POLICE-MADE LAW

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ABSTRACT

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

Contextualizing police-made law within policing theory and local government structure makes it less surprising, but we should be critical of it in many types of cases. Democratic political theory sets requirements for when bureaucratic interest groups may legitimately influence legislative deliberation, and police often fail to meet these. Basic expectations of neutrality and expertise, derived from administrative law, are often lacking. Moreover, the power of police to use violence makes them more analogous to military officials than to administrative agencies. This should trigger a strong norm of civilian control and a bar on advocacy in policymaking.

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

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INTRODUCTION

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

Legal academics and political scientists have focused their attention on the political role of police officials and interest groups, and their most important findings can be boiled down to two observations. First, the police function as a powerful bureaucratic interest group that expects to receive (and does receive) deference on many aspects of policymaking—including legislation.[3] Second, the concerns advanced by police interest groups have almost entirely been related to job benefits and protections, such as "Law Enforcement Officers' Bills of Rights"

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[1] See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001) ("Broad criminal law thus means that the law as enforced will differ from the law on the books. And the former will be defined by law enforcers, by prosecutors' decisions to prosecute and police decisions to arrest.").

[2] This is a term of art from legislative process at the state and federal level. The "sponsor" of a bill drafts it and introduces it for a vote. "Sponsorship of a bill usually carries with it the obligations to oversee the writing of legislation to be introduced and to shepherd the legislation through the legislative process." J. Garand & K. Burke, *Legislative Activity and the 1994 Republican Takeover*, 34 AMERICAN POLITICS RESEARCH 159, 162 (2006).

[3] See, *infra*, Part I.

or increased salaries.[4] Alone among these voices was that of the renowned scholar William Stuntz, who hypothesized in 2001 that police also had an interest in expanding the content of substantive criminal law so as to increase their authority to make arrests.[5]

This Article presents the first evidence proving Stuntz's hypothesis: police chiefs regularly draft and propose new offenses to local legislatures. By undertaking a study of over twenty years of journalistic accounts of police involvement in local legislation (from 2000-2022), a large set of cases was identified that demonstrates this behavior. These occurred in localities of all sizes, ranging from major cities to very small villages.[6] At the apex of police involvement in offense-creation was this mode of "sponsorship" identified above, with police identifying a social problem, drafting a new offense to address it, and formally proposing it during a legislative session. Other lower forms of involvement were also observed. In many cases police merely identified a social problem but did not also draft an offense themselves, and in others the police were directed to draft an offense after the legislature identified the problem. Sponsorship is the most interesting, as it situates police chiefs as quasi-legislators themselves.

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

An example of the first category occurred in 2019 in the locality of Waite Park, Minnesota. Prior to that year, public intoxication was not a criminal offense in the locality.[7] The police chief stated that this regulatory gap was hamstringing the department's ability to deal with "disruptive" behavior by intoxicated individuals.[8] Without an offense, the conduct was treated a public health matter and the intoxicated individual was taken to the hospital instead of jail.[9] The chief believed that this was a problem, and that the creation of a new intoxication offense would provide a "tool" needed to justify arrest, and thus the diversion of

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[4] Id.

[5] See id.; see also Stephen Rushin & Zoe Robinson, *The Law Enforcement Lobby*, 107 MINNESOTA LAW REVIEW ___ (Forthcoming, 2023), at *24-25.

[6] See, infra, Part II.B (discussing sponsorship in Clark County (Las Vegas), Nevada, and also in small town of Genoa, Illinois).

[7] 2019 WLNR 39411642.

[8] Id.

[9] Id.

intoxication cases away from hospitals and into jails.[10] An ordinance was enacted into law the same year, making "disruptive intoxication" a misdemeanor punishable by up to three months incarceration.[11]

An example of offense-creation to address a police chief's perception of "danger" occurred in North Platte, Nebraska, in 2019.[12] The chief appeared to be motivated by a recent University of Nebraska survey showing that use of e-cigarettes and vaping devices was popular among local youth.[13] He characterized the problem as "an epidemic" and a "huge issue," arguing that the industry suffered from a lack of "quality control" that caused children to get "horrifically ill" and to suffer from "lung problems."[14] While use of e-cigarettes was already an offense at both the state and local level, the chief believed that more regulation was needed—that mere possession should also be an offense.[15]

Figure 1: Meeting of North Platte, Nebraska, Council (December 3, 2019). Police chief, standing at lectern, sponsors an anti-vaping ordinance.[16]

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[10] Id.

[11] WAITE PARK, MINN. ORD. NO. 106.

[12] 2020 WLNR 1056167.

[13] *North Platte City Council 12-3-2019*, YOUTUBE.COM, available at <https://www.youtube.com/watch?v=dS3qe0CR72Q&ab_channel=cyngutsch>.

[14] Id. (showing Chief stating that "there is no quality control; we don't know what's in 'em," and that "you read a lot of news articles across the nation that our kids are getting you know horrifically ill because of this causing lung problem and diseases and its because there is no quality control").

[15] Id. (showing Chief stating that "right now the way it says [sic] we cant take any enforcement action unless someone sees them actually utilizing it. So what this ordinance does is it brings us into the ability to take enforcement action for the mere possession of someone [sic] under the age of 19"). See NEBRASKA REVISED STATUTE § 28-1418.

[16] *North Platte City Council 12-3-2019*, YOUTUBE.COM, available at <https://www.youtube.com/watch?v=dS3qe0CR72Q&ab_channel=cyngutsch>.

An offense prohibiting possession was enacted a month after the chief's proposal, and it punishes the conduct as a misdemeanor carrying a potential monetary fine of $100.[17]

The North Platte sponsorship brings with it an occasion to note an important point: while many of the offenses that police sponsored were non-jailable misdemeanors or civil offenses, their effect on the expansion of police power (and on the correspondent diminution of individual liberty) is identical to that of the most serious felony. The severity of an offense, so long as it is criminal, justifies broad intrusions by the police into the private lives of civilians—most obviously the power to arrest and search incident to arrest, as well as to ultimately "book" the person and conduct a nude body cavity search.[18] Moreover, much of the police-authorization inherent in criminalization is also inherent in the creation of civil offenses.[19] Police officers in many states are authorized to investigate, detain, and cite for even civil ordinance violations,[20] and any police encounter can spiral into a violent situation depending on how the officer and individuals involved react to

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[17] NORTH PLATTE NE ORD. § 130.040.

[18] Atwater v. Lago Vista, 532 U.S. 318 (2001); Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 566 U.S. 318, 335 (2012).

[19] Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1079–80 (2015).

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

each other.[21] After the courts become involved in the adjudication and disposition of these low level offenses, they preside over a racialized "managerial model" of "social control" in which defendants are marked for procedural hassle and the performance of court-ordered activities.[22] Police sponsorship is, therefore, worthy of our attention.

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

First, how can we understand police sponsorship? Many likely react strongly to the notion of police writing the laws that they themselves enforce. Such a practice scandalizes the classic, and perhaps naïve, view of police as mere neutral enforcers of pre-determined rules.[23] A deeper contextualization within the larger currents of policing theory, however, reveal that sponsorship is an explicit component of the now-dominant conception of police's proper role: "community-oriented policing," and specifically it's sub-theory of "problem-oriented policing."[24] This theory asks police to go beyond mere reactive incident response, and to identify deeper "problems" giving rise to the incidents they are called to and to propose solutions.[25] And local government law makes local legislatures particularly receptive fora for problem-oriented policing of this nature. Local council meetings, unlike those of state legislatures or Congress, are procedurally informal and open to interventions by non-members.[26] Local government law also lacks the strong separation of powers principles that structure institutional

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[21] See Avlana Eisenberg, *Policing the Danger Narrative*, __ JOURNAL OF CRIMINAL LAW & CRIMINOLOGY __ (forthcoming 2023). Eisenberg's discussion of the Sandra Bland case is illustrative.

[22] ISSA KOHLER-HAUSMANN, MISDEMEANORLAND 21 (Princeton 2019).

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

[24] See *infra*, Part III.A.

[25] Id.

[26] Id. at Part III.B.

relationships at higher governmental levels, and therefore the legislative proposals of executive-type actors such as police are likely to be viewed with less suspicion.[27]

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

One must begin by recognizing that in a democratic society, offense definition is ideally a task for a representative legislature, and that departures from this paradigm should be viewed with great skepticism. The creation of offenses by a political community represents one of the most severe forms of state action, as it restricts human autonomy—it prohibits the conduct of otherwise free persons. Given the controversial nature of many of these decisions, in a pluralistic society they can only be made legitimately by a representative institution operating on a principle of majority rule. The Supreme Court's void-for-vagueness jurisprudence is animated by this concern: "state power [must] be exercised only on behalf of policies reflecting an authoritative choice among competing social values,"[28] and this choice is a product of "democratic self-governance."[29]

This demand is not merely formalistic, and therefore when considering the legitimacy of offense-creation one must also consider the legislative process leading up to any eventual enactment. Certain influences on legislative deliberation, then, and not just the final vote itself, can be viewed as legitimate or not. The role of police as expert officials is such an influence that must be assessed, given the inherent tension between democracy, which demands equal influence, and expertise, which claims superior knowledge. This tension is not irresolvable in all cases. While bureaucratic interest groups possess no right to inclusion in deliberation as a matter of democracy—after all, internal government actors are the targets of such influence (not its claimants)—many theorists present sophisticated arguments in favor of expert official influence when certain minimal conditions are met.[30] The field of federal administrative law has produced the best examples of this. From this body of thought, one can distill at least two necessary conditions for administrative agency influence over legislation: (1) neutrality, and (2) expertise.[31]

Once one identifies these two requirements for the legitimation of expert official influence over lawmaking, the disanalogy between federal administrative agencies and local police becomes glaringly apparent. There are good reasons to

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[27] Id.
[28] Roberts v. U.S. Jaycees, 468 U.S. 609, 629 (1984).
[29] United States v. Davis, 139 S. Ct. 2319, 2325 (2019).
[30] See *infra* Part IV.A-B.
[31] See *infra* Part IV.B.

think that many police officials lack both neutrality and expertise over the subject matter on which they are opining.

Regarding neutrality, police are structurally partisan and exist in a culture that is inimical to healthy deliberation. Structurally, they are adversarial (not inquisitorial) law enforcement officials whose primary task is to represent only one side of the "v" in a criminal case.[32] To facilitate this they are permitted to lie to civilians, and even when they engage in their "community caretaking" function the evidence they discover is admissible in a criminal case.[33] Beyond this structural role, sociologists have identified a number of common cultural traits among police that can harmfully affect deliberation: police are often alienated from the communities they serve, expect deference, and are resistant to legal constraints.[34] Structural and cultural aspects of police loom over the endeavor of offense sponsorship, making their influence on legislatures presumptively negative.

The assessment of police expertise regarding offense definition is more complicated, but similarly yields a presumption of illegitimate influence over many cases of offense sponsorship. Sponsorship involves a number of distinct stages, each of which implicates different competencies. A social "problem" must be identified, which in turn involves both the observation of conduct and then its moral evaluation. Then, the sponsor must determine that a legal response is warranted, and more precisely, a response in the form of an offense prohibiting conduct. Finally, the text of the offense must be drafted and it must be proposed to the legislatures. While police may possess expert knowledge as conduct observers—they are regularly interacting with the community, and the department serves as a clearinghouse for information collection on citizen complaints—they are no experts in conduct evaluation, or in the decision as to what legal response (if any) is appropriate.[35] These decisions involve irreducibly controversial moral judgments about what conduct is socially harmful, what is the appropriate role of the state, and what tradeoffs and risks are tolerable when enacting policy. This means such decisions are not expertise-apt, let alone within police expert competence. Finally, police clearly lack expertise regarding proper drafting techniques, and thus ought not be involved in that process either.

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

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[32] See *infra* Part IV.C.
[33] Id.
[34] Id.
[35] Id. Part IV.C.2.

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

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

It is important to clarify that the critique I aim to present here is one of process and not substance—it is broadly applicable whether or not one supports the creation of the sponsored offense on its own merits. However, there are significant substantive concerns one might have with the expansion of the mass misdemeanor system.[36] To the extent one has those concerns, police sponsorship only exacerbates them.

This Article proceeds as follows. Part I discusses the findings of past scholars addressing the influence of police on legislation, noting that none have discussed attempts to alter the content of substantive offenses. Part II presents new evidence that police are acting as quasi-legislative sponsors with respect to criminal and civil offenses in local government codes. This Part discusses a number of case studies categorized by the apparent motivation for the sponsorship. Part III contextualizes police offense sponsorship in the movement for "problem-oriented policing," and in the structure of local government law. Finally, Part IV undertakes a normative evaluation of this phenomenon, concluding that many cases of sponsorship are illegitimate influences on healthy legislative deliberation.

I. Prior Studies of Police and Legislation: Police as Self-Regarding Bureaucratic Interest Group

Within the field of criminal legal scholarship, perhaps no topic has spawned a larger literature than that of policing. But far narrower a field is the scholarship

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[36] I survey the literature on these critiques, especially those of Alexandra Natapoff and Issa Kohler-Hausmann, in *Local Offenses*, 89 Fordham L. Rev. 837, 876-880 (2020). To these more general observations about the mass misdemeanor system, one might identify the proliferation of public order offenses—a major category of police-made law—as especially problematic. The primary criticism of public order offenses is that their vagueness confers excessive discretion on police officers, and that discriminatory application results. These offenses are not without their defenders, though. For excellent discussions of this scholarly debate, see Charlie Gerstein, J.J. Prescott, *Process Costs and Police Discretion*, 128 Harv. L. Rev. F. 268, 277 (2015); Nicole Stelle Garnett, *Relocating Disorder*, 91 Va. L. Rev. 1075 (2005).

that addresses the role of police in influencing legislation.[37] Perhaps because there has been so much to say about the *way* laws are enforced by the police, less attention has been paid to the part police play in also creating those laws. Recently, though, a number of scholars have begun to document the influence of police as a legislative interest group through their membership in professional associations and unions. One can identify two major conclusions that emerge from this work: (1) the police are a powerful bureaucratic interest group in the legislative process, but (2) they are almost entirely focused on job-related protections. Unpacking these conclusions will help to set the stage for the contribution of this Article.

Writing in 1981, a political scientist summarized prior scholarship as concluding that in criminal justice lawmaking, "groups composed of criminal justice professionals (law enforcement personnel, corrections officials, attorneys) are more influential than those with social service or reform concerns."[38] While influential and operating from "a relatively privileged position" accorded special access and deference,[39] police-based interest groups are often at pains to obscure that influence, and to frame their lobbying efforts as something else:

> While it is unequivocally the case that voluntary police organizations operate as interest groups in public policy domains…there is often a deep reluctance on the part of representatives of such groups to openly acknowledge the political nature of their advocacy work. Lobbying thus becomes ''consultation'' or is recast in even more idealized terms as ''seeking to find the truth,'' whereas police interest groups become ''stakeholders'' advocating not on behalf of themselves but for ''safer communities.''[40]

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[37] Writing in 2012, Canadian scholars Laura Huey and Dannielle Hryniewicz described a "surprisingly thin literature on the politics of the police." Laura Huey & Danielle Hryniewicz, *We Never Refer to Ourselves as a Lobby Group Because Lobby Group Has a Different Connotation: Voluntary Police Associations and the Framing of Their Interest Group Work*, 54 CANADIAN J CRIMINOLOGY & CRIM. JUST. 287, 288 (2012); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 529 (2001) n.102 ("The role of interest groups in criminal lawmaking has not been the subject of much study.").

[38] Erika Fairchild, *Interest groups in the criminal justice process*, 9 Journal of Criminal Justice 181, 181 (1981).

[39] "Not only are police associations said to enjoy access to policy makers frequently denied other interest groups, but it has also been suggested that the views of such groups are accorded a greater degree of deference." Huey and Hryniewicz at 300. For the influence of law enforcement bureaucrats in federal legislation, see Lisa L. Miller, *Rethinking Bureaucrats in the Policy Process: Criminal Justice Agents and the National Crime Agenda*, 32 THE POL. STUD. J. 569, 569 (2004) ("[C]riminal justice agents dominate the criminal justice policy process at the national level").

[40] Huey & Hryniewicz at 288.

According to these scholars, "the fiction of police neutrality is politically expedient: it permits police groups to preserve the symbolic capital that their role in a democratic society affords them, a form of capital that relies, in large part, on their avoiding overt engagement with politics."[41] Thus, police are a powerful interest group influencing legislation, according to these scholars, but police view themselves (and are viewed as) a bureaucratic interest group whose expertise makes it worthy of deference by the legislature and the public.[42]

More recent work by legal scholars has explicitly framed police as a "lobby" at work in American politics and legislation, with a specific goal of protecting police officers' prerogatives qua government employees. Barry Friedman and Elizabeth Jánszky argue that police unions are "a potent lobbying force," and that "Law enforcement officials care even more about matters that affect them directly than they do about sentencing…."[43] Similarly, Zoe Robinson and Stephen Rushin identify a "law enforcement lobby as the constellation of entrenched actors within the justice system—particularly police unions, correctional officer unions, and prosecutor associations—that exert an outsized role in policy development."[44] The methods employed by this lobby include direct campaign contributions, outreach to legislatures, and also the structuring of collective bargaining agreements.[45] Situating the legislative influence of police in the concepts of public choice, Rushin and Robinson argue that the power of the law enforcement lobby "raises many of the traditional lobbying costs identified in other contexts, including the risk

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[41] Id. At 289.

[42] Stephen Rushin & Zoe Robinson, The Law Enforcement Lobby, 107 Minnesota Law Review ___ (Forthcoming, 2023), at *49-50. ("When the law enforcement lobby engages in efforts to influence public policy, it comes with the imprimatur of state authority. Governmental institutions and their actors find themselves uniquely situated to dominate state policy on behalf of the state itself, ensuring a circular 'web of influence.' Second and relatedly, the information received from the law enforcement lobby as state actors, carries with it the perception of expertise….The totem of expertise presents the law enforcement lobby as comprised of professional and impartial bureaucrats. The asymmetrical provision of information, then, is legitimized, with law enforcement officials perceived as expert proxies that can accurately represent the interests of all persons involved in the criminal justice system, rather than repeat players that have an intense self-intense interest in expanding the scope of criminal justice policy."). This is true of other bureaucratic interest groups involved in criminal justice. See Karim Ismaili, *Contextualizing the criminal justice policy-making process*, 17 CRIMINAL JUSTICE POLICY REVIEW 255 ("As active members of the policy community subgovernment, these [official/bureaucratic] interest groups represent professions with institutionalized stakes in the operation of the criminal law and the criminal justice system…. Their influence is enhanced by the high degree of public deference accorded them, especially on policy matters concerning the day-to-day operation of the criminal justice system.").

[43] Barry Friedman & Elizabeth G. Jánszky, *Policing's Information Problem*, 99 TEX. L. REV. 1, 37 (2020).

[44] Rushin & Robinson at *1.

[45] Id. at *4-45.

conflicts of interest, regulatory capture, and corruption."[46] Police, then, are a rent-seeking interest group, but unlike many other interest groups, they have no countervailing influences.[47] The rents extracted by the police lobby, according to Rushin and Robinson, almost entirely center on protecting police interests as employees. Thus, they seek collective bargaining agreements that "impede officer accountability,"[48] agitate for statutory changes aimed at the same goal (often called "Law Enforcement Officer's Bills of Rights"), and buy ads to advocate for more police hiring.[49] Other commentators have focused specifically on the influence of police unions, noting similar observations.[50]

What these scholars do not identify is a pattern of police attempting to influence *substantive* criminal law—the law they are tasked with enforcing.[51] A very notable exception is the famous claim made two decades ago by William Stuntz regarding the "pathological politics" of criminal law.[52] Stuntz's 2001 work remains the most in-depth treatment of the relationship between police and substantive legislation. "Criminal law is not just the product of politics; it is the product of a political system, a set of institutional arrangements by which power over the law and its application is dispersed among a set of actors with varying degrees of political accountability," he wrote, and "Those institutional arrangements give those actors certain baseline incentives."[53] One such actor,

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[46] Id. at *38.
[47] Id. at *14, *47.
[48] Id. at *21 ("First, police unions have leveraged the collective bargaining process to thwart officer accountability and limit democratic oversight of policing…. These include [contract] provisions that delay interviews of officers after allegations of misconduct, limit or ban civilian oversight, purge disciplinary records from personnel files, and establish complex appellate procedures that can lead to terminated officers being rehired by arbitrators against the wishes of police chiefs and city leaders.").
[49] Id. at *24-25.
[50] Benjamin Levin, *What's Wrong With Police Unions?*, 120 COLUM. L. REV. 1333, 1340 (2020) (describing literature summarized as the "obstructionist critique" of police unions, meaning that "feeble accountability mechanisms are the direct result of concerted action by police" undertaken during the CBA process). See also Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017); SARAH ANZIA, LOCAL INTERESTS 202 (2022) ("We have already seen that interest groups are also active in local politics and that unions of police officers and firefighters are among the most politically active of all. They have a tremendous stake in how much cities spend and what they spend it on. They also have a stake in other types of policies that recent protests against police brutality have brought into the spotlight: policies governing how public employees do their jobs and how they are managed— and thus how public services are provided.").
[51] I was able to find only one example of this. Maybell Romero recounts an instance in 2018 when the California State Sheriffs' Association and California Police Chiefs Association unsuccessfully lobbied the Governor against a proposed narrowing the scope of felony murder liability. Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. RICH. L. REV. 1097, 1102–03 (2020).
[52] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 505 (2001)
[53] Id. at 528.

called one of "criminal law's three lawmakers," is the combination of "Prosecutors (and the Police)."[54] Like the scholars above, Stuntz claims that private competing interests groups will be dwarfed by the influence of bureaucratic interests such as police.[55] The specific interests of police, according to Stuntz, is to "maximize arrests," which is in turn facilitated by the expansion of substantive criminal law, and specifically low level public order offenses:

> To the extent that police seek to make arrests, or to exercise coercive power short of arrest, they need criminal law to enable them to do those things…. Thus, police benefit from laws that criminalize street behavior that no one wishes actually to punish, solely as a means of empowering them to seize suspects. This is the force that drives much of the current movement to expand the range of so-called 'quality of life' offenses, crimes that cover low-level street behavior that will only rarely be prosecuted, but that often serve as a convenient basis for an arrest and, perhaps, a search. Such crimes make policing cheaper, because they permit searches and arrests with less investigative work. Just as cheaper prosecution helps not only prosecutors but legislators too, cheaper policing should be a boon to police and legislators alike.[56]

The result of the incentives of police, along with the incentives of other actors, is the expansion of criminal law—the effect of the "pathological politics" of criminal law.[57] But Stuntz's *hypothesis* was just that; he had no robust evidence that police were actually lobbying for new and broader criminal offenses.[58]

To recap, prior scholarship on police and legislation has primarily understood police to be an interest group that is especially powerful, but also concerned almost entirely with job-related protections. Other than Stuntz's 2001 hypothesis, almost no attention has been paid to police involvement in the creation of substantive offenses.

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[54] Id. at 529.
[55] Id.
[56] Id. at 539.
[57] Id. Stuntz did not view police incentives as divergent from those of legislators, though, and claimed that "Lawmaking and law enforcement are given to different institutions, in part to diffuse power, but the institutions are usually seeking the same ends." Id. at 535. However, he did observe that police "are more culturally distinct from the rest of the population than are prosecutors." Id. at 538. This observation would apply a fortiori when comparing police with legislators.
[58] At most he briefly adverted to the movement for "community policing." Id. at n.138 (citing Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997). The connection between community policing and lobbying for new substantive offenses will be discussed below.

II. A NEW FINDING: POLICE AS LEGISLATIVE SPONSORS

This Article presents new evidence of police involvement in legislation—evidence that proves the Stuntzian hypothesis. This involvement goes far beyond intervention as a mere "interest group," and it directly relates to the substantive offenses that the police are tasked with enforcing. The phenomenon identified is that of police *sponsorship* of local criminal and civil offenses. There are three significant components of this. First, the police chief takes on the substantive role of determining a general societal goal, and of determining that the regulation of individual conduct via a new offense can advance this goal. Second, he or she undertakes the task of drafting text for an ordinance that would create the offense. Finally, he or she proposes this ordinance to the legislative body, either through informal or formal mechanisms. In doing so, police are acting in the way that so-called "sponsors" of legislation act at the federal and state level.[59]

In what follows, I will first discuss the method used to discover the evidence of police sponsorship, and then discuss the results through case studies.[60] The case studies were chosen from the larger set of findings—reported in appendix form after the conclusion—because of their especially detailed documentation of the police official's role in the lawmaking process. They are categorized based on the apparent public motivations of the police official in sponsoring the offense.

A. Method

Studying the laws of localities in the United States is a daunting task. The most recent U.S. Census data from 2017 reveals that there are 38,779 general purpose local governments, each with its own code of ordinances.[61] Thus, researchers who hope to peer into this underexplored body of law must avoid making generalizations while also avoiding a descriptive project that would be impossible to complete in one lifetime. As Dean Michael Cahill has explained, the "less-than-optimal research incentives and priorities of the academy" therefore serve to dissuade entrants into this vast and unknown legal world.[62] However, it is

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[59] "Sponsor: A Representative or Senator who introduces or submits a bill or other measure." *Glossary of Legislative Terms*, CONGRESS.GOV, available at <https://www.congress.gov/help/legislative-glossary>.

[60] The full results of the study are presented in appendix form following the conclusion.

[61] *2017 Census of Governments*, U.S. CENSUS, CENSUS.GOV, available at <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>.

[62] Michael Cahill, *Multilayered Criminal (F)laws*, FORDHAM LAW REVIEW ONLINE 183 (2021) ("First and foremost, such projects take a great deal of careful and often entirely original work. In undertaking to explore, or offer insights regarding, the general state of municipal criminal law, one must create one's own legal 'dataset' by identifying and then diligently scrutinizing a suitably diverse and representative sample of municipal codes.").

precisely because of the vast number of local governments and their power over peoples' daily lives that this subject is worth further study. Researchers presented with the problem of numerosity mentioned earlier have generally taken two approaches. First, one can study in-depth a single local government or a small number of local governments, hoping to glean lessons from that study that would be more broadly applicable.[63] Second, one can attempt not to create a comprehensively representative sample size in the statistical sense, but instead look at a large enough number of the phenomena such that one can identify patterns that make each individual case seem more than anecdotal.[64]

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

So, what is knowable? This study is premised on the notion that the best way to understand what is happening in local legislation is to rely initially on journalistic accounts of lawmaking. Just as there are a great number of local governments, so too are there are great number of local newspapers and local reporters devoted to covering the workings of city hall. This study effectively deputizes local journalists as first line reporters of police involvement in offense-creation. The diffuse work of these reporters has been collected and digitized in the form of the Westlaw News Database—a searchable dataset of almost 6,000 newspapers.[65] Again, even this database will be underinclusive, leaving out many smaller publications.[66] But the database is an excellent window into an otherwise opaque legislative terrain.

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[63] See MALCOLM FEELY, THE PROCESS IS THE PUNISHMENT (studying New Haven court); ISSA KOHLER-HAUSSMAN, MISDEMEANORLAND (studying NYC misdemeanor system).

[64] See generally ALEXANDRA NATAPOFF, CRIME WITHOUT PUNISHMENT (2019); Brenner Fissell, *Local Offenses*, 89 FORDHAM LAW REVIEW 837 (2021). Although even this practice is sometimes criticized as "anecdotal". Stephanos Bibas, *Small Crimes, Big Injustices*, 117 MICH. L. REV. 1025 (2019) (reviewing Natapoff).

[65] "All News (ALLNEWS) contains more than 5,800 newspaper, magazine, transcript, newsletter, and journal databases." WESTLAW.COM, available at <http://lscontent.westlaw.com/research/ppts/westlaw%20for%20the%20practitioner%20-%20news%20databases.ppt#:~:text=All%20News%20(ALLNEWS)%20contains%20more,databases%2C%20plus%20wire%20service%20databases>.

[66] For example, the database does not include the newspaper of my hometown, the Cobleskill Times-Journal, which is the primary news source covering 22 local governments in Schoharie County, NY.

In this study, a Boolean search aimed at identifying police involvement in the proposal and drafting of legislation after the year 2000 was run through Westlaw News.[67] This yielded 1,336 hits of local news stories. Analysis of these stories in turn yielded prima facie evidence of widespread police involvement in local legislation creating civil and criminal offenses, breaking down into four broad categories. The highest level of involvement, police sponsorship, is discussed in this Article. Other types of involvement below that of sponsorship included (1) police serving as the primary complainant regarding certain conduct, although without drafting or presentation of ordinance text,[68] (2) police serving as delegates tasked to draft offenses, usually together with the city attorney, after conduct was identified as worthy of regulation by the legislature,[69] and (3) police serving as expert consultants during the legislative process, but not as drafters or proposers.[70]

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

B. Case Studies

Police sponsorship is widespread and diverse in subject matter and locality type, making generalization difficult. However, broad categories can be discerned when identifying the apparent public motivation of the official's proposed offense.[71] The expressed motivation of the police official is the most useful

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

[68] See, e.g., 2007 WLNR 8972259 ("In Porter, police commission members have asked the Town Council to draft a curfew ordinance in part to help them deal with petty crimes committed by idle youths, Police Chief James Spanier said.") (full set of journalistic accounts on file with Author).

[69] See, e.g., 2007 WLNR 18130418 ("…Mayor Bud Lewis asked owners to voluntarily reduce the rowdy behavior and got little cooperation. After that, the council told police to draft a law giving the department the tools to crack down on the downtown weekend club scene, which was getting rowdier by the month.") (full set of journalistic accounts on file with Author).

[70] See, e.g., 2005 WLNR 746788 ("[Councilwoman Buck] said the city has been working to draft the [massage parlor] ordinance for more than a year and that the police department was also involved in the process.") (full set of journalistic accounts on file with Author).

[71] I stress that this is an *apparent* motivation, based on statements made to the press and to the council itself, and make no claim as to what the true motive of the department proposing the law

analytical delineator to deploy, as it reveals how she sees her role in the larger institutional schema.

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

1. Enforcement Tools & Gaps in the Law

Many of the cases of police sponsorship were apparently motivated by the police department's identification of a gap in the law, such that their authority to intervene in a recurring situation was hampered. Through sponsorship of substantive offenses, they worked to plug this hole, justifying search, seizure, and removal of persons where none may have existed before.[72] In these cases, one regularly sees the rhetoric of the offense being described as a "tool" for the police.

Police in Waite Park, Minnesota (population around 8,000) sponsored a public intoxication ordinance in 2019.[73] The police chief proposed the law because "Public intoxication is not a crime," and therefore officers dealing with "disruptive" behavior by intoxicated individuals only had the option of taking the person to the hospital.[74] He argued that the criminalization ordinance would be a "tool," in that it allowed the person to be detained in jail as opposed to in a hospital, thus "preventing staff at medical facilities from being exposed to potentially aggressive behavior…."[75] The chief modeled the draft language off that of neighboring jurisdictions.[76] This ordinance was enacted into law the same year, and punishes "disruptive intoxication": "No person, while intoxicated, in a public place shall conduct him or herself so as to be a danger to themselves or others and/or engage

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was. Moreover, in many cases there are multiple motivations. I attempt below to identify what appears to be the most significant.

[72] Alexandra Natapoff, *Atwater And The Misdemeanor Carceral State*, 133 HARV. L. REV. FORUM 147 (2020) ("[*Atwater*] permits custodial arrest and intrusive searches for any offense, no matter how minor. It converts racial profiling into jailtime. As a matter of governance structure, the decision authorizes police to insist upon incarceration even where the democratically elected state legislature has expressly decided that incarceration would be excessive punishment. *Atwater* is, in that sense, a doctrinal pillar of the American police power.").

[73] 2019 WLNR 39411642.

[74] Id.

[75] Id.

[76] Id.

in a public disruption."[77] This is a misdemeanor punishable by up to three months incarceration.[78]

Police in Conroe, Texas (population approximately 90,000) sponsored a number of homelessness-related ordinances in 2019.[79] Spurred to action by a rising unhoused population, and by an incident of property damage caused by an unhoused person, the ordinances were "presented by the Conroe Police Chief Jeff Christy and prohibit[ed] sleeping in places that limit public access, urinating and defecating in public, and panhandling aggressively."[80] These three offenses were enacted into law that year.[81] These are civil offenses punished by a $500 fine.[82] The minutes reflect no discussion or public comment—only the presentation by the police chief.[83] A video of the council's working session, though, shows the chief being called on by the Mayor to describe the proposed ordinances, and after some questioning he describes them as a "tool in the toolbelt."[84]

Police in Old Orchard Beach, Maine (population about 9,000) sponsored a 2015 ordinance restricting areas where registered sex offenders can live.[85] Police were prompted to propose the new law after observing enactments in neighboring towns, and the chief thought that restrictions "are needed to 'safeguard places where children congregate.'"[86] "It's another tool that we can use if we have to," he said.[87] The chief's proposal carved out certain areas as off limits to sex offender residency, and it was enacted into law that year.[88] In the findings and purposes section, the ordinance echoed the chief, stating, "[T]he town finds that further protective measures are necessary and warranted to safeguard places where children congregate."[89] Violations are punished as civil offenses with a fine of $500 per day of residency.[90]

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[77] WAITE PARK, MINN. ORD. NO. 106.
[78] Id. No. 14.2.
[79] 2020 WLNR 21337750.
[80] Id.
[81] CONROE, TX CODE, 46-7--46-9.
[82] Id.
[83] *Minutes of the Conroe City Council, June 12 & 13, 2019*, available at <https://www.cityofconroe.org/home/showpublisheddocument/21915/636988668824330000>.
[84] *Video of Conroe City Council Meeting, June 12, 2019*, available at <https://conroetx.new.swagit.com/videos/67109>. The video recording also clarifies that the sponsorship of the chief was not with respect to the content of the ordinances, but with their applicability outside the core downtown business district. Id. "It's not just downtown," he says. Id. Previously, they were limited to the business district. Id.
[85] 2015 WLNR 39288677.
[86] Id.
[87] Id.
[88] OLD ORCHARD BEACH, MAINE CODE OF ORDINANCES, ORD. OF 8-4-2015(1).
[89] Id.
[90] Id.

In 2013 police in Carmel, California (population about 4,000) sponsored a social host ordinance punishing the serving of alcohols to minors in private homes.[91] The sponsoring chief claimed that the law was needed in order to create probable cause to enter a home when there are no other offenses being committed: "That would be another investigative tool, he said," and "I want to be proactive and make sure we have our tools in place."[92] This ordinance was never enacted.

Police in Davis, California (population about 70,000) sponsored a 2012 ordinance dubbed as a "Minor Alcohol Preclusion Ordinance."[93] The law "would give Davis police officers the power to cite minors under the influence of alcohol in a public place."[94] The police chief who proposed this, Landy Black, viewed it as problematic that it was illegal for minors to purchase or consume alcohol, but that it was legal "for a minor to have alcohol in his or her system while in public."[95] Black appeared to draw a connection between drug usage and alcohol intoxication:

> "The community, the downtown and campus area, those neighborhoods where families live, are plagued with young people using without regard for their neighbors…. There is no doubt that there's a connection between alcohol and those problems. What is easily identifiable is there has been a lot of talk and there has not been results. It's my thought, and this is after a lot of discussion, maybe we need to do something a little bit different. There's a big hole here."[96]

When the chief presented the ordinance to the city council, the councilmembers "balked" at the idea because of the lack of the involvement of other groups outside the police department.[97] After a few months of meetings and a public hearing with many negative comments, the ordinance failed to receive sufficient votes for adoption despite the chief's continued sponsorship.[98] In its 2013 year-end report detailing goals for 2014-2015, the police department stated as a goal "continu[ing] with efforts, negotiations, and educational outreach to win broad enough

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[91] 2013 WLNR 812900.
[92] Id. I do not categorize this case as an "investigative tool" motivation, despite the words used by the official, because the tool here is not to investigate another more serious crime—it is a tool to enable the enforcement of a law that is directly related to social hosting: underage drinking.
[93] 2012 WLNR 1451244.
[94] Id.
[95] Id. The specific impetus for this ordinance was an upcoming "Picnic Day" at UC Davis which regularly involved binge drinking and nuisance parties. Id.
[96] Id.
[97] Id.
[98] *MINUTES OF THE DAVIS CITY COUNCIL Meeting of March 6, 2012*, available at <https://documents.cityofdavis.org/Media/Default/Documents/PDF/CityCouncil/CouncilMeetings/Minutes/2012/Minutes-2012-03-06-City-Council-Meeting.pdf>.

community and Council support to bring the Minor Alcohol Preclusion Ordinance into existence."[99] Davis's current code reflects that the ordinance has not been enacted.

In 2003, police in Molalla, Oregon (population around 9,000) sponsored a new noise ordinance for the city.[100] Molalla has previously had no laws regulating the creation of noise, but the police chief decided to propose one because "previous city councils did not want to deal with the issue."[101] The chief said that "the proposed law is needed to reduce the public's and police department's frustration with louder noises for which there are few legal remedies."[102] The city council enacted the ordinance, which the chief drafted himself, the same year.[103] Violations are punished as civil offenses carrying a fine of up to $1,000.[104]

2. Criminological Theories

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

In 2010, there was a push by the police department in the Dayton suburb of Trotwood to tackle the perceived problem of graffiti.[105] Trotwood had a population of approximately 24,000 at the time.[106] The article states that "In an effort to become pro-active in spotting and shutting down graffiti in the neighborhood, the Trotwood Police Department requested the city council to draft up an ordinance to eliminate graffiti from the city, including vacant business properties."[107] The police chief was quoted as saying that "they need the ordinance after seeing 'pockets of graffiti surfacing in sections of the community,'" and argued that the ordinance would "address the 'broken window theory' when 'unaddressed disorder (becomes) a sign that no one cares and actually invites further disorder.'"[108] He tasked a subordinate with overseeing the process of the drafting, which he estimated would

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[99] *2013 Annual Report*, DAVIS POLICE DEPARTMENT, available at <https://www.cityofdavis.org/home/showdocument?id=4601>.
[100] 2003 WLNR 15791118.
[101] Id.
[102] Id.
[103] Id. See MOLALLA, OR ORD. NO. 2003-02 §1.
[104] Id.
[105] 2010 WLNR 2924976.
[106] *QuickFacts, Trotwood city, Ohio*, U.S. CENSUS, available at <https://www.census.gov/quickfacts/fact/table/trotwoodcityohio/AGE295221>.
[107] 2010 WLNR 2924976.
[108] Id.

take one to two months, with plans to propose it to the city council after.[109] While no stories report on the outcome of this effort, Trotwood's code of offenses includes a chapter on graffiti that was enacted three months after the publication of the original story.[110] The ordinance broadly prohibits the creation of graffiti, the possession of implements such as spray paint near overpasses and other public areas, and the furnishing of implements to minors.[111] Violation of the ordinance is punishable by fine up to $500 and 25 hours of community service.[112] In the "purposes" section of the enacted ordinance one sees a clear indication of Broken Windows Theory: "Graffiti is a visual symbol of disorder and lawlessness. In contributes to a downward spiral of blight and decay, decreasing property values, lessening business viability and potentially adversely affecting tax revenues…."[113]

Police in Clark County, Nevada (population about 2.2 million), raised the issue of street race spectators as a problem in 2004, and they participated in drafting an ordinance prohibiting the conduct.[114] The Metropolitan Police Department of Las Vegas, a city in the county, initiated the process and one of its Sergeants helped to write the text.[115] Speaking to the media, the Sergeant justified the offense by likening the races to "cock fights": "It's like cock fights…Without spectators at these events, there is no sport."[116] He described the races as dangerous and also as draining on the resources of police, and that "[I]t becomes a sport when the police show up. They scatter like cockroaches."[117] An ACLU attorney appeared at the meeting proposing the ordinance and raised constitutional objections to the criminalization of innocent conduct, the Sergeant dismissed these concerns by stating that "A normal person will know this event is not legal…. What else would you be doing in the middle of the night at an industrial park?"[118] The county commissioners unanimously approved the introduction of the ordinance, and one appeared persuaded by the Sergeant's arguments: "If you take the spectators away, you take away the thrill for those violating the law…. That is what this ordinance is designed to do, take away the spectator thrill."[119] The ordinance was soon thereafter enacted into law, and punished being "knowingly present as a spectator…at an illegal motor vehicle speed contest or illegal exhibition of

[109] Id.
[110] TROTWOOD, OH, CODE OF ORDINANCES, Chapt. 557 § 557.01.
[111] Id. 557.01-.05.
[112] Id. 557-99.
[113] Id.
[114] 2004 WLNR 847426.
[115] Id.
[116] Id.
[117] Id.
[118] Id.
[119] Id.

speed."[120] The offense is punishable as a misdemeanor by up to six months incarceration in county jail.[121]

Police in Hillsboro, Oregon (population about 108,000) sponsored a 2011 ordinance regulating "social gaming"—playing card games for money while in public places.[122] A police department commander who proposed the rules at a city council meeting said the department "supports social gaming on a small scale," but "does not want to legalize card rooms or large-scale gaming operations, though, so it suggested restrictions."[123] The department's proposed ordinance went into great detail: it "recommended that a business only be able to host the games one night a week or only on 25 percent of the floor space. It also suggested that a business must have been operating for at least six months before it can offer space for the games. It must also clearly post notices that gaming is occurring. If a business breaks those rules, the department suggests a $1,000 fine -- rather than the normal $250 code violation fine."[124] At the meeting where the ordinance was proposed, the council suggested changes and asked the department to work on another draft with other city staff.[125] The ordinance was eventually enacted in 2012, and it imposed the suggested restrictions from the police department proposal, as well as some others.[126] Violations are punishable as civil offenses carrying a $1,000 fine.[127] Minutes and staff reports from a 2020 city council meeting indicates that the regulated businesses view the ordinance as unduly restrictive, and asked for the six-month waiting period and the 25% floor space restriction to be relaxed.[128]

3. Danger & Safety

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

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[120] CLARK COUNTY, NV, ORD. 3033 § 1, 2004.
[121] CLARK COUNTY, NV, CODE §14.64.080
[122] 2011 WLNR 23863069.
[123] Id.
[124] Id.
[125] Id.
[126] HILLSBORO, OR CODE, Chapter 5.44.
[127] Id. at 5.44.060. The city's planning director remarked that relaxation of restrictions would "need" police support. "Mr. Cooper mentioned the need for the Police Department's support if the ordinance is relaxed." *Hillsboro Oregon CITY COUNCIL MINUTES Tuesday, December 15, 2020*, available at <https://hillsboro-oregon.civicweb.net/document/26120/>.
[128] *Hillsboro Oregon CITY COUNCIL TELECONFERENCE MEETING AGENDA Tuesday, December 15, 2020*, available at <https://hillsboro-oregon.civicweb.net/document/25396/>.

The police department in Winchester, Virginia (population around 30,000), sponsored an ordinance in 2017 that would prohibit roadside panhandling.[129] The police chief "asked City Council…to consider adopting an addition to Chapter 14 of City Code, which governs vehicles and traffic. The ordinance would prohibit the exchange of items between pedestrians and motorists on public roadways."[130] The chief stated as his rationale that "We're saying those transactions are inherently dangerous, and they affect the flow of traffic through the city," and that "As the city continues to grow and we see more and more traffic ... I'm fearful we're going to end up seeing somebody get hit, or we'll have accidents."[131] During the discussion at the council work session where the chief proposed the law, the city attorney noted a potential issue with the ordinance's constitutionality, as a district court in 2015 struck down a Charlottesville panhandling ordinance as a content-based restriction on speech.[132]

The ordinance proposal was not taken up at the next monthly meeting, though, and instead was proposed again by the chief two years later in 2019.[133] In the minutes of that meeting the ordinance is noted as being "Presented by John R. Piper, Chief of Police."[134] At a meeting less than a week later, the ordinance was adopted unanimously and without public comment.[135] The enacted text prohibited (among other things) "exchang[ing] or attempt[ing] to exchange any item while the operator's motor vehicle is located in a traffic or travel lane on city roadways," and punished violations as a traffic infraction.[136] This law was in effect for about two years in the locality, until it was repealed in 2021 with the stated explanation that the ordinance failed to comply with the 2015 district court decision and a related Fourth Circuit opinion from the same year.[137] It seems strange that the 2015 decisions would be the reason for repealing the laws enacted in 2019 in full knowledge of the precedent, and a journalistic account of the repeal indicates that

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[129] 2017 WLNR 31237873.
[130] Id.
[131] Id.
[132] *Winchester VA, City Council Work Session Minutes October 10, 2017*, available at <https://winchesterva.new.swagit.com/videos/42104>.
[133] *Winchester VA, City Council Meeting Minutes, June 11, 2019*, < http://winchesterva.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=1674&Inline=True>.
[134] Id.
[135] Brian Brehm, *Council makes roadside panhandling illegal in Winchester*, THE WINCHESTER STAR (Jun 28, 2019), available at <https://www.winchesterstar.com/winchester_star/council-makes-roadside-panhandling-illegal-in-winchester/article_55bd4b3c-31a8-5177-8678-426b948495bc.html>.
[136] WINCHESTER, VA, ORD. 2019-24.
[137] WINCHESTER VA, ORD. 21-15, citing 779 F.3d 222 (2015).

the changes were mostly motivated by a change in the city's policy on addressing homelessness.[138]

4. Investigative Tools

Police sponsorship also often targeted conduct for prohibition not because it was itself deemed to be worthy of punishment, but because it fit within a regulatory scheme that helped police to solve more serious offenses. These investigation-type offenses usually helped to create or preserve evidence of other crimes.

In 2014, police in Cedar Rapids, Iowa (population around 130,000) sponsored an ordinance requiring a wide range of businesses to maintain a surveillance camera system and that it must be a certain quality.[139] A police lieutenant involved in the proposal stated to media that "many of…videos are useless for evidentiary purposes due to inefficiencies in camera placement, equipment and maintenance…[and] [i]t is anticipated that a set of standards will help produce a better product that can be used to solve and prosecute a crime."[140] He also said that the business types selected for the requirement were thought to potential "targets of violent crime."[141] The city council directed the police department to "reach[] out to business owners" for their input, and the department then scheduled two listening sessions.[142] The ordinance was enacted into law the following year, and is punishable as a misdemeanor or a civil offense.[143]

Police in Fall River, Massachusetts (population around 90,000) sponsored a 2011 ordinance aimed at facilitating the investigation of metal thievery from structures.[144] Here the effort was spearheaded by a detective (not the chief), who made a compelling presentation to the City Council complete with pictures of copper theft implements, as well as a list of streets where copper wires were recently stolen.[145] Apparently impressed by this presentation, the council "accepted" from the detective the laws he proposed, including "a draft amending

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[138] Brian Brehm, *City looks to repeal panhandling laws*, THE WINCHESTER STAR (Apr 23, 2021), available at <https://www.winchesterstar.com/winchester_star/city-looks-to-repeal-panhandling-laws/article_f3ec7a03-d0e8-530f-ad2a-e5df8a65d3b6.html> ("We're not going to arrest our way out of homelessness issues," City Manager Dan Hoffman told Winchester's Public Health and Safety Committee at a special meeting on Wednesday evening. "Law enforcement can sometimes be a blunt instrument and is not appropriate to address homelessness as a whole."").

[139] 2014 WLNR 27563653.

[140] Id.

[141] Id.

[142] Id.

[143] CEDAR RAPIDS, IOWA CODE, Chapter 60A.

[144] 2011 WLNR 22992473.

[145] Id.

the city laws requiring second-hand shops to keep computerized records of purchases sent daily to police for entry into a New England data bank and fully identify customers with photographs."[146] The Council also tasked the detective to work with its law department to also draft an ordinance requiring second-hand scrap dealers to hold materials for a certain period before resale.[147] While the precise legislative history is unavailable, a few months later the city council undertook a major overhaul of its code article covering "Junk and Secondhand Dealers."[148] Stringent recordkeeping requirements were added, certain items were prohibited from being bought and sold, and all these rules were enforced by a licensure regime backed by a civil fine of $300.[149]

5. Police Resource Conservation

Police also regularly sponsored offenses that were aimed at reducing strains on police resources. A large sub-category included sponsorship of false alarm ordinances.[150] Others, like the ordinance below, sought to deputize landlords to police their properties through "crime free rental" provisions.[151] The goal of this category of sponsorship is to reduce the number of calls being made to patrol officers.

Police in Menasha, Wisconsin (population about 17,000) sponsored a 2008 ordinance targeting rental apartments that are regularly visited by police.[152] The department's officials called the proposal a "chronic nuisance abatement ordinance," and billed it as a way to reduce the disproportionate strain placed on police resources.[153] The department undertook a study to determine which apartment complexes were the biggest drains, and identified a number of complexes clustered in a distinct area of the municipality.[154] The sponsored ordinance was modeled on an ordinance passed in Green Bay which had resulted in a large drop in police responses to local apartments; the proposed ordinance sanctioned landlords about $200 per police response after a property has been deemed a

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[146] Id.
[147] Id.
[148] See FALL RIVER, MA, CODE, Article X, 1-10-2012 Amendments.
[149] Id. 14-383.
[150] See *infra*, Appendix of Journalistic Accounts.
[151] Scholars refer to this as "third-party policing." See M. Desmond, & N. Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AMERICAN SOCIOLOGICAL REVIEW 117 (2013) ("Third-party policing attempts to control or prevent crime and disorder by activating nonoffending persons who are thought to influence environments where offenses have occurred or may occur.").
[152] 2008 WLNR 26881077.
[153] Id.
[154] Id.

chronic nuisance.[155] The department justified the ordinance by arguing that "nuisance properties are a blight on a neighborhood, frighten away law-abiding residents, discourage re-investment and consume too many town and police services."[156] The police chief said that "This is not to punish the landlords," and that "We understand the landlords' position and difficulty in evicting (problem tenants)…. But this is more of a collaborative effort; we're willing to work with the landlords. We just want to see some cooperation to get the problem solved." The department's community liaison officer argued that "The landlord has a lot more power than the police department."[157] This was enacted, and is punishable by fine of up to $500, and imprisonment for 90 days if the fine is not paid.[158]

6. Reacting to Recent Incidents

Police often sponsored offenses in reaction to recent incidents, especially those that were high profile. These include incidents involving the police, or publicized incidents in the community more generally. This is the local analogue, well documented at state and national levels, of criminalization following a sensational event.[159]

In 2014, the police chief in Genoa, Illinois (population around 5,000) sponsored a vicious dog ordinance after a recent biting incident.[160] "As it stands now, the city is authorized to destroy the dog," the chief said, but "That was a 1978 code that needs to be changed."[161] The chief's proposal changes this to a requirement that the animal be neutered and microchipped, and that it be muzzled when in public.[162] The chief also proposed changes to the sanctions regime: "Right now, the way the ordinance reads, if there's no specific fine amount listed, it's a mandatory court appearance…. It's just a matter of cleaning up what was already there."[163] This ordinance was enacted into law the same year, but included a provision requiring $1,000,000 in liability insurance when owning a vicious dog,

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[155] Id.
[156] Id.
[157] Id.
[158] MENASHA, WISC. CODE, § 11-7-6; Id at § 1-1-7.
[159] DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 132-33 (2001).
[160] 2014 WLNR 2571557.
[161] Id.
[162] Id.
[163] Id.

and also greatly limits the circumstances under which the dog can be brought out in public.[164] The sanction for violation of the ordinance is a $750 fine.[165]

Police in Lafayette, Indiana (population about 70,000) sponsored an ordinance in 2010 that prohibited the possession of so-called "spice"—a synthetic marijuana drug.[166] "Law enforcement leaders are pushing government bodies here to adopt ordinances that would prohibit spice from being sold in the community," writes a newspaper.[167] "Their concerns are prompted by what officials perceive to be growing popularity of the herbal mixture, particularly among youth."[168] The specific motivation of the police sponsorship in Lafayette was a number of recent encounters between patrol officers and individuals who were high on the substance.[169] These "troubled" the chief, who said that "We had to use force on one guy."[170] The ordinance was enacted into law that year, and broadly prohibited the possession and sale of spice-type products.[171] The penalty for violation is confiscation and destruction of the spice.[172]

In 2006, the police chief of Palo Alto, California (population around 70,000) proposed and drafted a law that criminalized the serving of alcohol at gatherings where minors are present.[173] This was prompted by a high profile case of parents near Stanford hosting a Halloween party where minors were intoxicated, resulting in the parents being charged with state law misdemeanors.[174] The social host ordinance proposed by the chief was enacted the next year, and prohibits the hosting of private gatherings where those under 21 are served alcohol.[175] This is punishable as a misdemeanor offense carrying a possibility of six months incarceration.[176]

7. Citizen-Initiated Complaints

Police sponsorship was also motivated at times by the receipt of a large number of citizen complaints to the department. After repeat calls for a police

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[164] GENOA, ILL. CODE § 5-3-6 (circumstances include only veterinary care, public emergency, or court order).
[165] Id. § 1-4-1.
[166] 2010 WLNR 16810872.
[167] Id.
[168] Id.
[169] Id.
[170] Id.
[171] LAFAYETTE, IND. CODE, ORD. NO. 2010-28, § 1, 9-13-10.
[172] Id.
[173] 2006 WLNR 21873599.
[174] Id.
[175] PALO ALTO, CA ORD. 4981 § 1 (2007).
[176] Id. at § 1.08.010

response at a given location or regarding a certain type of conduct, police then acted as conveyor belts for constituent opinion through offense sponsorship.

Police in Wilson, North Carolina sponsored a 2018 ordinance that deems a property a nuisance if it repeatedly violates noise ordinances and thereafter fails to obtain a permit for a gathering.[177] "We have some nuisance places that will pop up in residential settings and those are problems," said a police captain.[178] "We'll encounter parties happening at the same house week after week, so the neighbors are complaining because the situation deteriorates their quality of life."[179] He predicted that the ordinance "will be a pretty good tool for us to curb some of those situations."[180] This law was enacted without discussion by the legislature and without comment from the public.[181] The ordinance lays out ten different ways in which a party can be classified as a "Nuisance Party," including loud noise or littering, and imposes a permit requirement for future gatherings if a nuisance party has occurred on the property in the last two years.[182] Violations are punishable as either civil offenses or criminal misdemeanor offenses with up to thirty days incarceration.[183]

In 2005, the police chief in Newark, California (population around 50,000), sponsored an ordinance prohibiting scavenging through wastebins.[184] In this case the police appeared to be motivated by citizen complaints they received.[185] The police lieutenant who helped draft the ordinance stated, "We've just been inundated with calls, especially the nighttime officers, about people going through other people's property."[186] He stated that scavenging had become "a regular business," and noted that "(The scavengers) have gotten real, real pushy about going up onto people's property."[187] The proposal includes a sanction of increasing fines per offense, with repeat offenses punished as misdemeanors.[188] This ordinance was enacted into law the same year, and states that "It is unlawful for any unauthorized person to open, inspect or rummage through any container and/or remove any contents therefrom which contains waste…."[189] The final version includes the

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[177] 2018 WLNR 32549728.
[178] Id.
[179] Id.
[180] Id.
[181] Id.
[182] WILSON, NC CODE ART. VII.
[183] Id.
[184] 2005 WLNR 24257477.
[185] Id.
[186] Id.
[187] Id.
[188] Id.
[189] NEWARK, CA CODE § 8.10.020.

sanction scheme of escalating fines and a misdemeanor conviction after three offenses in the same year.[190]

III. UNDERSTANDING POLICE SPONSORSHIP

Police sponsorship of offenses presents a challenge to a standard view of police as mere enforcers of pre-determined laws,[191] but the practice seems less surprising when placed in context. Below, I will explain how two forces work together to help explain sponsorship's prevalence: (1) the established popularity of the conception of police that has been shaped by the theory of "community policing," and (2) various features of local government that facilitate legislative sponsorship as community policing's product. Community policing encourages police to be seen (and see themselves) as part of the community and tasked with identifying social problems in need of regulation, while localities' lack of separation of powers and informal legislative meetings make them especially receptive to this type of police influence.

A. Community Policing

First, consider the concept of "community policing." Policing scholars divide American history into distinct eras: a "political" era in which police were under the direction and patronage of local party bosses (pre-early 1900s), a "professional" or "reform" era in which political independence and neutral enforcement were prized (1930s-1970s), and a "community" era from the 1980s on which sought to re-connect the police to their communities following the separation imposed during the reform era.[192] More recently, one can identify a post-community policing era in which procedural justice and democratic control are prioritized,[193] as well as the rise of abolitionist theories which seek to shrink or

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[190] Id. § 1.16.
[191] See *supra* n.22.
[192] GEORGE L. KELLING & MARK H. MOORE, FROM POLITICAL TO REFORM TO COMMUNITY: THE EVOLVING STRATEGY OF POLICE 2 ("The political era, so named because of the close ties between police and politics, dated from the introduction of police into municipalities during the 1840's, continued through the Progressive period, and ended during the early 1900's. The reform era developed in reaction to the political. It took hold during the 1930's, thrived during the 1950's and 1960's, began to erode during the late 1970's. The reform era now seems to be giving way to an era emphasizing community problem solving.").
[193] Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U.L. REV. 65, 70–73 (2021) ("More recently, legitimacy theories have rejected instrumentalist approaches--focusing not on goals of reducing crime or improving police function--but concentrating on community lack of trust in police….").

eliminate policing.[194] But while academic theories of policing may have moved on from "community policing," this conception of police still holds sway among many actual departments and policymakers.[195]

The results of the present study also confirm that the legacies of community policing are alive and well, since a prominent version of community policing—"problem oriented policing"—explicitly calls for police sponsorship of offenses. This was most fully explicated by Herman Goldstein in 1979.[196] "The first step in problem-oriented policing," he wrote, "is to move beyond just handling incidents. It calls for recognizing that incidents are often merely overt symptoms of problems…. [I]t requires that they take a more in-depth interest in incidents by acquainting themselves with some of the conditions and factors that give rise to them."[197] Upon identifying a "problem" that is giving rise to incidents, the next question becomes how to solve it. According to Debra Livingston, problem-oriented policing demands that "Police should move beyond handling incidents to carefully identifying substantive problems and developing more effective, customized police responses to these problems."[198] Significantly, this was not limited to the *way* in which police responded to incidents or interacted with the community—it also included the proposal of new offenses:

> Goldstein was one of the first scholars to note that police departments in some communities might need new, tailored criminal statutes (or some other form of legal authority) to deal with public order problems, because these problems often persisted after courts invalidated disorderly conduct,

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[194] Amna Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781 (2020) ("Rather than aiming to improve police through better regulation and more resources, reform rooted in an abolitionist horizon aims to contest and then to shrink the role of police, ultimately seeking to transform our political, economic, and social order to achieve broader social provision for human needs."; see also Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 124 (2021) (discussing different versions of abolitionist thought as expressed by the slogan to "defund the police").

[195] Perhaps the best example of this consensus in the policy world is the product of the President Obama's Task Force on 21st Century Policing from 2015. *Final Report of the President's Task Force on 21st Century Policing*, WASHINGTON, DC: DEPT. OF JUSTICE OFFICE OF COMMUNITY ORIENTED POLICING SERVICES (2015). The DOJ's "Office of Community Oriented Policing Services" assisted with this task force's work, and the theory of community policing animates the entire document. See id. at 41.

[196] See Livingston, *Police Discretion* at n.93 (noting that Goldstein's arguments were first presented in 1979, and later expounded in a book in 1990).

[197] HERMAN GOLDSTEIN, PROBLEM ORIENTED POLICING 33 (1990).

[198] Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 573–74 (1997)

> loitering, and vagrancy statutes, leaving officers with no legal authority to intervene.[199]

Community policing also drew on the "idea of community-police reciprocity,"[200] and as applied to "problem-oriented policing" this reciprocity expressly called for legislative sponsorship. Thus, Goldstein wrote that he was dismayed that "In the past, police have not had as strong a tradition of initiating proposals for regulations to prevent some of the problems they must handle," and he lauded the "notable exception" of the Portland Police Bureau in "pressing for" certain regulations aimed at preventing burglaries.[201] He argued that after identifying the "problem," an option for the police is to propose "Increased Regulation, through Statutes or Ordinances, of Conditions That Contribute to Problems."[202] Other community policing theorists, too, echoed Goldstein's calls for police involvement in legislating.[203]

Police sponsorship of local offenses, when placed in this context, seems less surprising. Community policing is the dominant theory of policing currently employed by departments (if not accepted by academics), and the problem-oriented component of this theory explicitly recommends offense sponsorship as part of its larger program of problem-solving.

B. Local Government: Informal Meetings, Unified Powers

Community policing helps to explain the prevalence of police sponsorship, but so too does the nature of the forum that is receiving the proposals: local governments. A number of features of localities combine to make them particularly receptive to the type of offense-sponsorship that community policing endorses. These include (1) the informality and openness of legislative sessions, and (2) the lack of robust separation of powers in most local governments.

1. Informal and Open Floor Meetings

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[199] Id.

[200] Id. at 576 ("the concepts of community and problem-oriented policing are frequently used interchangeably").

[201] Goldstein, POLICING at 127.

[202] Id. He asked rhetorically, "Are the police sufficiently assertive in identifying such conditions and practices and in encouraging communities to choose, through their governing bodies, from among the alternatives they have for dealing with them?" Id. at 128.

[203] "A second form of new relationship to the community, but not necessarily exclusive of the first, is for both police and citizens to nominate the problems with which police and citizens will deal, the tactics that each will use to address those problems, and the outcomes that are desired." George Kelling et. al., *Police Accountability and Community Policing*, 7 PERSPECTIVES ON POLICING 1 (1998).

The most significant facilitator of police sponsorship, I believe, is the openness of local legislative meetings. By this I do not mean openness of attendance, but openness of the floor for discussion. In Congress and State Legislatures, only elected members can speak and introduce bills; members of the public and agency heads comment only during committee hearings.[204] In local legislative sessions, though, there is no such restriction. Many of the meeting minutes from in the case studies above reveal that department heads such as police chiefs have official speaking roles and regularly participate in council meetings.[205] Videos indicate that some of them sit alongside the councilmembers with other officials.[206] Moreover, the public is almost always given a chance to comment at the end of a meeting.[207] The overall effect is to break down the wall between member and non-member that exists at higher levels of government. When police chiefs are permitted to formally propose legislation, they become more like quasi-legislators in their own right.

Take the panhandling ordinance from Winchester, Virginia: the meeting minutes state that the ordinance was "Presented by John R. Piper, Chief of Police."[208] Winchester's City Charter says nothing about meeting procedures, and its Code of Ordinances requires merely that ordinances be presented in writing, reviewed by the City Attorney, and be considered at two meetings before adoption.[209] The code section detailing the powers of the chief of police states that he or she shall be responsible "for the enforcement of the City Ordinances, State Code, and other applicable criminal law."[210] Thus, there was no explicit legal authority for Piper to propose an ordinance, but the council allowed him to do so nonetheless.

Local legislative meetings, then, are marked by a general lack of formality not observable at higher levels. The barrier between members and non-members is

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[204] See, e.g., RULES OF THE U.S. SENATE XIX (describing opportunities for "Senators" to speak during debate, and noting that only other official who may speak is a former U.S. president); GENERAL OPERATING RULES OF THE HOUSE OF REPRESENTATIVES, PENNSYLVANIA HOUSE OF REPRESENTATIVES, RULE 10 (noting opportunities for "members" to speak).

[205] See, *supra*, Part II.

[206] See, e.g., *Hinsdale Illinois Village Board of Trustees Meeting of May 7, 2019*, <http://villageofhinsdale.granicus.com/MediaPlayer.php?clip_id=201>.

[207] "There is no *individual* right to notice and opportunity to be heard at meetings of local governmental bodies at which legislative action is to be taken, although the general public may have the right to minimal notice and opportunity to submit input at such meetings." *Open meetings*, 2 LOCAL GOVERNMENT LAW § 11:7.

[208] *June 11, 2019 Minutes, Winchester City Council Meeting*, <http://winchesterva.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=1674&Inline=True>.

[209] WINCHESTER, VA CODE. ART. III.

[210] WINCHESTER, VA ORD. of 3-9-76, § 18-4; ORD. NO. 2011-21, § 10-11-11.

porous, and rules of debate are less stringent.[211] This informality has allowed a social practice to develop by which department heads, especially police chiefs, have the quasi-legislative power to introduce legislation.

2. Unified (not Separate) Powers

Beyond the informality and openness of a local legislative session, there is a second aspect of local government law that makes localities particularly receptive to police sponsorship of offenses: most local governments do not have a clear separation of legislative and executive powers.[212] This is especially true in council-manager and "weak mayor"-council systems, where the mayor expressly has no executive-type powers of his or her own, but is also true in many "strong mayor"-council systems.[213] In the words of Richard Briffault, "At the local level there is often a complete blurring of the distinction between executive and legislature. Many localities do not even have a chief executive. They may be governed by a multimember commission or council rather than a single executive. In these settings, lawmaking and administration, and legislation and regulation, are fused."[214] Defenses of this unified government arrangement vary, but an important move is to emphasize the reduced powers of a locality—that simply less is at stake.[215]

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[211] "A local legislative body is not ordinarily bound to follow rules of procedure which derive neither from statute nor from charter." 2 LOCAL GOVERNMENT LAW § 11:6; see also Smith v. City of Dubuque, 376 N.W.2d 602 (Iowa 1985) (actions not invalid simply because council violated own parliamentary rules).

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

[213] "At the local level, there is a wide variety of executive structures….[F]or the majority of local governments, the executive branch is housed within the legislative branch. Even for local governments with a recognizable chief executive, whether mayoral or otherwise, many such chief executives have quite limited, or even no, formal appointment and removal power over the heads of administrative agencies." Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 600–02 (2017).

[214] Richard A. Briffault, *Beyond Congress: The Study of State and Local Legislatures*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 23, 29 (2004); accord Kellen Zale, *Part-Time Government*, 80 OHIO ST. L.J. 987, 1001 (2019), and Noah M. Kazis, *Service Provision and the Study of Local Legislatures: A Response to Professor Zale*, 81 OHIO ST. L.J. ONLINE 1, 4 (2020)

[215] "Justifications range from the 'mere'-ness of local governments, to the idea that checks and balances are unnecessary at the local level, to the empirical observation that states have the legal-structural latitude to choose not to separate out executive from judicial and legislative functions in

In a governmental system in which the division between executive and legislative powers is broken down, it seems less problematic that a core executive officer such as a police chief would have a role in proposing legislation. Thus, there is no appearance of impropriety that a council should discern when it allows for a chief to sponsor an offense—the meeting is a group of government officials all working to solve "problems" together. Moreover, institutional actors and third-party observers might be less concerned about police involvement in local offense-creation because of the limited power of local governments. Less seems "at stake" if the government is only empowered to create misdemeanors.[216]

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

IV. Evaluating Police Sponsorship

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

In what follows, I will first describe the basic claim that in a liberal democratic polity, it is the legislature that must decide what conduct is and is not prohibited. Then, I will explain how bureaucratic experts can legitimately influence this kind of deliberation when they act within certain constraints—especially that they be neutral governmental actors, and that they opine only within the confines of their actual expertise. Finally, I will apply these principles to the case of police

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local governments." Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 601 (2017); see Bd. of County Comm'rs v. Padilla, 804 P.2d 1097, 1102 (1990) (echoing these arguments).

[216] I am aware of no state that permits localities to create felonies. 2 LOCAL GOVERNMENT LAW § 11:27 (describing express limitations in some jurisdictions).

sponsorship, noting the risk that police will influence deliberation in a way that violates the constraints of neutrality and expertise.

A. The Ideal Premise: Legislative Offense Definition

Whenever the state creates an offense, it prohibits conduct. In a liberal democratic political community such as ours, this coercive restriction on individual autonomy requires (at a minimum) that this decision be made by a democratically legitimate institution. "[E]qual political liberty" writes Amy Gutmann, "entails the right of adult members of a society to share as free and equal individuals in making mutually binding decisions about their collective life."[217] This requirement is normally satisfied by the creation of a representative legislature. "[T]he basic norm of democracy is empowered inclusion of the community of those affected in collective decisions and actions," write Dario Castiglione and Mark Warren, "[and] [i]n all but directly democratic venues (and even sometimes then), this norm of democratic inclusion is achieved through representation."[218] Moreover, in a modern, pluralistic society, fundamental disagreement about the proper use of state power should be expected, and it is a legislative assembly that can accommodate such diversity. In the words of Jeremy Waldron, "The point of a legislative assembly is to represent the main factions in society, and to make laws in a way that takes their differences seriously rather than in a way that pretends that their differences are not serious or do not exist."[219]

Since the creation of offenses involves using one of the most potent tools of state power even against those who disagree with the conduct's prohibition, theorists rightly hold that offense-definition should be especially grounded in a legislative decision. Markus Dubber calls this the "legislativity" requirement of criminal law,[220] which is reflected in Model Penal Code § 1.05: "No conduct constitutes an offense unless it is a crime or violation *under this Code* or another *statute* of this State."[221]

One of the most important doctrinal manifestations of the legislativity requirement is the "void-for-vagueness" doctrine, in which a court will invalidate

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[217] See Amy Gutmann, *Rawls on the Relationship Between Liberalism and Democracy*, in THE CAMBRIDGE COMPANION TO RAWLS (Samuel Freeman ed., 2006) 173.
[218] Dario Castiglione & Mark E. Warren, *Rethinking Democratic Representation: Eight Theoretical Issues and a Postscript*, in THE CONSTRUCTIVIST TURN IN POLITICAL REPRESENTATION 21, 24 (Lisa Disch, Mathijs van de Sande & Nadia Urbinati eds., 2019).
[219] JEREMY WALDRON, LAW AND DISAGREEMENT 25-27.
[220] See Markus Dirk Dubber, *The Historical Analysis of Criminal Codes*, 18 L. & HIST. REV. 433, 436 (2000). Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 331 (2002) ("This requirement ensures that conduct can only be criminalized by an elected, representative body.").
[221] Model Penal Code § 1.05 (emphasis added).

a statute if it fails to "establish minimal guidelines to govern law enforcement."[222] Criminal laws cannot be written such that they "entrust[] lawmaking to the moment-to-moment judgment of the policeman on his beat,"[223] as such a law "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[224] The key concept identified as beyond police authority is the resolution of "basic policy matters"—the fundamental decision of what conduct is worthy of regulation by criminal law. In a civil vagueness case, the Supreme Court spoke of the demand that "state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values…."[225] Police have no claim to make such a choice, as this is a choice a community must make for itself—not one that it can have foisted upon it. The Court thus explicitly connected the doctrine of unconstitutional vagueness to "democratic self-governance" very recently: "Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide."[226]

To say that legislatures alone can legitimately determine when conduct is prohibited does not exhaust the inquiry into an offense's legitimacy, though. *How* the legislature made that decision also matters,[227] and certain influences on legislative deliberation can be understood as legitimacy-depriving (or legitimacy-conferring) in nature. In what follows, we will unpack the ways in which expert officials outside of the legislature can legitimately influence lawmaking despite their apparently non-democratic status.

B. The Legitimate Role of Expert Officials in Legislative Deliberation

There is a tension between bureaucratic expertise and democracy. "The idea that people ought to have equality of opportunity to contribute to deliberation on matters that affect them," writes one theorist, "seems to be undermined by the inequalities in knowledge that are necessary for the analysis, regulation and management of social and technological problems."[228] This tension is not unresolvable, though. Perhaps the most sophisticated attempts to reconcile these two values has been in the field of administrative law. Drawing from the lessons of agency involvement in legislation, I conclude that the legitimacy of this influence

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[222] City of Chicago v. Morales, 527 U.S. 41, 60 (1999).
[223] Id.
[224] Grayned v. City of Rockford 408 U.S. 104, 108-09 (1972).
[225] Roberts v. U.S. Jaycees, 468 U.S. 609, 629 (1984).
[226] United States v. Davis, 139 S. Ct. 2319, 2325 (2019).
[227] For example, no one would dispute that a legislative vote that was openly bought by bribes is illegitimate.
[228] A. MORE, CRITICAL ELITISM 10.

is predicated on, at a minimum, satisfaction of two conditions: (1) the neutrality of the agency, and (2) the agency's expertise over the legislative subject matter.

First, we must lay the groundwork for these points by establishing that it is certainly not the case that bureaucratic experts have any claim to influence legislation as a matter of democratic inclusion. Here, the "bureaucratic" component deprives them of that. As political theorists Dario Castiglione & Mark E. Warren explain, "the basic norm of democracy is empowered inclusion of the community of those affected in collective decisions and actions."[229] But interest groups of officials *internal* to the government are not part of the community that democratic inclusion must include in decisionmaking to be truly democratic. Rather, they are the targets or recipients of inclusion claims.[230] Such interests and actors may have a legitimate role in influencing legislation, but their claim to involvement and influence flows not from democratic inclusion, but from something else.

Now, we may consider what else can legitimate bureaucratic expert influence over legislation. Again, the best answers have been developed by theorists studying federal administrative agencies. In thinking of their legislative influence, I am thinking especially of the formal process through which federal agencies may draft and propose legislation to Congress by coordinating their proposals through the Executive Office of the President.[231] A full discussion of the legitimacy of the "administrative state" is far beyond the scope of this Article, and I aim only to emphasize two features of administrative agencies that are at least necessary (but not necessarily sufficient) conditions to legitimize their influence over legislatures. Consider as foundational Jerry Mashaw's argument that administrative law is legitimate because its "reason-giving" features facilitates both the aggregative and deliberative aspects of democracy.[232] Focusing on the latter, more significant

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[229] Castiglione & Warren, *Rethinking* at 24.

[230] This is never explicitly stated in the literature on democratic inclusion, I think, because it is presumed. Consider Archon Fung's discussion of the "principle of affected interests"—"the most basic of democratic intuitions…that individuals should be able to influence decisions that affect them." Archon Fung, *The Principle of Affected Interests: An Interpretation and Defense*, in REPRESENTATION: ELECTIONS AND BEYOND 237 (2013). In defending the principle, Fung argues that "we should interpret the principle as applying not only to legislatures but also to administrative agencies…." Id. Thus, official governmental entities are targets of the principle of affected interest, but are not affected interests themselves. See also, ROBERT DAHL, AFTER THE REVOLUTION 25 ("The Principle of Affected Interests is…very likely the best general principle of inclusion that you are likely to find," and it states that "everyone who is affected *by the decisions of a government* should have the right to participate *in that government*.") (emphasis added).

[231] Jarrod Shobe, *Agencies As Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 455–56 (2017).

[232] JERRY MASHAW, REASONED ADMINISTRATION 168 (2018).

aspect,[233] he writes that "legitimacy flows from a capacity to give public-regarding reasons that all might accept," and that procedural constraints imposed by the Federal Administrative Procedures Act helps to implement this requirement.[234] Embedded within this claim of legitimation through the APA is, I argue, at least two sub-requirements: neutrality and expertise.

1. Neutrality

Regarding neutrality, a federal agency must act in such a way that its legislative proposals will take a larger view of the public interest than the narrow goals of the agency's components. Deliberative theorist Mark Seidenfeld cautions that the legitimizing feature of agency deliberation is undermined if agencies pursue regulators "private interests" such as "power, prestige, convenience, and security."[235] "[O]fficials' self-interest also creates incentives for them to augment their regulatory authority," he writes, and therefore both Congress and the courts should push back against attempts to increase their power and jurisdiction.[236]

When proposing legislation, this tendency is counteracted by the diffusion of roles across the agency.[237] Agencies usually combine features of executive law enforcement, legislative rulemaking, and also adjudication.[238] To the extent that an agency has police-like enforcement or investigative officials working for, these officials are but part of a larger ecosystem of institutions within the agency aimed at a certain regulatory goal. For example, the Occupational Safety and Health Administration has a police-like arm of investigators called Compliance Safety and Health Officers who inspect workplaces, question employers and employees, and issue citations for violating OSHA rules.[239] But OSHA is also composed of

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[233] Mark E. Warren, *A Problem-Based Approach to Democratic Theory*, 111 AM. POL. SCI. REV. 39, 40 (2017) (describing deliberative model as "now arguably the most productive research paradigm within democratic theory").

[234] Mashaw, REASONED at 168. See also Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1542 (1992); id. n.153 ("Administrators at least operate within a set of legal rules (administrative law) that keep them within their jurisdiction, require them to operate with a modicum of explanation and participation of the affected interests, police them for consistency, and protect them from the importuning of congressmen and others who would like to carry logrolling into the administrative process.").

[235] Seidenfeld, *Civic Republican* at n.253.

[236] Id. at 1564-65.

[237] I am grateful to Guyora Binder for this insight.

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

[239] "Compliance Safety and Health Officers of the Department of Labor are authorized to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; to inspect

Administrative Law Judges who adjudicate alleged violations "impartial[ly],"[240] and also a Directorate of Standards and Guidance which proposes new regulations.[241] When an agency *qua* agency proposes a new statute to a legislature, such as those federal proposals coordinated through the Executive Office of the President,[242] the partisanship of the police-like component is mollified by the countervailing culture and disposition of the quasi-legislative and quasi-judicial components. High-level proposals from Cabinet Secretaries and agency heads are unlikely to viewed by those leaders as proposals coming from power-hungry investigators or enforcers. They take a broader view.

2. Expertise

The reason-giving that legitimates a federal agency's proposals must also be grounded in subject matter expertise. "[Agencies'] internal structure also encourages deliberative decisionmaking aimed at furthering public rather than private values," argues Seidenfeld, as "At the core of almost every agency is a professional staff, chosen for its knowledge rather than for its political views or affiliations."[243] While expertise may not occupy the central place in contemporary thinking about administrative law that it once did,[244] that is probably because expertise is now simply assumed. Expertise alone may not legitimate agency influence, then, but it can be seen as a necessary condition. "While agency decisional legitimacy depends on more than expertise," Mashaw writes, "the expectation that agencies will act on the basis of knowledge is a core feature of

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and investigate during regular working hours… all pertinent conditions…; to question privately any employer… or employee; and to review records…which are directly related to the purpose of the inspection." 29 C.F.R. § 1903.3.

[240] "It shall be the duty of the Judge to conduct a fair and impartial hearing, to assure that the facts are fully elicited, to adjudicate all issues and avoid delay." 29 C.F.R. § 2200.67.

[241] *Directorate of Standards and Guidance - Directory of Offices & Staff*, OSHA.gov, available at <https://www.osha.gov/contactus/byoffice/dsg>; 29 C.F.R. § 1910.1 (proposal of standards within OSHA's powers).

[242] Shobe, *Agencies As Legislators* at 455.

[243] Seidenfeld, *Civic Republican* at 1554.

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

acceptable administrative action."[245] Expertise is the Supreme Court's preferred justification for the involvement of administrative agencies in federal lawmaking. In a recent plurality opinion regarding agency interpretive deference, Justice Kagan summarized this rationale: "Agencies (unlike courts) have unique expertise, often of a scientific or technical nature, relevant to applying a regulation to complex or changing circumstances."[246]

Expertise-based defenses of agency deference can be applied to support agency involvement in the legislative process. There is a formal process through which federal agencies may draft and propose legislation to Congress by coordinating their proposals through the Executive Office of the President.[247] In his empirical study of various actors' views of an agency's role in legislation, Jarrod Shobe reported "Nearly all respondents emphasized that agencies have much more subject-matter expertise than congressional staff, and because of this, Congress is unable to draft legislation that is both detailed and effective without significant agency input."[248] Agencies also influence legislation on the basis of expertise through the process of "technical drafting assistance," which is not coordinated through the White House.[249]

C. The Disanalogy: Police Officials as Administrative Agencies

Having explained what I claim to be two necessary conditions for the legitimation of a bureaucratic interest group's influence over legislative deliberation—neutrality and expertise—the stage is set to assess police offense sponsorship using these criteria. Overall, I will argue that police sponsorship can create a risk of skewing deliberation illegitimately, depending on the nature of the

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[245] MASHAW, REASONED ADMINISTRATION at 106.

[246] Kisor v. Wilkie, 204 L. Ed. 2d 841 (2019) (plurality) (addressing *Seminole Rock* deference) (cleaned up); Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1286–87 (2008) ("Administrative agencies' superior experience and expertise in particular regulatory fields offers a second popular justification for Chevron deference.").

[247] Shobe, AGENCIES AS LEGISLATORS at 455–56.

[248] Id. ("Agency expertise allows agencies to control much of the legislative dialogue with Congress and important portions of the resulting legislative text."); see also Id. at 477 ("Respondents generally said that this agency review is deep and substantive because agencies have superior subject-matter expertise.").

[249] Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377 (2017) ("In the shadows, agencies provide confidential "technical drafting assistance" on legislation that originates with congressional staffers. This technical drafting assistance provides Congress with agency expertise on the subject matter, which helps Congress avoid considering legislation that would unnecessarily disrupt the current statutory scheme."); see also Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 103–04 (2015) ("The functional reasons why both MCs and the executive find executive branch authorship valuable are not surprising. First, members of the executive branch have considerable expertise in the subject areas they cover….").

claim that the police are making. Deference accorded to police officials in some cases is therefore unwarranted, and is effectively an abdication of the legislative duty.[250] Any analogy to federal administrative agencies, then, falls apart in most cases of sponsorship. First, I will explain how police officials usually fail the test of neutrality. They are structurally partisan as they are enforcers representing one "side" in an adversarial system, and sociological work has demonstrated that a unique culture has arisen alongside this structure that reinforces that partisanship. Second, police officials usually fail the test of expertise. Offense sponsorship involves a multifaceted set of claims relating to the conduct that the offense seeks to prohibit, but police officers at most possess expert knowledge about empirical "conduct observation," not normative "conduct evaluation." In sum, many instances of offense sponsorship create a risk of illegitimate legislative deference to police.

1. Lack of Neutrality

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

i. Structural Partisanship

First, police are *partisan*. By this I do not mean that they owe allegiance to a specific political party, but rather that the criminal justice system has assigned them a role that is adversarial and which contemplates eventual litigation—litigation in which they are decidedly on one side of the "v." This is best described by the famous statement by Justice Jackson that "zealous officers" will not often "gras[p]" the purpose of constraints on their own power, as they are "engaged in the often competitive enterprise of ferreting out crime."[251] The key word here is "competitive." Officers, and the chiefs they work for, play an adversarial role in criminal law. They investigate offenses and serve as witnesses *for the government*. Speaking of the close relationship between police and the criminal defendant's

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[250] Scholars have paid great attention to the phenomenon of an excessive judicial deference to police on this basis, see Anna Lvovsky, *Rethinking Police Expertise*, 131 YALE L.J. 475, 486 (2021), and many of these observations seem equally applicable to legislative deference. Consider Lvovsky's description of the former: "[S]uch deference echoes a longstanding intuition about the role of relative competency in governance: that the technology of government perfects itself, in essence, by entrusting public functions to those most knowledgeable and skilled in their performance." Id. Judges defer, she argues, because of the perception of police officers' "greater insight and experience," but also of their "impartiality." Id. at 493.

[251] Johnson v. United States, 333 U.S. 10, 13–14 (1948)

arch-adversary—the prosecutor—Daniel Richman writes,"[O]ne ought not underestimate the unifying influence of a shared commitment to 'getting the bad guys,' hardened by the adversarial process, [and] nurtured by mutual respect and need…."[252] Police encounters with civilians on the street are therefore fraught with the potential of arrest and prosecution. American police do not serve primarily as neutral truth seekers as they would in countries[253] (like some in Europe) with inquisitorial systems.[254] Powerful evidence for this is the authorization of police to lie to citizens,[255] and the recognition by the Supreme Court that even when they are acting in their non-criminal "community caretaking" capacity, the evidence police discover is often admissible.[256] With respect to high level officials, even if they are not so concerned about conviction in an individual case, they are nevertheless motivated to demonstrate evidence of their effectiveness through increased arrest and citation numbers.[257]

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[252] Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 792 (2003).

[253] But see William J. Stuntz, I*nequality and Adversarial Criminal Procedure: Comment*, 164 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 47 (2008). ("American police are more inquisitorial than adversarial: police forces are government-controlled investigative agencies whose job is to ascertain the truth and gather evidence for trial – often for both sides."). Stuntz cites to *Brady* for the proposition that police gather evidence for both sides. But a duty to disclose exculpatory evidence that one happens to find while searching for incriminating evidence does not, in my view, convert police into truth-seekers working for both sides. Moreover, the fact that police are "government-controlled" tells us little, since they are generally autonomous (as he states earlier in the piece), and with respect to litigation they are controlled by prosecutors, who are surely adversarial.

[254] For example, in France police investigations are supervised by magistrates. "As magistrats, the procureur and juge d'instruction exercise a judicial role in the pre-trial supervision of investigations—even though the procureur is also responsible for the prosecution of offences." Jacqueline Hodgson, *The Police, The Prosecutor And The Juge D'instruction: Judicial Supervision In France, Theory And Practice*, 41 THE BRITISH JOURNAL OF CRIMINOLOGY 342 (2001) (also noting that hands-on direct supervision is not common in practice). For a debate about the nature of continental investigative practices, see John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: Myth and Reality*, 87 YALE LAW JOURNAL 1549 (1978), and Goldstein SL Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977).

[255] See Julia Simon-Kerr, *Public Trust and Police Deception*, 11 NE. U.L. REV. 625, 634 (2019) (describing "Reid Technique").

[256] Brigham City, Utah v. Stuart, 547 U.S. 398, 407 (2006) (when rendering emergency aid); Cady v. Dombrowski, 413 U.S. 433 (1973) (when aiding disabled vehicle after accident); but see Caniglia v. Strom, 141 S. Ct. 1596 (2021) (not admissible when in a home). For a larger discussion of the doctrine pre-*Caniglia*, see Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEG. FORUM 261, 263 (1998).

[257] Stuntz, *Pathological Politics* at n.133. Jenny Carroll cautions against viewing police motivations regarding arrest rates as disconnected from the larger system. Jenny E. Carroll, *Safety, Crisis, and Criminal Law*, 52 ARIZ. ST. L.J. 769, 791 (2020).

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

ii. Culture

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

Very recent work by Ana Lvovsky has synthesized the voluminous literature on police culture and organizational psychology.[258] She claims that some of these traits are the unintended consequences of the move towards increased police "professionalism" that began in the mid-20th Century.[259] A few of Lvovsky's observations are especially relevant for our purposes here.

First, sociologists describe a deep alienation of police from their communities.[260] Citing Jerome Skolnick's landmark study of the "working personality" of police officers, Lvovsky notes:

> The typical police officer is…is deeply suspicious, constantly on the lookout for "symbolic assailants" who, by their dress or attitudes, project a threat of violence—a judgment often triggered by any displays of unconventional behavior. He is extraordinarily jealous of his authority, eager to assert dominance in the face of skepticism and disrespect. Not least, the archetypical policeman is fiercely loyal to and protective of his fellow officers, who not only support him against threats in the field but also alone appreciate his burdens.[261]

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[258] Anna Lvovsky, *The Two Lives Of Police Professionalism* (unpublished manuscript, on file with author).
[259] Id.
[260] Id. at *28.
[261] Id. at *28.

One might summarize police alienation as a self-conception of being both separate from and above members of the general public, resulting in an expectation of deference[262] and also an insular group loyalty.

Police culture also resists oversight and legal constraint. Resistance to oversight stems from the false claim of expertise discussed above: "the professionalized mindset presumes that
'ordinary citizens' simply cannot 'understand . . . and therefore should not question police activities.'"[263] This results in a chaffing at legal constraints imposed externally by courts or legislatures, which "strike police officers as not just naïve but profoundly harmful."[264] Instead, officers expect to be afforded discretion, which he or she guards with "characteristic jealousy…as both a core component and core reward of his [or her] rarefied status."[265]

These traits make the influence of police over legislation especially problematic—especially legislation that involves criminal punishment and the authorization of state sanctioned violence in enforcement. While no interest group should be expected to be wholly altruistic, enlightened, and open-minded,[266] the traits identified above seem to be an unusually toxic brew. Healthy deliberation presumes some basic measure of concern for the larger community,[267] equal footing of voices,[268] and an anticipatory respect for the eventual outcome, even when one disagrees with it.[269]

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[262] Id. at *34 ("Critics have long observed that police-civilian encounters reflect an obsessive fixation on deference, a 'desire to maintain respect and . . . exert authority over others' that often sours into anger and hostility if unrequited.").
[263] Id.
[264] Id. at 47
[265] Id. at 48.
[266] Deliberative democratic theory need not assume this. See Brenner Fissell, *Rightsizing Local Legislatures*, 2023 Utah Law Review __ n.162 (2023) (describing "impartialist" vs. "non-impartialist" schools).
[267] This flows from the principle of "reciprocity" elaborated by deliberative theorists Amy Guttman and Dennis Thompson. See GUTTMAN AND THOMPSON, DEMOCRACY AND DISAGREEMENT 53 ("Because the results of democratic deliberations are mutually binding, citizens should aspire to a kind of political reasoning that is mutually justifiable…. [E]ven in the face of what we call deliberative disagreement, reciprocity calls on citizens to continue to seek fair terms of cooperation among equals.").
[268] JAMES FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION 43 (2009) ("In addition [to equal share in voting], one might hope that there is some equality in each person's opportunity to determine the views that are given equal consideration."). See also id. at 34 (identifying "equal consideration" as one of five conditions of deliberation, and defining it as "The extent to which arguments offered by all participants are considered on the merits regardless of which participants offer them….").
[269] Guttman and Thompson call this "accommodation." See GUTTMAN AND THOMPSON, DEMOCRACY at 79. ("The principles of accommodation provide the standards for…how citizens

2. Lack of Expertise

Police sponsorship can illegitimately skew legislative deliberation in a second way: the legislature may uncritically view police as experts in the subject matter of offense creation and drafting. As we said above, expert knowledge is a necessary condition for the legitimacy of expert influence over legislation, and most think that this condition is satisfied in the case of federal agencies proposing statutes to Congress. Police do not similarly deserve deference as experts on offense creation—at least not in many cases.[270] Recall that our definition of sponsorship includes multiple components: the identification of a social problem as worthy of response by the creation of a new civil or criminal offense, the drafting of the text of the offense, and the proposal of the offense draft to the local legislature. Each of these steps involves different competencies, some of which the police possess, and many of which the police do not. The most significant distinction I will draw is between the descriptive observation of conduct, and the normative evaluation of conduct. Police may legitimately claim expert knowledge over the former, but not the latter.

i. The Problem Identification Phase: Conduct Observation and Conduct Evaluation

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

Regarding the descriptive observation of community events and interactions, we should concede that police are especially competent. They are "experts" in the sense that they are more fully aware of these facts than average

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who, after deliberation, still fundamentally disagree about an issue should treat one another with regard to that and related issues—even when their deliberations result in legislation that favors one side of the dispute.").

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

civilians, and this is for multiple reasons. The police respond to complaints—thus they are fed a form of information by the public—and are privileged insiders in government, with access to non-public data and statistics. Police departments also usually employ more people than other municipal departments, and their patrol function causes them to regularly observe that which lay people will not. The police chief, especially, is likely to have a broader view and greater knowledge of what is happening in a city, both good and bad. For example, the police chief is more likely than a layperson to know which rental properties are the subject of the most citizen complaints, and the general nature of those complaints. This tells her something about what is happening inside those properties, and this knowledge may not be widely known. As information gathering *conduct observers*, then, police have an advantage over the public and even the legislature.

Sponsorship initiation takes information that is gathered, though, and it evaluates the phenomena as socially harmful.[271] This is inherently normative in nature. It is the step in political life during which policy goals or ends are determined, as opposed to the means to achieve them. To identify certain conduct (or omissions) as damaging to the community requires moral judgment, and while much conduct will be unambiguously viewed as harmful, in other cases this will be highly controversial. The police chief and the average person will likely agree that vehicle collisions are harmful, but what about the acceptable noise level for social

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

gatherings in a campus-adjacent neighborhood? Here, police have no special competence: they are not experts in *conduct evaluation*.[272]

This is not because police officers are especially bad at ethical reasoning, or that legislators are especially good at it, but because ethical reasoning and the moral evaluation of conduct is not a task which lends itself to specialized professionals. This stage of offense initiation is simply not expertise-apt. This is especially true with respect to evaluation that conduct should be criminalized. Consider this assessment by Doug Husak:

> [T]he most basic question to be answered by a theory of criminalization is: For what conduct may the state subject persons to punishment? ... This inquiry plunges us directly into one of the deepest quagmires in the history of political and legal philosophy: the justification of state punishment…. Disagreement among philosophers is profound, is radical, and takes place at the deepest level of moral intuition. Some theorists hold premises to be self-evident and humane that others regard as counterintuitive and barbaric. It is unrealistic to expect these disputes to be resolved any time soon.[273]

But the controversiality of normative conduct evaluation remains, albeit to a lesser extent, when the conduct is being prohibited and sanctioned by a civil offense. The disagreement noted by Husak regarding intuitions about punishment is also present regarding intuitions about state coercion more generally,[274] and a liberal political community expects this to be so. There can be no "expertise" regarding what conduct is socially harmful—at least not once one moves beyond the stage of observing factual phenomena and one begins assessing them normatively.

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

[273] DOUG HUSAK, OVERCRIMINALIZATION 82 (2008).

[274] When an offense is civil, the effects of state power exercised against the individual are lessened, but not eliminated, and therefore much of the controversiality will remain. "When offenses are fully decriminalized -- reclassified as civil with no possibility of arrest, incarceration, or criminal stigma -- defendants do indeed face lesser formal punishments. But much of decriminalization is only partial, leaving uncounseled defendants unprotected against the significant punitive effects of decriminalized offenses. And in fact, even where offenses have been fully decriminalized and reclassified as civil, the consequences of being labeled an "offender" do not disappear, and defendants may be further punished in informal and unauthorized ways due to the sloppy, punitive nature of the misdemeanor system more generally." Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1078 (2015).

This moral evaluation of the social harm that conduct or omissions causes in a political community is, as the Supreme Court recognized in the vagueness decisions, an evaluation that constitutes a "basic policy matter" often involving choices among "competing social values."[275] This is no straightforward question with a "right answer" determinable through extended study, research, or analysis. As Husak wrote, it often implicates the "deepest level of moral intuition."[276] In a pluralistic liberal democracy such as the United States, fundamental disagreement about the moral quality of human actions is expected, but accommodated through the institutions of a representative legislature constrained by a constitution. The statutes created by a legislature are authoritative not because they are "correct," but because they reflect the decision of a representative majority vote, and are therefore fair.[277]

The moral evaluation of conduct in a political community is not expertise-apt, and therefore police may not legitimately claim superior ability to discern what conduct is or is not a "problem." Once one recognizes this, problem-oriented policing appears rather naïve—or at least far narrower in its applicability than one might initially think. Only in areas of conduct that are universally held to be socially harmful may police safely identify it as a "problem." But how big is this category? Again, the core categories of antisocial conduct—say, murder, rape, arson, theft—will be state level felonies. Conduct addressed by local governments is often less clearly a public wrong, and thus the moral evaluation is more controversial. Think again of the college-town noise example from above.

ii. The Regulatory Response Phase

Sponsorship of offenses is also more than a moral evaluation, though: it is a determination that a legal response is appropriate, and that the form such a response should take is the creation of a new civil or criminal offense. Sponsorship

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[275] See *supra,* Part IV.A.

[276] HUSAK, OVERCRIMINALIZATION at 82.

[277] The most sophisticated explication of this value of legislation is the political thought of Jeremy Waldron. See J. WALDRON, LAW AND DISAGREEMENT 25-27 ("The point of a legislative assembly is to represent the main factions in society, and to make laws in a way that takes their differences seriously rather than in a way that pretends that their differences are not serious or do not exist."); JEREMY WALDRON, POLITICAL THEORY: ESSAYS ON INSTITUTIONS 264 (2016) ("In democratic theory, the most powerful case that can be made for [Majority Decision] is that it is required as a matter of fairness to all those who participate in the social choice. . . . Informally, people may be persuaded that [Majority Decision] is fair because, although they are losers this time around, they may be winners in the next political cycle. . . . Formally, we may defend [Majority Decision] as a way of respecting political participants as equals."). "[L]aw may properly elicit allegiance only from those that the law respects, and you respect a person not just by taking their interests and views into account, but by taking them into account as active intelligences and consciences." J. Waldron, *Legislation by Assembly*, 46 LOYOLA LAW REVIEW 507, 529 (2000).

takes a "problem" and purports to devise a solution. However, like with conduct evaluation, this determination is mostly a normative one that is not amenable to expert-type reasoning or analysis. Thus, police have no special competence regarding whether socially harmful conduct deserves a regulatory response in the form of a new offense.

Consider the first aspect of this process: the decision to respond to socially harmful conduct through the instrument of law. This is not a trivial or uncontroversial decision, and it may be made for many reasons. There are many bad things that people do to each other, or that happen to them in the world, that a political community does not believe to be either an appropriate or worthy subject of legal regulation. The reasons for restraint might be because of resource constraints and competing priorities, a thought that non-coercive private solutions are better suited to addressing the problem, or due to weighty countervailing interests such as individual privacy or autonomy. For example, most would agree that the divorce of parents of young children produces a variety of harms that the affects the wider community.[278] Nevertheless, the law has steadily gotten out of the business of keeping marriages together against the wishes of the spouses, and now nearly all states permit "no fault" divorces.[279] The point is that a choice to regulate (or not) is a normative choice that must be made by a representative political institution, and not on the basis of expert knowledge. Thus, Anna Lvovsky, one of the foremost scholars of police conceptions of "expertise" and "professionalism," insists that "questions of *policy*" involving whether conduct is "sufficiently inimical to the public welfare to demand state intervention" are not matters on which any police expertise can be brought to bear: "Those decisions involve a complex weighing of interests surrounding the use of state power: the elimination of undesirable behaviors, on the one hand, against the expenditure of state resources and intrusion on individual rights, on the other."[280] "Courts have never suggested that the police have any unique competence over such policy questions," she writes, and "the police's experience hardly prepares them for the legislature's task of weighing public interests."[281]

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[278] See e.g., H.S. Kim, *Consequences of Parental Divorce for Child Development*, 76 AMERICAN SOCIOLOGICAL REVIEW, 487 (2011).

[279] Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 79 (1991).

[280] Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2073 (2017). Her arguments are made in the specific context of a criticism of a number of judicial decisions permitting vague statutes to stand because of an expectation of police expertise in enforcement. See id. at 2043. The Supreme Court opinions reviewed earlier should make clear that these lower court decisions are hopelessly wrong, and Lvovsky's work ably explains why.

[281] Id. at 2073-4 ("Deferring to police on matters of what conduct should be punished 'imports a factual judgment about police competence into a structural debate about democratic governance.'").

Even after finishing the hard normative work of deciding in favor of a legal response, though, the legislator must then decide what that response looks like. This is also inescapably normative for the most part, and thus outside the realm of any expertise the police may have. The creation of offenses that prohibit (or compel) conduct and sanction violations is the most severe form of state regulation.[282] Offenses represent the greatest legal restriction on individual autonomy. Thus, before a political community turns to the creation of offenses, it has a multitude of other options it should consider.[283] A.P. Simester and Andreas von Hirsch list a number of these: taxes, tort remedies, and state-funded publicity campaigns.[284] The last of these illustrates an important larger point point—that the political community can respond to social harms with positive incentives as well as negative ones.[285] Modern theorists of prison abolition argue along these lines when they claim that criminality can be reduced more successfully by reinvesting in communities than by incarcerating offenders.[286]

The determination of an appropriate and effective legal response to a social problem is extremely complex and controversial. It involves a mix of normative and descriptive claims about what types of laws might "work" and whether they are worth the costs. The normative assessments regarding tradeoffs are similar to those discussed earlier (regarding conduct evaluation), and can only legitimately be made by a representative legislature. The descriptive or empirical assessments of whether an intervention will be effective in achieving its intended goals are potentially expertise-apt, though, and can be subjected to study and even the scientific method.

For example, even if all agree that public camping by the unhoused deserves a legal response, it is far less clear that this response should take the form of an

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[282] "The criminal law is different and must be evaluated by a higher standard of justification because it burdens interests not implicated when other modes of social control are employed." Douglas Husak, *The Criminal Law As Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 234 (2004). See generally Nils Jareborg, *Criminalisation as Last Resort (Ultima Ratio)*, 2 OHIO ST. L. J. 521 (2005). With respect to the prohibitory effect of an offense, this is also true for civil offenses.

[283] "[F]or every criminal prohibition designed to prevent some social evil, there is a range of alternative techniques for achieving, at somewhat less drastic cost, the same purpose." JOEL FEINBERG, HARM TO OTHERS 25. His example is smoking: one could prohibit it, but one could also tax it.

[284] A.P. SIMESTER & ANDREAS VON HIRSCH, CRIMES, HARMS, AND WRONGS : ON THE PRINCIPLES OF CRIMINALISATION 195-97.

[285] On this distinction, see Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341 (2013).

[286] Rachel Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, WAKE FOREST LAW REVIEW (Forthcoming 2023) at *22 ("The abolitionist policy playbook is therefore devoted to addressing what they see as the societal ills that lead people to harm one another. Some of these measures would require financial investments in education, housing, health care, and the like.").

offense sanctioning the camper. Countervailing concerns might include a recognition of the person's need for a space to live,[287] as well as the futility of imposing a monetary penalty on a judgment-proof person. A reasonable legislature might therefore conclude that creating an offense is either unjust or simply not worth it. Such weighing of tradeoffs is fundamentally normative and political, and outside the realm of expertise, and accordingly outside the purview of police competency. Again, an expert might be able to assess the effectiveness of legal interventions ex post, thus providing a template for future policies, but the police lack this kind of expertise and are ill suited to develop it.[288]

iii. The Drafting Phase

The last step in police sponsorship—just before the chief proposes the offense to the legislature—is the drafting phase. Having observed conduct, evaluated it as socially harmful, determined a legal response was justified, and finally determined that that legal response should take the form of a new offense, he or she must write that offense. As I will explain, while the drafting of offenses is a task best undertaken by those with expertise in the work, police do not have such expertise.

The proper drafting of offenses has occupied a primary place in the mind of criminal law scholars for generations. A well-drafted offense can advance a number of values, most importantly by providing notice to civilians as to how to avoid liability, and by providing guidance to adjudicators to determine whether an offense

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

[288] Earlier we conceded that police have superior competence in information gathering as conduct observers. Thus, they would be well positioned to observe changes in the prevalence of antisocial behavior after a given legal intervention is enacted. But they are not able analyze the changes in a sophisticated manner such that they could establish causation (and not mere correlation). The effect of offense-creation and policing policy on crime rates is theoretically amenable to scientific study, but its complexity has made firm conclusions out of the reach of the expert community. We seem to be no closer today on understanding the causes of changing crime rates than we were decades ago. "[M]any of the things that governments have done to reduce crime rates in recent decades have been largely epiphenomenal—normatively and politically important, and having major effects on many people's lives, but pretty much beside the point in terms of crime rates and patterns." Michael Tonry, *Why Crime Rates Are Falling throughout the Western World*, 43 CRIME AND JUSTICE 1 (2014).

was committed ex post.[289] Code reform, and the re-drafting of the offenses contained in codes, occupied much of the energy of criminal law intellectuals in the mid-20th century, and culminated in the Model Penal Code.[290] The interpretation of offenses is highly technical—most significantly in the need to understand the mental state required for each offense element.[291] Indeed, in German criminal law this interpretation is so technical that it is called *dogmatik*, and precise interpretation of American offenses can be seen as similarly dogmatic.[292]

Technical interpretation means technical expertise is required in drafting. Thus, Paul Robinson and Dean Michael Cahill concluded their 2000 study of all American criminal codes with the following observation: "If nothing else, our study reveals that the creation and maintenance of a sound code demands two things: expertise and vigilance. A team of criminal-law specialists was needed to draft the Model Penal Code, and even that code, in our view, is not flawless."[293] They go on to observe that part of the problem the Model Penal Code fixed was due to unsophisticated legislative drafters.[294] We should expect this problem to be aggravated at the local level.[295]

But the lack of legislative sophistication regarding offense drafting cannot be remedied by police drafting, because police are similarly non-experts in this field. Their training in law or in the interpretation of statutes, if it takes place at all,

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[289] Paul H. Robinson, Michael T. Cahill, and Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 3–4 (2000) (Describing two functions of a criminal code to be (1) the "rule articulation function: it must define and announce the conduct that is prohibited (or required) by the criminal law," and (2) the "adjudication function" which "decide[s] whether the violation merits criminal liability and, if so, how much.").

[290] Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323 (2007). They describe a grim status quo from which the ALI began its work: "A typical American criminal code at the time was less a code and more a collection of ad hoc statutory enactments, each enactment triggered by a crime or a crime problem that gained public interest for a time."

[291] See Paul Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 695 (1985).

[292] Kai Ambos, 32 CRIMINAL LAW FORUM 175 (2021) ("George Fletcher['s] *Rethinking Criminal Law*, published in 1978, revolutionised the debate on criminal law in the Anglo-American world, not least by drawing on German Dogmatik, which Fletcher – despite the dominance of the English language – still considers to be the lingua franca of criminal law discourse today.").

[293] Robinson & Cahill, et. al., *Five Worst* at 63.

[294] "However sound their qualifications or strong their dedication may be, legislative drafters are rarely even aware of, much less worried about, the special needs of criminal codes." Id.

[295] Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837 (2020) (hypothesizing that phenomenon of widespread archaic drafting practices at local level may be result of "reduced institutional competence of city councils and town boards").

is limited.[296] Legislatures should defer to experts in drafting offenses, but it is city attorneys who should receive this deference—not police. This article's study of police involvement in legislation identified many instances in which police were directed to work with city attorneys in drafting offenses.[297] Such a practice, which is distinct from pure police sponsorship, would at least cure the expertise deficit with respect to drafting.

iv. Case Studies & Categories Re-Visited

Armed with a more precise understanding of when police do and do not deserve legislative deference, it is worth re-visiting the various case studies and categories of apparent police motivation for the offense sponsorship. Legislatures legitimately defer to police expertise as "conduct observers," but not as "conduct evaluators" or regulatory response deciders. Recall the categories of apparent motivation for sponsorship were: (1) to create an enforcement tool justifying police intervention where none existed before, (2) to enact the police chief's chosen theory of criminology, (3) to guard against a safety or danger that the police chief perceives, (4) to create an investigative tool helpful for the detection of more serious offenses, (5) to reduce a drain on limited police resources, (6) to respond to recent incidents, (7) to respond to citizen-initiated complaints or calls to the police. While *all* involve unwarranted claims of expertise regarding regulatory response decisions, and while many involve conduct evaluation, there are some categories that can otherwise be seen as limited to conduct observation.

a. Conduct Evaluation

Unwarranted deference to police conduct evaluation can occur when police sponsor offenses aimed at creating enforcement tools, furthering a criminological theory, and protecting against purported dangers. Three of the cases are most illustrative: (1) the Molalla noise ordinance, (2) the Trotwood graffiti ordinance, and (3) the Lafayette spice ordinance.

Normative conduct evaluation occurred via the claimed need for an enforcement tool when the police chief in Molalla sponsored a new noise ordinance for the city.[298] Molalla had no laws regulating the creation of noise, and the police

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

[297] See, e.g., 2006 WLNR 19470589 ("City Attorney Tamara Johnson said her office has met with the district attorney, police chief and the city's finance department to draft the ordinance that will be ready for a vote by end of the year.").

[298] 2003 WLNR 15791118.

chief decided to propose one because "previous city councils did not want to deal with the issue."[299] He said that "the proposed law is needed to reduce the public's and police department's frustration with louder noises for which there are few legal remedies."[300] The chief situated his own evaluation of noise in opposition to deliberate legislative inaction on (and thus evaluation of) the same conduct. While previous legislatures had not deemed noise to be offense-worthy, the chief nevertheless declared that there was a need for a "legal remedy" for the conduct due to his own assessment of "frustration." He substituted himself for the legislature as the normative evaluator of the conduct.

Normative conduct evaluation occurred via the importation of a criminological theory in the case of the Trotwood graffiti ordinance. The sponsoring police chief explicitly invoked the infamously controversial "broken windows" theory, arguing that "unaddressed disorder (becomes) a sign that no one cares and actually invites further disorder."[301] Broken Windows is a criminological theory that makes a predictive claim about petty offenses' effects on future antisocial conduct, along with a normative claim that these effects should be prevented.[302] But the theory's validity—both empirical and normative—is far from being clearly established.[303] The casual, uninformed manner by which the Trotwood chief cited to Broken Windows, as if it were the "truth" of an scientific consensus, demonstrates well his lack of expertise.

Normative conduct evaluation advanced via a claim of dangerousness occurred in the Lafayette ordinance prohibiting possession of spice (a synthetic marijuana drug).[304] The sponsoring chief perceived a "growing popularity of the herbal mixture, particularly among youth," and was "troubled" by the encounters a few of his officers had with those high on spice.[305] He seemed to imply that one person had lost control of his faculties, and said that "We had to use force on one guy."[306] All of the claims advanced by the chief are contestable, and none of them sound in the expertise of a police officer. First, he made an unsupported assertion that there was increased use among a certain vulnerable population, but this was

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[299] Id.
[300] Id.
[301] 2010 WLNR 2924976.
[302] "[P]rostitution, petty drug dealing, public drunkenness, and the like 'lead[ ] to the breakdown of community controls' because they convey that people in the community either don't value or don't expect order.…An order-maintenance strategy should reverse these effects. When citizens obey norms of orderliness--and when authorities visibly respond to those who don't--onlookers see that the community is intolerant of criminality." Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 369–71 (1997).
[303] For an important scholarly criticism, See generally BERNARD HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2004).
[304] 2010 WLNR 16810872.
[305] Id.
[306] Id.

likely just a "hunch." Next, he seemed to be implying that the drug was physiologically dangerous, although he had no evidence for this except anecdotal experiences among a very small number of users. The claim of dangerousness, and the expectation of deference, was premised on little more than the chief's personal opinions.

b. Conduct Observation

Legislative deference to police expertise can be warranted, as we said, when the claimed expertise is nothing more than conduct observation and information gathering. Since the below examples also include claims by police regarding the appropriateness of a legal response and its form, they do not deserve deference in their entirety. However, the kernel of the conduct observation claims advanced in these examples represents a category of subject matters where legislatures should defer to police knowledge: claims for investigative tools, claims regarding police resource drains, claims relating to recent incidents, and claims purporting to be grounded in widespread citizen complaints.

Police representations regarding how new offenses would facilitate their investigation into more serious offenses deserve deference. Consider the Cedar Rapids sponsorship of an ordinance requiring certain businesses to maintain a surveillance camera system of a certain quality.[307] A police official stated that "many of…videos are useless for evidentiary purposes due to inefficiencies in camera placement, equipment and maintenance…[and] [i]t is anticipated that a set of standards will help produce a better product that can be used to solve and prosecute a crime."[308] This knowledge of the deficiencies of existing systems, as well as the type of evidence being used to put together criminal cases for theft, robbery, and burglary, are core competencies of police.

Similarly, police should be considered "experts" in the information-possessing sense when making claims about strains on their own resources. They have the data that is relevant, and the legislature should usually defer to these claims. Thus, the Reno false-alarm ordinance that was sponsored by the police was predicated on the department's data that false alarms constituted around 12,200 calls per year, and its evaluation that this was "a huge waste of police manpower."[309]

Police also deserve deference as conduct observers when they gather information and convey it to the legislature. This occurs when they report a recent incident that mobilizes public sentiment, or when they communicate to the legislature that they have received a large number of citizen complaints. The former

[307] 2014 WLNR 27563653.
[308] Id.
[309] 2007 WLNR 27962924.

occurred when the police chief in Lodi, California sponsored a vicious dog ordinance after a pit bull killed a dachshund, "sparking cries for new dog laws."[310] An example of the latter occurred in Newark, California, when the police department sponsored an anti-scavenging ordinance after being "inundated with calls, especially the nighttime officers, about people going through other people's property."[311] In cases like these, the police gather information on community happenings, and may act as conveyor belts of constituent opinion without injecting their own normative evaluations.

D. The Analogy: Police as Military Officials

While the previous section worked to establish that comparing the police with administrative agencies results in a disanalogy, in what follows we will briefly consider how another institution far more analogous to that of police provides relevant lessons: the military. The military, like the police, is authorized to use violent force with legal justification—an authorization that gives rise to a danger, and a concomitant safeguard. This safeguard from civilian-military relations theory—a very strong norm of *civilian control* over the military—implies that police should be similarly subordinate to local officials. Put another way, police are within a particular class of executive branch actors whose special features make their influence over policymaking is especially concerning.

1. Civilian Control Over the Military

In American political and legal thought, the principle of civilian supremacy over military affairs is universally accepted. It is interesting not so much in whether or not it is true or valuable, which it obviously is, but in its implications for institutional design.[312] The eminent historian and theorist of military affairs, Richard Kohn, describes the issue in this way:

> For democracy, civilian control--that is, control of the military by civilian officials elected by the people--is fundamental. Civilian control allows a nation to base its values, institutions, and practices on the popular will rather than on the choices of military leaders, whose outlook by definition focuses on the need for internal order and external security. The military is, by necessity, among the least democratic institutions in human experience;

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[310] 2013 WLNR 24887302.

[311] 2005 WLNR 24257477.

[312] See Risa Brooks, *Integrating the Civil–Military Relations Subfield*, 22 AMERICAN REVIEW OF POLITICAL SCIENCE 379 (2019) (surveying state of the field).

> martial customs and procedures clash by nature with individual freedom and civil liberty, the highest values in democratic societies.[313]

Civilian control is, as I said above, "obviously" valuable, then, because without it democracy is conceptually vitiated. If an authoritarian and violence-centered institution determines political outcomes, then there is no longer a political community of free and equal citizens who deliberate together and decide action based on majority will.[314] As Kohn puts it, militarism and democracy are "inherently adversarial."[315] One might add that the violence-centeredness of the military adds a threat not only to citizens' democratic lives, but to their physical wellbeing.[316]

But what does the principle of civilian control demand? Certainly the decision of *whether* a military force may be used is one that must be exclusively reserved to civilian authorities,[317] but what should the military's role be within decision-making process? In a mature democracy such as the United States, where a military coup is somewhat unthinkable, it is these questions of *influence* that most preoccupy theorists. As Samuel Huntington wrote in 1957, "the problem of the modern state is not armed revolt but the relation of the [military] expert to the politician…."[318]

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[313] Richard H. Kohn, *How Democracies Control the Military*, 8 J. DEMOCRACY 140, 141 (1997).
[314] In this sentence I am importing a number of components of democratic theory. *See, e.g.,* Nadia Urbinati & Mark E. Warren, The Concept of Representation in Contemporary Democratic Theory, 11 ANN. REV. OF POL. SCI. 378, 395 (2008); JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS 264 (2016). James Burk, *Theories of Democratic Civil-Military Relations*, 29 ARMED FORCES & SOCIETY 7, 8 (2002) ("This is a problem because military values and practice are not the same as liberal democratic values and practice and so it is not always clear how their conflicting demands can be met. What values are at risk? One is that reliance on coercion as opposed to reason and persuasion should be minimized as a method for resolving conflicts. Another is that sovereignty of and respect for people who live within a democratic jurisdiction should be institutionalized.").
[315] Kohn, *Democracies* at 142. Peter Feaver, *Civil-Military Relations*, 2 ANN. REV. POL. SCI. 211, 220 (1999) ("The spheres are necessarily analytically distinct. A distinction that derives from democratic theory and the agency inherent in political community….").
[316] Feaver claims that this gives rise to what he calls the "civil-military problematique": "because we fear others we create an institution of violence to protect us, but then we fear the very institution we created for protection." Peter Feaver, *The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control*, 23 ARMED FORCES & SOCIETY 149, 150 (1996).
[317] This basic protection is constitutionalized in the War Powers Clause. See U.S. CONST. ART. I, SEC. 8, CL. 11.
[318] SAMUEL HUNTINGTON, THE SOLDIER AND THE STATE 20 (1957); Burk at 8 ("To be sure, democratic values include the idea that those with authority ought to be the elected representatives of the people, and that these representatives ought to exercise ultimate authority over the uniformed military elite. But this issue should not be at the center of a normative theory about civil-military

A line of civil-military relations thought coalesces on the following proposition: the military may advise civilian authorities, but ought not transform into an advocate for its own use. In the words of two early commentators, "The principle of civilian control requires not only that the military not be policymakers but also that they not be seen (nor see themselves) as a separate constituency whose interests are to be considered in policy debates."[319] While they have a legitimate role in consulting and advising,[320] military officials must respect that this is limited. Feaver gives concrete examples:

> [T]he military may be best able to identify the threat and the appropriate responses to that threat for a given level of risk, but only the civilian can set the level of acceptable risk for society. The military can say we need such and such level of armaments to have a certain probability of being able to defend successfully against our enemies, but only the civilian can say what probability of success society is willing to pay for. The military can describe in some detail the nature of the threat posed by a particular enemy, but only the civilian can decide whether to feel threatened and so how or even whether to respond. The military quantifies the risk, the civilian judges it.[321]

In other words, the normative and political judgments are properly left to the civilians.[322] Having no independent constituency or interests of their own, military officials ought not then seek to influence those judgments as an advocate, but merely to elucidate and inform the decisionmakers. Elliott Cohen calls this the "unequal dialogue."[323]

2. The Police-Military Analogy & Civilian Control

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relations in mature democracies. In these countries, there is no realistic expectation that the military will intervene to overthrow civilian rule or even that the military will influence a civilian government to pursue a more aggressive military policy than it otherwise would.").

[319] KW Kemp, & C. Hudlin, *Civil Supremacy over the Military: Its Nature and Limits*, 19 ARMED FORCES & SOCIETY 7, 9 (2002).

[320] "Military advice and cooperation are crucial to the quality and effectiveness of policy, and….The public expects that 'the experts' will be involved and that their judgment, depending on the situation and personalities, will receive proper weight." Kohn at 149.

[321] Feaver 1996 at 154; see also YEHUDA BEN MEIR, CIVIL-MILITARY RELATIONS IN ISRAEL 25 (1995). One might also see this as an implication of Samuel Huntington's influential theory of "objective civilian control." See Huntington at 84 ("Objective civilian control…render[s] [the military] politically sterile and neutral….").

[322] A complication of this division can be seen in the work of Peter Roman and David Tarr, who view military officials as having a more legitimate role in determining policy goals. See Peter Roman & David Tarr, *Military Professionalism and Policy Making*, in SOLDIERS AND CIVILIANS 17 (2001) (eds. P. Feaver & R. Kohn).

[323] ELLIOTT COHEN, SUPREME COMMAND 209 (2002).

There are importantly lessons one can glean from all this for evaluating police sponsorship of offenses. The similarities between the police and the military have long been recognized. Most centrally, they share a feature that very few other institutions share[324]: they are authorized to use violence. This has been ably described by scholars of police militarization, who have also noted how police in recent decades have grown even more similar along other axes of comparison.[325] In the words of Trent Steidley and David Ramey:

> The police and military share a theoretically fundamental relation to the state and its legitimate monopoly on the use of violence. Both the military and the police are state actors exercising the state's license for violence to implement social control. While the military embodies the state's use of violence against actors outside the state, the police embody the state's capacity to use violence to pacify populations and produce social control within its borders.[326]

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

By implication, police too ought to be subject to a strong norm of civilian control. The dangers of military advocacy in relation to military policy are very similar to those presented by police involvement in offense-creation. Indeed, given that police violence is deployed internally (unlike the military), they may be even more pressing. In a liberal democracy, an institution authorized to use violence against its citizens ought not be permitted to advocate for an expansion of its own authority. Its authority to act must be determined externally, untainted by the self-

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

[325] See, e.g., Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 105, 110 (2018) ("Police militarization is usually viewed through the lens of four parameters: material, cultural, organizational, and operational. The material lens focuses on the types of weapons, uniform, technology, and equipment police use. The cultural lens examines the type of language, style, appearance, and values used by the police. The organizational lens views the way the police choose to organize themselves in terms of hierarchy, special units, and forces. Finally, the operational lens looks at the patterns of police action in the various areas of its operation."); Fanna Gamal, *The Racial Politics of Protection: A Critical Race Examination of Police Militarization*, 104 CAL. L. REV. 979, 1003–04 (2016); PB Kraska, P. B. (2007), *Militarization and policing—Its relevance to 21st century police*, 1 POLICING 501 (2007).

[326] T. Steidley & D. Ramey, *Police Militarization in the United States*, 13 SOCIOLOGY COMPASS 1, 2 (2019) (internal citation omitted); Sam Bieler, *Police Militarization in the USA: The State of the Field*, 39 POLICING: INT'L J. POLICE STRAT. & MGMT. 586 (2016) ("Only two arms of the American state, the police and the military, are generally permitted to use force to execute policy and only the police can use this power domestically.").

interest of the armed group. One might be concerned about OSHA expanding its authority by lobbying Congress, but such concern pales in comparison to the Joint Chiefs of Staff lobbying for a new war. The point is that police look more like the latter than the former, and we should extend our civilian control norms accordingly.[327]

CONCLUSION

Police are writing the laws that they enforce. In doing so, they are expanding the footprint of the racialized misdemeanor system while also increasing the scope of their own power. There is a great risk that this influence on legislative deliberation will be self-interested and non-expert, but that local legislatures will uncritically defer nonetheless. To avoid this, these institutions must re-claim their role as lawmakers, and resist the incentives to outsource or delegate the task of defining what conduct is or is not prohibited in their communities—a task that represents the most significant exercise of their power.

The observations made in this Article also suggest that scholars must re-double their efforts to understand the effects of local government institutions on the criminal justice system. Excessive attention on the federal system, with its limited jurisdiction and carceral footprint, has come at the expense of the nearly 40,000 general purpose localities who govern our daily lives. As Alexandra Natapoff reminds us, "misdemeanor cases are the vehicles through which most Americans experience the criminal justice system."[328] The DOJ's Ferguson Report documented well the power of local ordinances, stating that the municipal code of Ferguson "addresses nearly every aspect of civic life for those who live" there.[329] This Article helps to further show that if one peers below the state level, one can quickly find troubling yet unexamined aspects of institutional relationships.

APPENDIX: FULL DATASET OF JOURNALISTIC ACCOUNTS

[327] Many scholars call for community control of the police, although I have not discovered any who ground their claims in an analogy to the military. See e.g., Jocelyn Simonson, *Police Reform Through A Power Lens*, 130 YALE L.J. 778 (2021).

[328] Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*: MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING by Issa Kohler-Hausmann (Princeton University Press, 2018), 128 YALE L.J. 1648, 1695 (2019).

[329] U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 7 (2015), available at <https://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf>.

Year	State	Locality	Subject Matter
2022	Washington	Edmonds City	Red flag[330]
2022	Oregon	Astoria	Homelessness[331]
2020	Nebraska	North Platte	Youth Vaping[332]
2020	Texas	Willis	Homelessness[333]
2020	California	Santa Cruz	Homelessness[334]
2019	North Carolina	Henderson	Youth curfew[335]
2019	Oklahoma	Oklahoma City	False alarms[336]
2019	Washington	Bremerton	Massage parlors[337]
2019	Illinois	Hinsdale	Dogs[338]
2018	Oklahoma	Oklahoma City	Parking[339]
2018	North Carolina	Fayetteville	Noise[340]
2017	Idaho	Pullman	ATVs[341]
2017	California	Weed	Animals[342]
2017	Minnesota	Austin	Wildlife feeding[343]
2016	Carbondale	Illinois	Nuisance parties[344]
2016	Indiana	Fort Wayne	Nuisance property[345]
2015	North Carolina	Charlotte	Zones of exclusion[346]

[330] 2022 WLNR 3835846.
[331] 2022 WLNR 5189429.
[332] 2020 WLNR 1056167.
[333] 2020 WLNR 21337750.
[334] 2020 WLNR 4679215.
[335] 2019 WLNR 24753105.
[336] 2019 WLNR 11152886.
[337]2019 WLNR 23248240.
[338] 2019 WLNR 15040657.
[339] 2018 WLNR 26095405.
[340] 2018 WLNR 3775976.
[341] 2017 WLNR 6432336.
[342] 2017 WLNR 19518233.
[343] 2017 WLNR 17702475.
[344] Bill Lukitsch, *Carbondale city council, community members discuss fining landlords for "chronic nuisance" homes*, THE DAILY EGYPTIAN (Aug. 31, 2016), available at < https://dailyegyptian.com/58110/news/city-council-community-members-discuss-fining-landlords-for-chronic-nuisance-homes/>.
[345] *Fort Wayne Police Department Proposes Chronic Problem Property Ordinance To Enhance Public Safety Efforts*, CITYOFFORTWAYNE.ORG (Sept. 26, 2016), available at < https://www.cityoffortwayne.org/latest-news/3116-fort-wayne-police-department-proposes-chronic-problem-property-ordinance-to-enhance-public-safety-efforts.html>.
[346] 2015 WLNR 31063285.

2015	Arizona	Tucson	Large events[347]
2014	Indiana	Terre Haute	Graffiti[348]
2014	Missouri	Kirksville	Drugs[349]
2013	Illinois	Orland Park	Traffic and parking[350]
2013	Pennsylvania	Hazleton	Vendors[351]
2013	Illinois	St. Charles	Liquor control[352]
2013	California	Lodi	Dogs[353]
2012	North Carolina	Charlotte	Public Protests[354]
2012	Montana	Kalispell	Cellphone use while driving[355]
2012	Texas	San Antonio	Tow trucks[356]
2012	Texas	Corpus Christi	Parking[357]
2012	South Carolina	Clemson	Drugs[358]
2012	Florida	Brooksville	Drugs[359]
2011	Kentucky	London	Pawn shops[360]
2011	Illinois	Batavia	Crime-free rentals[361]
2011	Texas	Corpus Christi	Scrap metal[362]
2010	Texas	Cibolo	Sex offenders[363]
2010	Iowa	Logan	Snow[364]
2008	California	Montebello	Tobacco[365]
2008	Colorado	Denver	Protests[366]
2008	Washington	Spokane	Graffiti[367]

[347] 2015 WLNR 39050510.
[348] 2014 WLNR 9801122.
[349] 2014 WLNR 816819.
[350] 2013 WLNR 18258950.
[351] 2013 WLNR 17720748.
[352] 2013 WLNR 26707303.
[353] 2013 WLNR 24887302.
[354] 2012 WLNR 1630273.
[355] 2012 WLNR 25282926.
[356] 2012 WLNR 20068121.
[357] 2012 WLNR 29348357.
[358] 2012 WLNR 8730710.
[359] 2012 WLNR 27057296; BROOKSVILLE, FLA. ORD. NO. 837, § 3, 7-1-2013.
[360] 2011 WLNR 22602316.
[361] 2011 WLNR 13517276.
[362] 2011 WLNR 28540591.
[363] 2010 WLNR 1351728.
[364] 2010 WLNR 28167592.
[365] 2008 WLNR 24280263.
[366] 2008 WLNR 32028446.
[367] 2008 WLNR 22509297; SPOKANE, WA CODE § 10.10.090.

2007	Nevada	Reno	False alarms[368]
2007	Illinois	Elburn	Graffiti[369]
2007	Virginia	James City	Traffic cameras[370]
2007	Missouri	Fairview Heights	Youth curfew[371]
2006	Idaho	Nampa	Dogs[372]
2006	Arizona	Chandler	False alarms[373]
2006	Maine	Lincoln	Drug-free zone[374]
2006	Oregon	Prairie City	Restricted zones[375]
2006	Maine	Lincoln	Drug free zones[376]
2005	Arizona	Glendale	Motorized skateboards[377]
2005	Ohio	Columbus	Scrap Metal[378]
2005	Ohio	Columbus	Traffic cameras[379]
2004	Minnesota	Hopkins	Alcohol & youth[380]
2004	Indiana	Porter	False alarms[381]
2004	Massachusetts	Sutton	Silly string[382]
2004	Colorado	Denver	Forfeiture[383]
2004	Washington	Pasco	Food vendors[384]
2003	California	Gilroy	Hotels[385]
2003	Ohio	Garfield Heights	Gambling[386]
2002	Texas	Corpus Christi	Towing[387]
2002	Kansas	Topeka	ATVs[388]

[368] 2007 WLNR 27962924.
[369] 2007 WLNR 26646089.
[370] 2007 WLNR 7021689.
[371] 2007 WLNR 11977669.
[372] *Nampa wants public input on vicious dogs*, AP ALERT ID 16:26:54 (12/7/06).
[373] 2006 WLNR 25189379.
[374] 2006 WLNR 4381302.
[375] 2006 WLNR 27203727.
[376] 2006 WLNR 581558.
[377] 2005 WLNR 26888634.
[378] 2005 WLNR 24982183.
[379] 2005 WLNR 24980065.
[380] 2004 WLNR 15692502.
[381] 2004 WLNR 18514097.
[382] 2004 WLNR 20731172.
[383] 2004 WLNR 1251150.
[384] 2004 WLNR 12359522.
[385] 2003 WLNR 10917755.
[386] 2003 WLNR 15884584.
[387] 2002 WLNR 16094425.
[388] 2002 WLNR 16329315.

1997	West Virginia	Huntington	Animal control[389]

[389] 2022 WLNR 23569389.