, “the use of economic sanctions—statutory fines, surcharges, administrative fees, and restitution—has exploded in courts across the country. . . . [This] modern debtors’ prison crisis . . . has been driven in large part by a desire by lawmakers to use economic sanctions as a tax substitute as well as a form of punishment, leading to the creation of more and greater sanctions, and in some jurisdictions to policing targeted at offenses from which revenue

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236 Flaten at 24.
237 Ferguson Report, at 8, 14-15. Post-reform Missouri law requires the state Supreme Court to promulgate new conflict rules.
239 Briffault, Our Localism, at 3. See also Nicole Garnett, Ordering the City: ___ ; cf. Richard C. Schragger, The Limits of Localism, 100 Mich. L. Rev. 371, 405 (2001) (claiming that the Chicago gang loitering statute struck down in Morales “is a zoning regime”).
240 See, e.g., Michael D. Makowsky et al., To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement (August 30, 2018). GMU Working Paper in Economics No. 16-17. Available at SSRN: https://ssrn.com/abstract=2745000 (finding that drug and DUI arrests increase in counties where local governments are running deficits and where states allow police departments to retain seizure revenues, but only for black and Hispanic but not white arrests); Michael W. Sances and Hye Young You, Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources, 79 J. Politics 1090 (2017) (study showing that cities’ reliance on fines and fees is connected to the size of the black population and also mediated by the presence of black city council representation).
Criminal Municipal Courts

can be generated.”241 Courts are the quiet centerpiece of this strategy—they are the site in which revenue-generating legislation and extractive policing actually translate into collections.242 In this sense, the conversation around municipal courts as local economic actors has implicitly begun.

Last Term, the Supreme Court recognized the fraught quality of the judicial revenue-collection function and its potential threat to the integrity of the criminal system. In Timbs v. Indiana, the Court incorporated the Eighth Amendment’s prohibition against excessive fines against the states. In explaining why the “[p]rotection against excessive punitive economic sanctions secured by the Clause is . . . ‘fundamental to our scheme of ordered liberty,’” the Court observed that criminal fines “may be employed ‘in a measure out of accord with the penal goals of retribution and deterrence,’” because “fines are a source of revenue.”243 Quoting an amicus brief by the ACLU, the Court noted that the threat is “scarcely hypothetical”: “state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.”244 The reference to “local governments” is actually to municipal courts—the rest of the quoted paragraph in the ACLU brief is devoted to documenting municipalities’ heavy reliance on city court-generated revenue:

“In 2017, New Jersey municipal courts collected more than $400 million in fines and fees, with more than half of that amount funneled to the general funds of municipalities and a significant portion directed to state and county governments. Similarly, in 2016, more than half of the $167 million raised by Arizona municipal courts in fines and fees funded general municipal operations. Among the 100 cities in the United States that generated the highest proportion of municipal revenue from fines and fees in 2012, between 7.2% and 30.4% of total municipal revenue was derived from fine and fee collection.”245

In these various ways, municipal courts turn out to be an important vehicle through which local governments respond to state fiscal crises.246 They can be seen as a low profile but integral part


242 See Ordower, supra note xx. See also All Things Considered: North Carolina Law Makes It Harder For Judges To Waive Fees And Fines, NPR, Dec. 4, 2017 (explaining new state law restricting judges’ ability to waive fines and fees).

243 Timbs, slip op. at 6, 586 U.S. _ (2019).

244 Id.


246 The Conference of Chief Justices and the Conference of State Court Administrators (COSCA) have announced their opposition to the current fiscal reliance on fines and fees, stating that “court functions should be funded from the general operating fund of state and local governments to ensure that the judiciary can fulfill its obligation of upholding the Constitution and protecting the individual rights of all citizens.” National Center for State Courts News Release, February 3, 2016, http://www.ncsc.org/Newsroom/News-Releases/2016/Task-Force-on-Fines-Fees-and-Bail-Practices.aspx [https://perma.cc/74RH-52MT].
of a larger economic story about the relationship between state and local government, and the sometimes fraught relationship between local government and its own residents. That economic role makes these courts potentially influential players in the localism narrative, even as it further complicates their judicial status as neutral adjudicators and standard-bearers for the rule of law.

C. Criminal Justice Localism

Across the intellectual pond, a different debate is brewing over the role of local democracy in criminal law. In his last book, the eminent criminal law scholar William Stuntz argued that the profound dysfunctions and unfairnesses of the American criminal justice system called for more local democracy. Local communities, he argued, especially poor communities of color, lose out when counties, states, and the federal government dominate crime policy. He thought that mass incarceration and the system’s racial skew could be understood in part as failures of local political accountability. “Make criminal justice more locally democratic,” he concluded, “and justice will be more moderate, more egalitarian, and more effective at controlling crime.”

Professor Stuntz passed away in 2011. Four years later, DOJ’s Ferguson Investigation pulled back the curtain on the local court’s practice of using misdemeanor convictions to extract revenue, often through incarceration, from the city’s poorest black residents. Municipal courts around the country have likewise demonstrated their political responsiveness, not to community voices, but to pressure to save and raise money. Such practices remind us that localism alone cannot be counted on to provide reliable protection for vulnerable criminal defendants.

Such complexities notwithstanding, many criminal law scholars continue to call for a stronger role for community responsiveness and local criminal justice decision-making. In a recent symposium entitled “Democratizing Criminal Law,” over a dozen scholars argued for various forms of public participation, local accountability, and community-based adjudication as ways of improving fairness in the criminal process. Nineteen scholars signed onto a “White Paper of

247 For example, the exit option is important to public choice theories of local government: “the threat that people will ‘vote with their feet’ by moving in search of suitable locales serves as an inherent check on local government behavior.” Michelle Wilde Anderson, Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe, 55 UCLA L. Rev. 1095, 1135 (2008). Municipal courts’ racialized criminalization of poverty might be seen as a burden on mobility that prevents residents from exiting the jurisdiction. I’m indebted to Michelle Wilde Anderson for this insight.


249 Id. at 38-39.

250 Id. at 39; see also id. at 283 (“Local neighborhoods should exercise more power over the administration of justice within their bounds, as they once did.”).

251 Ferguson Investigation, supra note xx; see also Natapoff, supra note xx (discussing misdemeanor processing as a form of regressive taxation).

252 E.g., In for a Penny, supra note xx (documenting local court deployment of extortionate private probation practices).

Democratic Criminal Justice” containing thirty different reform proposals, many of which revolved around giving the public and the community a stronger voice in criminal justice policy and adjudication. Like Stuntz, these scholars see various forms of local engagement as ways of pushing back against mass incarceration and the racialization of crime, and injecting more democratic responsiveness into the criminal justice process. In this account, “democracy” refers to a broad range of practices and values including political accountability, official responsiveness to local needs, and opportunities for lay participation in criminal justice policymaking and decision-making. The normative tendency of such analyses is to celebrate inclusion and participation, to resist bureaucratization, and to reject the class-based and racial inequalities for which the U.S. criminal system is infamous.

This criminal localism debate has mostly ignored municipal courts, but local courts are an obvious vehicle for such a shift. Locally selected judges have enormous authority over their own court operations, public access to information, and the experiences that defendants and their families have when they come to court. Judges can nudge, discipline, and collect information about police, prosecutors, and public defenders in ways that could render those actors more responsive. Such courts also have unique capacities to respond to local demands both for enforcement and for restraint, for more criminal punishment where it is needed, and less where the community finds it counterproductive. In theory, they could be important intermediaries in the local quest to get the balance right between over- and underenforcement.

More concretely, local judges have all sorts of tools through which to alter the local justice ecosystem. Their most obvious authority lies in the management and resolution of particular cases, accepting pleas and, rarely, presiding over trials. More broadly, like all judges, they are...
symbolically important high-profile representatives of community norms.\(^{259}\) But they also wield indirect influence over local law enforcement and prosecution policies. For example, in those many communities that suffer from intrusive order maintenance policing, local judges are well-positioned to use their docket management authority to resist the shortcuts of so-called “assembly line” justice and require stronger evidence and procedural protections.\(^{260}\) Such judicial interventions would raise the institutional costs of bringing so many cases—and detaining so many people—and could force police and prosecutors to internalize more fully the social costs of policing.\(^{261}\) Local judges also have broad discretion over punishment, the use of bail, and politically fraught matters such as whether to use private probation companies.\(^{262}\) They have the inherent authority, in other words, to push back against many of the prime inequities and dysfunctions of the low level misdemeanor process. Conversely, when local courts acquiesce in the bloated dockets that result from overpolicing and overcharging, they effectively validate those law enforcement choices.\(^{263}\) When they impose burdensome fines and fees, or incarcerate individuals for failure to pay them, they operationalize the criminalization of poverty. In such cases, local judges are complicit in the local promotion of mass incarceration.

The broader debate over the merits and demerits of localist justice is complicated and old—as old as Justices of the Peace and municipal courts themselves.\(^{264}\) It is also ongoing. Twenty years ago, when the Supreme Court struck down Chicago’s gang loitering statute in Chicago v. Morales, it generated a highly contested literature on whether local communities should have the authority to weaken or forgo civil liberties in exchange for the promise of reduced crime. Tracey Meares and Dan Kahan famously argued that courts should defer to the political calculus of local communities besieged by crime.\(^{265}\) Many scholars pushed back hard against the negotiability of constitutional rights, especially for criminal defendants, and especially in already disadvantaged communities.\(^{266}\) Since then, others have continued to point out that the concept of community itself is a highly politicized, constructed notion that does not necessarily justify

\(^{259}\) See Part IV supra.

\(^{260}\) Such resistance might include, for example, performing full plea colloquies, insisting on a factual basis, and appointing counsel where the defendant faces incarceration. Cf. Resnik, Managerial Judges., supra note xx, at 380 (surveying broad unregulated authority that accrues to judges in their managerial role and observing that “managerial judging may be redefining sub silentio our standards of what constitutes rational, fair, and impartial adjudication”).

\(^{261}\) See Richard A. Bierschbach and Stephanos Bibas, Rationing Criminal Justice, 116 Mich. L. Rev. 191 (2017) (criticizing the “correctional free lunch” and arguing that law enforcement overindulges because they are not forced to internalize the full costs of overenforcement).

\(^{262}\) See notes supra (locally elected judges who refused to use private probation companies sued by those companies).

\(^{263}\) For an elaboration of this argument, see Alexandra Natapoff, The High Stakes of Low-Level Justice, 128 Yale L.J. 1648, 1688, 1697, 1701 (2019) (arguing that judicial docket management strategies make possible and therefore implicitly validate high-volume order maintenance policing and prosecutions).

\(^{264}\) Edwards, supra note xx; Provine, supra note xx; Smith, supra note xx (on the contested history of justices of the peace).

\(^{265}\) Tracey Meares and Dan Kahan, Urgent Times: Policing and Rights in Inner-City Communities (1999).

\(^{266}\) E.g., Carol S. Steiker, More Wrong Than Right, Boston Review, April 1999 (“[S]ome things are too important to be alienated.”).
localist legal accommodations. As Robert Weisberg wryly put it, “sometimes ‘community’ refers to something very concrete which is actually very bad for justice.”

More recently, scholars have expressed skepticism about the salutary promises of localized criminal justice. Colgan argues in particular that “[t]he experience in Ferguson suggests that Stuntz’s exchange of procedural rules for local control is ill conceived.” John Rappaport similarly challenges the key assumption in the democratizing debate that localized justice will be less racialized and more lenient. That assumption, he argues, rests on some dubious empirical premises regarding “public attitudes toward punishment, the political economy of sentencing, [and] the benefits insulated bureaucratic institutions can provide. It naively assumes that people will go easy on ‘their own’ despite considerable contrary evidence.” During the post-Ferguson debate over whether to preserve municipal courts in Missouri, Kimberly Norwood pointed out that the municipal court power structures in majority black communities did not actually reflect those communities: “the municipal court judges and lawyers in the predominately Black municipalities . . . are overwhelmingly White and male--not bastions of black power by any stretch of the imagination.” Wayne Logan has worried more generally about local overcriminalization and the “spectrum of local oppressiveness” as reasons to be suspicious of local criminal legislative authority.

In all these ways, municipal courts are paradigmatic examples of the tense relationship between criminal justice and local democracy. Their localist legacy is repeatedly marred by their failure to provide consistently lawful convictions, the unseemly political and economic motivations of too many of their judges, and their institutional role in converting punishment into revenue for cash-strapped municipalities. To the extent that such practices reflect majoritarian or elite-dominated local politics, they validate the localism skeptics. At the same time, these courts also reflect the persistent allure of local accountability. That allure is not irrational: it was, as Stuntz pointed out, largely state and federal crime policies and practices that led to our current state of racially disparate mass incarceration. Municipal courts also shine by association with the more general promise of localism, as cities around the country pass anti-discrimination statutes, global warming ordinances, and other progressive legislation eschewed at the state and national level.

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268 Colgan, supra note xx, at 1239.


271 Logan, Shadow, at 1441-50.

272 Stuntz at __. The causes of mass incarceration are diverse. See Carol S. Steiker, Introduction, Symposium: Mass Incarceration: Causes, Consequences, and Exit Strategies, 9 Ohio St. J. Crim. L. 1 (2011) (surveying range of causes of mass incarceration including race, the war on drugs, and the breakdown of democratic ideology); Pfaff, Locked In (blaming state prosecutor felony filing rates for mass incarceration); Elizabeth Hinton, From the War on Poverty to the War on Crime (2017) (charting the gradual conversion of federal poverty resources into crime control mechanisms).

In their hybridity, municipal courts thus provide a conceptual bridge between the preoccupations of criminal law and local government. On the one hand, they force us to confront the need for the fair, neutral adjudication of criminal cases, the protection of vulnerable defendants, and the many ways that local political pressures can erode those commitments. On the other, they also highlight the possibilities for a more responsive, accountable criminal process that is particularly attractive against the backdrop of 30 years of American-style state and federal investment in the War on Drugs and mass incarceration. Their contributions are not just conceptual: the aggregate size and reach of municipal courts make them contenders at both the local and national level. They have the potential—both positive and negative—to alter the quality and trajectory of much of our criminal legal system. For proponents and skeptics alike, they should assume a more central role in the ongoing drama over democratizing criminal justice.

VII.  Low-Status Law at the Bottom of the Penal Pyramid

The final contribution of the municipal court is the insight it provides into the deep structures of our criminal process. In addition to the many lives and communities they affect, municipal courts have been jurisprudentially influential. Over the decades, judges and other legal officials have adjusted key features of criminal law and procedure to accommodate these low-status environments, both on paper and in practice, changing basic tenets of due process and even the meaning of criminal liability itself. In this way, municipal courts exert a powerful gravitational pull over the criminal legal ecosystem.

This accommodation is a dynamic of what I have previously described as the “penal pyramid.” The criminal process is not a monolith: it operates more formally and rigorously in serious or elite types of cases. At the narrow top of the pyramid, where federal jurisdiction, serious cases, and/or wealthy defendants command resources and attention, the criminal system is typically rigorous and rule-bound. By contrast, at the enormous bottom where cases are pettiest and defendants are poorest, it tends to be informal, sloppy, and fast. Here, where most misdemeanors are processed, evidence is rarely scrutinized, legal arguments are scarce, and lower courts openly flout various provisions of the Constitution.

Much of the current critique of misdemeanor processing accuses lower courts at the bottom of the pyramid of flouting the law: so-called “assembly-line” courts are ignoring or breaking the basic rules of criminal adjudication. Municipal courts are also flouters, but as the discussion above reveals, their story is more complicated. In important respects, the law itself has adjusted to permit a greater informality. Since the earliest days of the republic, municipal courts have been accorded special treatment as local, low-resource institutions. As the Court has noted as far back as 1888 and as recently as 1972, municipal courts have “from time immemorial” been subject to lesser standards of independence, due process, and adversariality. They are exempt from the demands of separation of powers. They need not hold jury trials. Judges need not be

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275 I have made this argument repeatedly myself. See supra note xx. See generally, Symposium: Misdemeanor Machinery: The Hidden Heart of the American Criminal Justice System, B.U. SCH. OF LAW, 2018 (nine article symposium).
lawyers. The Supreme Court curtailed the misdemeanor right to counsel in part because it worried that lower courts lack the resources to provide it.\textsuperscript{276}

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

These local courts contribute to a yet broader phenomenon in which law adopts different standards or blurs key formal lines in response to low-status or low-resource cases and institutions.\textsuperscript{277} Similar dynamics can be seen in other low status, high volume arenas from juvenile law to immigration to family law, where the formalism and adversarialism associated with elite adjudication has been relaxed. This last Part explores these mechanisms of accommodation in which municipal courts are permitted to straddle the criminal-civil line and operate in more informal ways than criminal law typically demands. These legal accommodations are not mere mistakes or deviations from an elite ideal. Rather, they are affirmative legal strategies designed for the bottom in which rules, law, and formalism are seen as overly expensive and potentially unnecessary to the work of low status institutions.

A. Blurring the Criminal-Civil Line

Municipal courts blur the criminal-civil line in a variety of ways. Punishments typically come in the form of fines, which can be either civil or criminal. Some courts lack the initial sentencing authority to jail and can only incarcerate upon the non-payment of fines. Formally speaking, “ordinance violations” are not part of the state criminal code; sometimes they are referred to as “quasi-criminal.”\textsuperscript{278} More conceptually, these courts adjudicate many offenses so minor or so regulatory that they do not really seem like crimes at all. These features have generated lingering ambiguities over whether and to what extent these are fully criminal institutions, and reinforce the intuition that municipal court cases might not mandate the strongest formal or due process protections.

\textsuperscript{276} Scott v. Illinois, 440 U.S. 367, 373 (1979) (worrying that extending the right to counsel to all misdemeanor defendants would “impose unpredictable, but necessarily substantial, costs on 50 quite diverse States”); see also id. at 372 (expressing concern over the “social cost or a lack of available lawyers”). See also id. at 384 (Brennan, J., dissenting) (“The apparent reason for the Court’s adoption of the “actual imprisonment” standard for all misdemeanors is concern for the economic burden that an “authorized imprisonment” standard might place on the States.”).

\textsuperscript{277} See, e.g, Kessler, supra note xx at 2960 (noting that Progressives engaged in municipal court reform believed that “traditions of common-law-based adversarialism were poorly suited to the new socioeconomic conditions”); Lawrence Friedman, Courts Over Time: A Survey of Theories and Research, in Empirical Theories About Courts, supra note xx, at 40 (low-level “ordinary” criminal cases are essentially “administrative” and receive “perfunctory treatment” while “big” and “important” cases receive meticulous care).

\textsuperscript{278} Cf. United States v. Ward, 448 U.S. 242, 253 (1980) (surveying doctrinal history of “quasi-criminal” proceedings such as forfeitures that are “so far criminal in their nature” that they trigger the Fifth Amendment privilege against self-incrimination without triggering other criminal procedural rights such as the right to counsel).
To be clear, a significant percentage of municipal court work is unambiguously criminal in nature. Every year, municipal courts process over three million straightforwardly criminal misdemeanor cases, including DWI, theft, and assault. Convicted defendants receive criminal records and face or receive incarceration as punishment. State courts have held that such offenses are criminal—and thus trigger the right to counsel, beyond-a-reasonable-doubt standards, and the full panoply of criminal procedural formalities—regardless of whether they are technically labeled “crimes” or “ordinance violations.”

But municipal courts also occupy large gray areas. Traffic offenses dominate most court dockets. Some like DWI are always criminal; other offenses like running a stop sign usually are not. But 25 states define speeding as a criminal misdemeanor, while “serious traffic” offenses such as driving on a suspended license are usually defined as criminal misdemeanors in the state or local code. Municipal courts also engage in a great deal of noncriminal incarceration. Even where offenses are technically civil, violations routinely trigger incarceration for civil contempt when defendants fail to pay fines or fees.

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

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279 The caseloads in the Appendix include only offenses designated as criminal and do not include speeding and other low-level traffic offenses.

280 E.g., State v. Chacon, 273 S.W.3d 375, 377 (Tex. App. 2008) (municipal ordinance violations are criminal cases); City of Albany v. Key, 124 Ga. App. 16, 18, 183 S.E.2d 20, 22 (1971) (“[City’s] authority to inflict or impose punishment and penalties has, since 1923, at least, included the power to impose a fine or imprisonment.”); 3B C.J.S. Animals § 21 (city ordinances were criminal and thus required beyond a reasonable doubt standard); see also cases cited in Appendix.

281 See Natapoff, supra note xx, at _ (describing array of criminalized traffic offenses).


283 E.g., Outskirts of Hope, supra note xx.

284 Mullins v. State, 214 Tenn. 366, 368, 380 S.W.2d 201, 201 (1964). See also Justin J. Goetz, If It Walks Like A Duck: The Creature of A Municipal Ordinance Violation in South Dakota, 63 S.D. L. Rev. 534, 540 (2019) (“The South Dakota Supreme Court has described an ordinance violation proceeding “as civil, quasi-civil, hybrid, criminal, quasi-criminal, and criminal in form with varying results to meet the exigencies of a particular case.””). South Dakota cities do not have municipal courts; they can pass municipal ordinances that are enforced in state-run magistrate courts of limited jurisdiction.

285 9A McQuillin § 27:6. See also LaFave 1 Subst. Crim. L. § 1.7(c) (3d ed.) (some ordinance violations may not be “strictly criminal” but instead “constitute a civil wrong against the municipality”). LaFave notes that modern trend is towards treating such offenses as criminal. See also Osborne M. Reynolds Jr., Local Government Law § 24.2 (4th ed. 2015) (describing “archaic” and “outdated doctrines” that treat municipal ordinance violations as civil).
courts respond to the definitional difficulty by labeling such ordinances “quasi-criminal,” triggering some but not all criminal procedural entitlements.286

Municipal courts are not the only low-status institutions that straddle the criminal-civil divide. Drug courts, community courts, and other specialty criminal courts that provide direct welfare services often adopt less adversarial, informal procedures more consistent with civil proceedings; this can make them look more like direct service welfare institutions than criminal courts.287 Juvenile law is technically noncriminal but treated in almost all respects as a criminal cognate.288 Immigration cases are technically civil, but so often result in detention and punitive experiences that the arena is widely recognized as a criminal hybrid.289 And some low level civil courts that were formerly criminal still reflect their punitive roots. For example, Elizabeth Katz has described how civil family courts—which currently engage in a large amount of noncriminal incarceration—evolved directly out of criminal nonsupport courts.290 In each of these spaces, the blurring of the criminal-civil divide permits the state to engage in punitive or coercive activities—including a great deal of incarceration—that would be more stringently regulated were it deemed conventionally criminal.291

286 Compare Vill. of Kildeer v. LaRocco, 237 Ill. App. 3d 208, 211, 603 N.E.2d 141, 143 (1992) (“Where the prosecution for a violation of a municipal ordinance is to recover a fine or a penalty only, although the proceeding is of a quasi-criminal nature, it is civil in form, and the cause is tried and reviewed as a civil proceeding.”) with City of Santa Fe v. Baker, 1980-NMCA-169, ¶ 14, 95 N.M. 238, 241, 620 P.2d 892, 895 (“The fine [for a zoning violation] was assessed as a penalty. Prosecution for violation of a municipal ordinance is a quasi-criminal proceeding. . . . Fines are by nature punitive.”) and DeKalb Cty. v. Gerard, 207 Ga. App. 43, 43, 427 S.E.2d 36, 37 (1993) (holding that with respect to violation of county soil erosion ordinance, “[a] prosecution for violation of a city or county ordinance is a “quasi-criminal” case having the nature of a criminal case”) and Tupper v. City of St. Louis, 468 S.W.3d 360, 371 (Mo. 2015) (“Prosecutions for municipal ordinance violations are civil proceedings with quasicriminal aspects.”). See also LaFave 1 Subst. Crim. L. § 1.7(c) (Oct. 2017) (“[V]iolations of the ordinances of local governmental organizations, although resembling crimes, are not strictly criminal.”) (citing People v. Hizhniak, 195 Colo. 427, 579 P.2d 1131 (1978), in which home rule municipality was authorized to incarcerate a defendant for speeding under its local ordinance although state speeding law did not permit a jail sentence).

287 E.g., Allegra M. McLeod, Decarceration Courts: Possibilities and Perils of A Shifting Criminal Law, 100 Geo. L.J. 1587, 1612 (2012) (describing therapeutic model of problem-solving courts in which “[t]he entire legal process--in fact, the entire institutional operation of the court as such--is to be reconceived on the therapeutic model”).

288 In re Gault, 387 U.S. 1 (1967) (due process requirements of notice, counsel, and the right against self-incrimination applied to juvenile proceeding); Tamar R. Birckhead, Toward A Theory of Procedural Justice for Juveniles, 57 Buff. L. Rev. 1447, 1447 (2009) (“The juvenile court has historically been a hybrid institution in terms of its purpose and procedures, incorporating aspects of both the civil and criminal court systems.”).

289 E.g., Katherine Beckett and Heather Evans, Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation, 49 Law & Soc'y Rev. 241, 274 (2015) (“Crimmigration . . . appears to have transformed the criminal process for non-citizens in state and local justice systems in ways that enhance the pain associated with criminal punishment.”).

290 Elizabeth D. Katz, Criminal Law in A Civil Guise: The Evolution of Family Courts and Support Laws, 86 U. Chi. L. Rev. 1241, 1245 (2019) (“Beginning in the 1930s, lawmakers strategically rebranded criminal nonsupport prosecutions and the courts that heard them as ‘civil.’”).

291 Louis Michael Seidman, Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State, 7 J. Contemp. Legal Issues 97, 146 (1996) (“Sometimes, the very use of criminal procedures may be stigmatizing. When the [civil/criminal] label is not explicit, a punitive purpose might be inferred by the use of procedures often associated with criminal punishment.”).
The criminal-civil divide is definitional. It recognizes the exceptional quality of state power when the government engages in the coercive, often violent work of criminal enforcement. As the Bill of Rights itself reflects, we have heightened fears of undemocratic overreach in precisely this context. The criminal-civil line is also a recognition of the special burdens and harms imposed through criminal punishment. In particular, it reflects the moral, stigmatic content of the criminal conviction that is not conveyed by a civil penalty. When municipal courts, and low status institutions more generally, are permitted to blur this line, they effectively test the boundary between the blaming and regulatory functions of criminal law itself.

B. Informality in Criminal Law

The idea that low status cases do not warrant full-fledged and expensive processes has long been used as justification for the summary quality of low level adjudication in general, and in municipal courts in particular. Out of deference to their local status, constricted jurisdiction, and lack of resources, the Supreme Court has ratcheted down basic criminal procedure requirements in municipal criminal cases, permitting summary adjudications in front of non-lawyer judges with no formal record and, often, no defense counsel.

The criminal localism debate, discussed above, offers a theoretical defense of such constitutional accommodations. A commitment to criminal justice localism might mean that local courts should have some flexibility in the ways that they process low level cases, especially in light of municipal resource constraints. Drug courts and other specialized courts are premised on a similar, although not identical belief that informality can provide more individuated justice, and that tribunals sensitive to defendant wellbeing should have more flexibility in providing it. The local democratizing potential of municipal courts could support such accommodations, on the theory that such courts are especially responsive and well situated to provide individuated, community-sensitive justice.

But in operation, the dangers of such accommodations are on stark display in cities like Ferguson. When municipal courts in low-resource cities are insulated from formal regulatory requirements embodied in standard criminal procedure and the transparencies that accompany it, those courts are vulnerable to becoming crass revenue generators. That extractive impulse, in

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293 See Seidman, supra note xx (discussing regulatory aspect of criminal law).

294 Colten v. Kentucky, 407 U.S. 104, 117 (1972) (“[I]nferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses.”). See also Harrington, at 51 in The Politics of Informal Justice, supra note xx (on the creation of informal courts during the Progressive Era which claimed to provide “social justice” in contrast to “legal justice”).

295 See, e.g., Jane E. Larson, Informality, Illegality, and Inequality, 20 Yale L. & Pol’y Rev. 137, 142 (2002) (“Regularization … sets standards relative to the means available to the regulated, and enables flexible and general compliance, with the goal of progressive improvement rather than immediate, full and universal compliance. Regularization is an alternative regulatory strategy pioneered in the developing world and designed for conditions of extreme economic constraint.”).
turn, is often economically regressive and racially biased: as the U.S. Commission on Civil Rights concluded, “[m]unicipalities target poor citizens and communities of color for fines and fees.”\textsuperscript{296} The civil court system has long grappled with the comparable fear that the informalities of tribunals like landlord-tenant or small claims court disadvantage the most vulnerable.\textsuperscript{297} The localist argument for greater informality of municipal court function must therefore contend with the demonstrated risk that underregulated municipal courts can be engines of economic and racial inequality.

More fundamentally, informality poses special dangers to criminal adjudication, especially where the subjects of that adjudication—criminal defendants--are one of the polity’s most socially and politically vulnerable constituencies.\textsuperscript{298} Criminal law and procedure are stubbornly formalist, in part out of fear of unfettered official decision-making in the fraught communal spaces of blame, harm, and social disfavor.\textsuperscript{299} Because criminal punishment is exceptional in its harshness, it requires bright lines of application.\textsuperscript{300} Criminal procedure in particular can be anti-populist: it is a barrier intentionally interposed between the local political will and criminal law outcomes.\textsuperscript{301} To be sure, rules and formalism are all-too imperfect protections for the vulnerable: formalism creates well-known blind spots that often prevent meaningful evaluation of law enforcement practices and defendant realities.\textsuperscript{302} Nevertheless, as David Cole once wrote, 

\textsuperscript{296} Targeted Fines and Fees Against Low-Income Communities of Color: Civil Rights and Constitutional Implications, 4-5, U.S. Comm’n for Civil Rts., Sept. 2017; see also Dan Kopf, The Fining of Black America, Pricenomics, June 24, 2016, https://pricenomics.com/the-finings-of-black-america/ (“[The] use of fines as a source of revenue is not a socioeconomic problem, but a racial one. The cities most likely to exploit residents for fine revenue are those with the most African Americans.”).


\textsuperscript{298} See Schragger, The Limits of Localism, supra note xx, at 386 (describing Madisonian “tradition that views the neighborhood as a threat to individual liberty”).

\textsuperscript{299} Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (striking down vagrancy statute as conferring unfettered discretion on police); In re Gault, 387 U.S. 1, 18 (1967) (“[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”). See also Louis Michael Seidman, Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State, 7 J. Contemp. Legal Issues 97, 160 (1996) (“Criminal law is that portion of our legal system defined by the practice of blaming. That practice, in turn, necessarily entails a formalist world view complete with its emphasis on individualism, freedom of choice, and adjudicatory models of justice.”).

\textsuperscript{300} Josh Bowers, Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of A "Pointless Indignity", 66 Stan. L. Rev. 987, 996–97 (2014) (“The stigma and hard treatment that flow from criminal culpability are unmatched by even the most serious forms of civil liability. No other body of law has the power to declare an otherwise-free person a convict and thereafter deprive him of his liberty (and even his life). Such solemn legal consequences are appropriately thought to . . . demand ‘that the agencies of official coercion should, to the extent feasible, be guided by rules’ as a means to promote ‘regularity and evenhandedness in the administration of justice and accountability in the use of government power.’”). See also David Cole, Formalism, Realism, and the War on Drugs, 35 Suffolk U. L. Rev. 241, 242 (2001) (“The sanctions involved in the criminal system are too severe to permit them to be allocated in an open-ended discretionary or regulatory manner.”).

\textsuperscript{301} Michael J. Klarman, The Racial Origins of Modern Criminal Procedure, 99 Mich. L. Rev. 48, 49 (2000) (arguing that “Jim Crow justice [] provided the occasion for the birth of modern criminal procedure”); Scalia, supra note xx, at 1180 (“[Judges’] most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of [the] popular will.”); cf. Alice Ristroph, Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure, 95 B.U. L. Rev. 1555, 1558, 1593 (2015) (conceptualizing criminal procedure not only as regulating the state but as “many individual acts of resistance to state coercion”).

\textsuperscript{302} See, e.g., Alexandra Natapoff, A Stop is Just a Stop: Terry’s Formalism, 15 OHIO ST. J. CRIM. L. 113 (2017) (criticizing the Supreme Court’s formalist approach to Terry stops); Josh Bowers, Probable Cause,
“[f]ormalism, with its commitment to fair procedures, clear rules, and restricted discretion, is a necessary part of any fair system of criminal law.” Much of criminal procedure is styled as a constraint on the state’s power to punish precisely because the political process—local and state as well as federal—cannot be counted on to protect defendants from these harshest of penalties. It is somewhat ironic, then, to point to the local political process as a reason to divest defendants of their strongest legal protections against the most serious forms of state intrusion.

Ratcheting down criminal procedure, of course, is not the only way to respect local autonomy or enhance popular engagement. Scholars have identified an array of potentially inclusive mechanisms—from greater reliance on juries to court watching and other forms of lay participation. But the rules of criminal law and procedure—and adherence to rule of law more generally—perform a structural policing function integral to the integrity and fairness of criminal justice. Their relaxation in the municipal court context has contributed not only to the practical dysfunctions in this realm, but to the perception that the cases, people, and punishments that fill this space are not terribly important.

These are knotty problems without easy solutions. The criminal municipal court sits squarely on that perennial fault line between informality and rule of law, between individuated justice and formalized rule-bound equality. The fault line is omnipresent—it pervades criminal institutions from drug courts to the death penalty—and promulgating more rules does not erase it. That said, there are various ways one could imagine reforming the legal informalities of municipal court. Requiring lawyer-judges, providing public defenders, and holding proceedings on the record are the most commonly cited fixes. But these are admittedly limited responses. After all, the availability of such provisions in state misdemeanor courts has not always brought substantive justice either. At the bottom of the pyramid, injustices flow not just from the presence or absence of rules, but from the pervasive sense that these are minor, unimportant cases that do not deserve our full-fledged legal attention, either on paper or in practice. That dismissive attitude is cemented by the socio-economic disadvantages of the defendant pool: the subjects of these local cases typically lack the social capital to demand more rule enforcement, more respectful treatment, and more substantive justice. Perhaps the last, big lesson of the


Cole, Formalism, supra note xx, at 242.

William J. Stuntz, Substance, Process, and the Civil-Criminal Line, 7 J. Contemp. Legal Issues 1, 20 (1996) (“A lot of constitutional theory has been shaped by the idea . . . that constitutional law should aim to protect groups that find it hard or impossible to protect themselves through the political process. If ever such a group existed, the universe of criminal suspects is it.”).

See notes supra on democratizing mechanisms.

See McLeod, supra note xx (on the problems with informality in specialty courts); Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting) (“Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.”)

See notes supra.

Natapoff, Penal Pyramid, supra note xx.
municipal court is to remind us of all the concrete ways that disadvantage and informality reinforce one another, and to force us to grapple with whether it need be so.

VIII. Conclusion

Thirty-eight years ago, Malcolm Feeley instructed us to pay closer attention to lower courts. “Whatever majesty there is in the law,” he warned, “may depend heavily on these [lower court] encounters.” Since then, the legal academy has not fully contended with this lowest municipal tier of the American judiciary. But actors on the ground are deeply aware of its significance. Chief Justice Stuart Rabner of the New Jersey Supreme Court writes that “[m]illions of people who come into contact with the municipal courts each year form their impressions of the justice system based primarily on those interactions.” Presiding Judge Sparks in Birmingham calls municipal courts “the front porch of the judicial system,” a missed opportunity to engage, educate, and help millions of Americans in their initial and often only encounters with the judiciary. One might even say that the social and political importance of these institutions has made its way into the popular culture. It was municipal court dysfunction, after all, that helped trigger one of the most important criminal justice events of the past decade: the 2014 unrest in Ferguson and the subsequent explosion of the Black Lives Matter movement.

Such insights from the front lines of the justice system deserve to be taken seriously. These age-old courts have special legal and democratic import. They provide new insights into the history and nature of American courts, the relationships between criminal law and localism, and the complex legal dynamics of the bottom of the penal pyramid. Notwithstanding their historical identity as low status, low resource institutions, their influence is profound: these courts are annually responsible for millions of criminal cases and represent the primary, perhaps only, experience that millions of Americans will have with the criminal system. It is time that the municipal court took its rightful place in the modern scholarly conversation.

309 Feeley, supra note xx. See also Robertson, Rough Justice, supra note xx, at xx (“For the millions of people who pass annually through the lower courts…these courts are the justice system, and in a real sense represent the power and majesty of the law.”).
311 Panelist, Judicial Responsibility for Justice in Criminal Courts, Hofstra University Maurice Deane School of Law, April 6, 2017 (public remarks).
# APPENDIX

## Characteristics of U.S. municipal courts

<table>
<thead>
<tr>
<th></th>
<th>State</th>
<th>Total # local courts</th>
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<th>Maximum penalties for ordinance violations</th>
<th>Unified w/state judiciary</th>
<th>Appellate structure: Two-tier review</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Alabama</td>
<td>138&lt;sup&gt;315&lt;/sup&gt;</td>
<td>95,507&lt;sup&gt;316&lt;/sup&gt;</td>
<td>appointed</td>
<td>yes</td>
<td>6 mo./$500&lt;sup&gt;317&lt;/sup&gt;</td>
<td>yes&lt;sup&gt;318&lt;/sup&gt;</td>
<td>De novo</td>
</tr>
<tr>
<td>2.</td>
<td>Arizona</td>
<td>163</td>
<td>271,319&lt;sup&gt;319&lt;/sup&gt;</td>
<td>appointed</td>
<td>no</td>
<td>6 mo./$2500&lt;sup&gt;320&lt;/sup&gt;</td>
<td>yes</td>
<td>De novo (if no record)&lt;sup&gt;321&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

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<sup>313</sup> Id.  
<sup>316</sup> Includes DUI and non-traffic.  
<sup>317</sup> Ala. Code § 11-45-9; see also Ala. Code § 12-14-1 (authorizing creation of municipal courts).  
<sup>320</sup> Ariz. Rev. Stat. Ann. § 9-240 (penalties may be civil or criminal); see also Ariz. Rev. Stat. § 22-402 (mandating creation of municipal court in each city or town).  
<sup>321</sup> See also State v. Eby, 244 P.3d 1177, 1178–79 (Ariz. Ct. App. 2011) (confirming right to appeal judgment of justice court to superior court but no right to subsequent appeal to Arizona Court of Appeals, even when superior court appeal is a de novo trial).  

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</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>Arkansas (city courts)</td>
<td>89</td>
<td>unknown</td>
<td>election</td>
<td>Mayor or lawyer</td>
<td>Same as state penalties including incarceration</td>
<td>no</td>
<td>De novo</td>
</tr>
<tr>
<td>4</td>
<td>Colorado</td>
<td>225</td>
<td>unknown</td>
<td>appointed</td>
<td>no</td>
<td>364 days/ $2650</td>
<td>no</td>
<td>De novo</td>
</tr>
<tr>
<td>5</td>
<td>Delaware (Alderman courts)</td>
<td>6</td>
<td>unknown</td>
<td>appointed</td>
<td>no</td>
<td>1 year/$500</td>
<td>no</td>
<td>De novo</td>
</tr>
</tbody>
</table>

322 City Courts, Ark. Judiciary, [https://www.arcourts.gov/content/city-courts](https://www.arcourts.gov/content/city-courts).

Since 2012, Arkansas city courts have been going through a multiyear process of consolidating with state district courts and being re-designated as “departments” of those district courts. Ark Code § 16-17-1202 (2012); Ark. Code Ann. § 16-17-1113 (West). Once consolidated, they are referred to as local district courts. See Lonoke Cty. v. City of Lonoke, 2013 Ark. 465, 1, 430 S.W.3d 669, 670 (2013) (referring to municipal court as “Lonoke District Court”). The state’s annual caseload report does not distinguish between state and local district courts. 2016 Annual Report at 89 (reporting total district court criminal caseload of 570,299, not including ordinance violations).


324 City Courts, Ark. Judiciary, [https://www.arcourts.gov/content/city-courts](https://www.arcourts.gov/content/city-courts).

325 Ark. Code Ann. § 14-55-502; see also Wright v. Burton, 279 Ark. 1, 4, 648 S.W.2d 794, 796 (1983) (declaring fine-only city ordinance invalid because state statute for same offense authorized incarceration as a penalty and municipality lacked authority to set penalties lower than state law).

326 No centralized repository; not included in state data; caseloads not included on most municipal court websites.

327 Town of Frisco v. Baum, 90 P.3d 845, 847 (2004) (judge must be attorney only if municipal court is a court of record).


330 The 2018 annual report lists a caseload of 26,365, but this includes traffic and does not distinguish criminal cases. Id.


332 See, e.g., Newark DE Muni. Code § 1-9; State v. Murray, No. 1406007495, 2016 WL 561180, at *2 (Del. Super. Ct. Feb. 5, 2016) (Newark Alderman’s Court has “original jurisdiction” to hear only cited violations of the Newark Municipal Code, including those that carry incarceration); Dunn v. Mayor & Council of City of Wilmington, 59 Del. 287, 290, 219 A.2d 153, 155 (1966) (“The time-honored rule is that the legislature may validly delegate to a municipal government . . . the power to enact ordinances, consistent with State law, which create crimes and impose the punishment of imprisonment.”)

333 “Alderman’s Courts are not part of the Delaware court system. They are independent entities within their respective Municipalities.” 2018 Delaware Courts Annual Report. At least two individual Aldermanic court websites describe themselves, however, as follows: “The Alderman Court falls under the
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<th>Appellate structure: Two-tier review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia (municipal)</td>
<td>399</td>
<td>vary 334</td>
<td></td>
<td>no</td>
<td>6 mos. / $1,000 335</td>
<td>yes</td>
<td>De novo &amp; on the record</td>
</tr>
<tr>
<td>Indiana (city and town courts)</td>
<td>65 approx. (43 city; 22 town) 336</td>
<td>32,043 state misdemeanors 337</td>
<td>election</td>
<td>no</td>
<td>Ordinances are fine-only but courts also adjudicate state misdemeanors 338</td>
<td>De novo</td>
<td>336</td>
</tr>
<tr>
<td>Kansas</td>
<td>385</td>
<td>71,561 339</td>
<td>appointed</td>
<td>no</td>
<td>1 yr/$2,500 341</td>
<td>yes</td>
<td>on the record (check)</td>
</tr>
</tbody>
</table>

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334 [https://caseload.georgiacourts.gov/](https://caseload.georgiacourts.gov/).

335 Ga. Code Ann. § 36-35-6(a)(2)(A)-(C). See also Ga. Code Ann., § 36-30-8 (authorizing additional incarceration or forced labor for 30 days “in addition” to any other penalties); see City of Albany v. Key, 124 Ga. App. 16, 18, 183 S.E.2d 20, 22 (1971) (“[City’s] authority to inflict or impose punishment and penalties has, since 1923, at least, included the power to impose a fine or imprisonment.”).

336 Indiana Trial Courts: Types of Court, Indiana Judiciary Website, [https://www.in.gov/judiciary/2674.htm](https://www.in.gov/judiciary/2674.htm) (47/28); see also Organizational Chart of the Indiana Judicial System, [https://www.in.gov/judiciary/2681.htm](https://www.in.gov/judiciary/2681.htm) (43/22).

337 2015 Indiana City/Town Courts: Indiana Trial Court Statistics by County (32,043 misdemeanor cases filed and 48,190 ordinance violations filed), [https://publicaccess.courts.in.gov/ICOR/](https://publicaccess.courts.in.gov/ICOR/). See also Ind. Code Ann. § 36-1-3-8(a)-(9) (specifically withholding from cities “[t]he power to prescribe a penalty of imprisonment for an ordinance violation”); Boss v. State, 944 N.E.2d 16, 22 (Ind. Ct. App. 2011) (municipal ordinances civil in nature for purposes of Double Jeopardy because “[Indiana] General Assembly [has] denied local government units ‘the power to prescribe a penalty of imprisonment for an ordinance violation’”). But see Gates v. City of Indianapolis, 991 N.E.2d 592, 594 (Ind. Ct. App. 2013) (holding that fine-only “speeding infractions remain quasi-criminal in nature” and therefore trigger the right to a jury trial).

338 Ind. Code Ann. § 33-35-2-3 (municipal court jurisdiction over ordinance violations, misdemeanors and infractions)


340 K.S.A. § 12-4114 (training program for non-lawyer municipal court judges in non-first-class cities); K.S.A. § 12-4105 (municipal court judges must be attorneys in first class cities).

341 Maximum violation for repeat traffic offense is Class A misdemeanor, K.S.A. 8-2116.
## CRIMINAL MUNICIPAL COURTS

<table>
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<tr>
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<th>Unified w/state judiciary</th>
<th>Appellate structure: Two-tier review</th>
</tr>
</thead>
<tbody>
<tr>
<td>9. Louisiana (City and Mayor’s Courts)</td>
<td>300 (City: 49; Mayor’s: 250)</td>
<td>City: 130,450&lt;sup&gt;343&lt;/sup&gt;, Mayor’s: unknown</td>
<td>City: election, Mayor’s: varies</td>
<td>City: yes, Mayor’s: no</td>
<td>6 mos/$1,000&lt;sup&gt;344&lt;/sup&gt;</td>
<td>no</td>
<td>De novo &amp; on the record</td>
</tr>
<tr>
<td>10. Michigan</td>
<td>4</td>
<td>402&lt;sup&gt;345&lt;/sup&gt;</td>
<td>elected</td>
<td>yes</td>
<td>90 days/$500&lt;sup&gt;346&lt;/sup&gt;</td>
<td>yes</td>
<td>De novo</td>
</tr>
<tr>
<td>11. Mississippi (municipal and justice courts)</td>
<td>319</td>
<td>324,097&lt;sup&gt;347&lt;/sup&gt;</td>
<td>Muni: appointed, Justice: elected</td>
<td>no</td>
<td>90 days/$1,000&lt;sup&gt;348&lt;/sup&gt;</td>
<td>De novo</td>
<td></td>
</tr>
<tr>
<td>12. Missouri&lt;sup&gt;349&lt;/sup&gt;</td>
<td>473</td>
<td>298,588&lt;sup&gt;350&lt;/sup&gt;</td>
<td>appointed</td>
<td>yes</td>
<td>$450 for most offenses&lt;sup&gt;351&lt;/sup&gt;</td>
<td>yes</td>
<td>De novo (as of 2010)</td>
</tr>
</tbody>
</table>

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<sup>342</sup> 2015 Annual Report at 16. There are also 390 Justices of the Peace with only traffic jurisdiction and are not included here. https://www.lsba.org/Public/CourtStructure.aspx.


<sup>346</sup> Mich. Comp. Laws Ann. § 117.4i(k); see, e.g., City of Grosse Point Code of Ordinances § 1-13.

<sup>347</sup> Natapoff, supra note xx.


<sup>349</sup> Underwent significant municipal court reform after Ferguson.


<sup>351</sup> Mo. Ann. Stat. § 479.353 (West) (“The [municipal] court shall not sentence a person to confinement, except the court may sentence a person to confinement for any violation involving alcohol or controlled substances, violations endangering the health or welfare of others, or eluding or giving false information to a law enforcement officer.”); see also Mo. Const. art. V, § 23 (municipal judges to hear violations of municipal ordinances).
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</thead>
<tbody>
<tr>
<td>13.</td>
<td>Montana (municipal and justice courts)</td>
<td>159</td>
<td>69,551</td>
<td>election</td>
<td>Muni: yes</td>
<td>6 mos/$500</td>
<td>De novo</td>
<td></td>
</tr>
<tr>
<td>14.</td>
<td>Nevada (municipal and justice courts)</td>
<td>58</td>
<td>120,073</td>
<td>election</td>
<td>Muni: yes</td>
<td>6 mos/$1,000</td>
<td>De novo &amp; on the record</td>
<td></td>
</tr>
<tr>
<td>15.</td>
<td>New Jersey</td>
<td>560</td>
<td>680,000</td>
<td>appointed</td>
<td>yes</td>
<td>90 days/ $2,000</td>
<td>yes</td>
<td>De novo &amp; [?] on the record [check]</td>
</tr>
<tr>
<td>16.</td>
<td>New Mexico</td>
<td>81</td>
<td>unknown</td>
<td>election</td>
<td>no</td>
<td>90 days/ $500</td>
<td>No</td>
<td>De novo</td>
</tr>
</tbody>
</table>


359 Letter from Barry Massey, Communications Officer, Administrative Office of the Courts, Dec. 15, 2016, on file with author (“[N]o municipal court reports its data to the Judiciary’s central state data repository.”).

360 N.M. Stat. Ann. § 3-17-1 (West); see also N.M. Const. art. X, § 6 (municipal ordinance may not impose “penalty greater than the penalty provided for a petty misdemeanor).
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</thead>
<tbody>
<tr>
<td>17. New York</td>
<td>1270</td>
<td>unknown&lt;sup&gt;361&lt;/sup&gt;</td>
<td>election</td>
<td>no</td>
<td>364 days/$1,000&lt;sup&gt;362&lt;/sup&gt;</td>
<td>no&lt;sup&gt;363&lt;/sup&gt;</td>
<td>on the record</td>
</tr>
<tr>
<td>18. North Dakota</td>
<td>90&lt;sup&gt;364&lt;/sup&gt;</td>
<td>67,812&lt;sup&gt;365&lt;/sup&gt;</td>
<td>election</td>
<td>no</td>
<td>30 days/$1,500&lt;sup&gt;366&lt;/sup&gt;</td>
<td>yes&lt;sup&gt;367&lt;/sup&gt;</td>
<td>De novo</td>
</tr>
<tr>
<td>19. Ohio (Mayor's)&lt;sup&gt;368&lt;/sup&gt;</td>
<td>301</td>
<td>38,393</td>
<td>election</td>
<td>no</td>
<td>6 mos/$500&lt;sup&gt;369&lt;/sup&gt;</td>
<td>no&lt;sup&gt;370&lt;/sup&gt;</td>
<td>De novo</td>
</tr>
</tbody>
</table>

<sup>361</sup> Over 2 million cases are filed in these courts but state statistics do not distinguish between civil and criminal filings. See, e.g., Fines and Fees and Jail Time in New York Town and Village Justice Courts: The Unseen Violation of Constitutional and State Law (2019) (citing aggregated state statistics).

<sup>362</sup> N.Y. Penal Law § 70.15 & 80.05 (McKinney) (Class A misdemeanor punishments); N.Y. Gen. City Law § 20(22) (McKinney) (authorizing incarceration as punishment for municipal ordinance violation); N.Y. Town Law § 135 (McKinney) (defining ordinance violation as misdemeanor punishable by imprisonment); N.Y. Crim. Pro. § 10.30 (confering misdemeanor jurisdiction on local criminal courts).

<sup>363</sup> But see N.Y. Const. Art. VI, Sec. 1(a) (“unified court system”).

<sup>364</sup> https://www.ndcourts.gov/other-courts/municipal-courts.

<sup>365</sup> Spreadsheet provided by North Dakota AOC, on file with author. This data represents caseloads from only 16 out of 90 North Dakota municipal courts; they are the only ones to report their caseloads to the state central authority. Letter from Sally Holewa, State Court Administrator, dated March 10, 2017, on file with author (“16 municipal courts [] have voluntarily chosen to use the district court's case management system.”).

<sup>366</sup> N.D. Cent. Code Ann. § 40-05-06(1) (West)

<sup>367</sup> US Civ. Rts. Comm’n Report lists North Dakota as unified; so does Raftery in Judicature, But see Holewa Letter, supra note xx (only 16 out of 90 courts report data to AOC).

<sup>368</sup> MAYOR’S COURTS SUMMARY 2015 1, 7, 36 (Sup. Ct. of Ohio, 2015).

<sup>369</sup> Ohio Rev. Code Ann. § 715.67 (West) (ordinance violation may be a misdemeanor).

<sup>370</sup> Ohio Supreme Court and Judicial Structure, Ohio Judiciary Homepage (“Mayor’s courts are not a part of the judicial branch of Ohio government and are not courts of record.”), https://www.supremecourt.ohio.gov/JudSystem/.
<table>
<thead>
<tr>
<th>State</th>
<th>Total # local courts</th>
<th>Criminal cases filed in 2015</th>
<th>Method of judicial selection</th>
<th>Lawyer Judges required</th>
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<th>Unified w/state judiciary</th>
<th>Appellate structure: Two-tier review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oklahoma</td>
<td>200</td>
<td>unknown</td>
<td>appointed</td>
<td>yes</td>
<td>60 days/$750 (courts not of record)</td>
<td>No</td>
<td>De novo on the record [check]</td>
</tr>
<tr>
<td>Oregon</td>
<td>147</td>
<td>unknown</td>
<td>varies</td>
<td>no</td>
<td>364 days/$6,250</td>
<td>no</td>
<td>On the record</td>
</tr>
</tbody>
</table>

371 Okla. Const. art. VII, § 1 (“Municipal Courts in cities or incorporated towns . . . shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns.").


375 US Civ. Rts. Comm’n Report lists Oklahoma as unified; so does Raftery


377 The Oregon AOC does not collect caseload data from municipal and justice courts. Telephone conversation with Tim Lewis, AOC, Sept. 8, 2017.


380 Oregon Courts Homepage (“[S]tate court system has no administrative control over local courts.”), https://www.courts.oregon.gov/courts/Pages/other-courts.aspx
## CRIMINAL MUNICIPAL COURTS

<table>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Rhode Island</td>
<td>26</td>
<td>unknown&lt;sup&gt;382&lt;/sup&gt;</td>
<td>appointed</td>
<td>yes</td>
<td>30 days/$500&lt;sup&gt;383&lt;/sup&gt;</td>
<td>yes</td>
<td>De novo</td>
</tr>
<tr>
<td>South Carolina</td>
<td>400</td>
<td>200,000</td>
<td>appointed</td>
<td>no</td>
<td>30 days/$500&lt;sup&gt;384&lt;/sup&gt;</td>
<td>yes&lt;sup&gt;385&lt;/sup&gt;</td>
<td>De novo on the record [check]</td>
</tr>
<tr>
<td>Tennessee</td>
<td>241</td>
<td>Non-criminal (except for home rule cities)&lt;sup&gt;386&lt;/sup&gt;</td>
<td>election</td>
<td>yes</td>
<td>Home rule (14 cities): 30 days/$500&lt;sup&gt;387&lt;/sup&gt; Non-home rule (over 400): Fine only, $500</td>
<td>no</td>
<td>De novo</td>
</tr>
</tbody>
</table>

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<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Texas</td>
<td>928³⁸⁸</td>
<td>941,238³⁸⁹</td>
<td>varies</td>
<td>no</td>
<td>Criminal fine-only Class C misdemeanor³⁹⁰</td>
<td>De novo</td>
<td>De novo</td>
</tr>
<tr>
<td>Utah (justice courts)</td>
<td>109³⁹¹</td>
<td>72,835³⁹²</td>
<td>appointed</td>
<td>no</td>
<td>6 mos/$2,500³⁹³</td>
<td>De novo</td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td>92</td>
<td>63,198³⁹⁴</td>
<td>varies</td>
<td>no</td>
<td>364 days/$5,000³⁹⁵</td>
<td>De novo and de novo on the record [check]</td>
<td></td>
</tr>
</tbody>
</table>

³⁸⁸ FY 2015 Annual Statistical Report for the Texas Judiciary, at vi. Texas designates both municipal and justice courts as “local courts of limited jurisdiction.” Another 807 local Justice Courts operate at the county level and are not included in these totals.
³⁹⁰ Tex. Loc. Gov’t Code Ann. § 54.001 ($500 default max but $2,000 max for municipal ordinance violation concerning “public health”); Tex. Penal Code Ann. § 12.41 (West) (defining fine-only offenses as “Class C misdemeanor”); see also Tex. Penal Code Ann. § 12.03(b)-(c) (“An offense designated a misdemeanor in this code without specification as to punishment or category is a Class C misdemeanor” and “Conviction of a Class C misdemeanor does not impose any legal disability or disadvantage.”). Texas law deems Class C misdemeanors criminal. See Tex. Crim. Proc. Code Ann. § 4.14(a)(1)-(2) (conferring municipal court jurisdictions over all municipal ordinance violation fine-only “criminal cases”); State v. Chacon, 273 S.W.3d 375, 377 (Tex. App. 2008) (municipal ordinance violations are criminal cases); see also Reese v. City of Hunter's Creek Vill., 95 S.W.3d 389, 391 (Tex. App. 2002) (fine-only ordinance was a “penal statute” and therefore civil district court lacked jurisdiction to address its validity).
³⁹¹ https://www.utcourts.gov/directory/.
³⁹³ Utah Code Ann. § 10-3-703 (West).
³⁹⁴ Spreadsheet on file with author (includes DUI and nontraffic misdemeanor).
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<tr>
<td>West Virginia</td>
<td>122(^{396})</td>
<td>unknown(^{397})</td>
<td>varies</td>
<td>no</td>
<td>30 days(^{398})</td>
<td>no</td>
<td>De novo if no jury trial</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>252</td>
<td>Civil [90,000](^{399})</td>
<td>election</td>
<td>no</td>
<td>Fine-only</td>
<td>yes</td>
<td>De novo but not for criminal?</td>
</tr>
<tr>
<td>Wyoming</td>
<td>82</td>
<td>unknown(^{400})</td>
<td>appointed</td>
<td>no</td>
<td>6 mos/$750(^{401})</td>
<td>no</td>
<td>De novo on the record</td>
</tr>
<tr>
<td>TOTAL</td>
<td>7,685</td>
<td>3,496,409</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{396}\) https://www.wvencyclopedia.org/articles/1655. Magistrate courts operate at the county level.

\(^{397}\) Email from Tabetha D. Blevins, Senior Analyst, Division of Court Services, West Virginia, Jan. 4, 2017, on file with author (“Municipal Courts do not report to the Administrative Office.”).


\(^{400}\) Letter from Lily Sharpe, State Court Administrator, December 2016, on file with author (“We do not maintain reports for municipal courts.”).