

IDENTIFYING THE MOST DEMOCRATIC INSTITUTION TO LEAD CRIMINAL JUSTICE REFORM

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ABSTRACT—American criminal justice is in crisis, and most scholars agree why: unduly severe laws, mass incarceration, and disproportionate effects on minority groups. But they don't agree on a solution. One group of scholars—known as the “democratizers”—thinks the answer is to make the criminal justice system more democratic. According to democratizers, layperson participation and local democratic control will impart sensibility into criminal justice reform. In short, a transfer of power away from distant lawmakers and toward local communities, which would craft their own criminal codes and elect their own prosecutors. This argument assumes that more local means more democratic—but what if democratization actually threatens democracy?

Criminal law could be made at the statewide level, the neighborhood level, or somewhere in between. And that distinction matters. This Note analyzes democratization through the lens of democratic theory, finding that the degree to which the criminal lawmaking process is democratic depends heavily on the unit of government at which it operates. In other words, the critical variable is how local we go. Each level of government creates tradeoffs between democratic principles. If criminal law is too localized, it unfairly excludes voters from the political process and encourages localities to compete in protectionist arms races. On the other hand, if criminal law sweeps too broadly, then preferences vary too much among constituents for the law to adequately represent any one community's views. This Note argues that “intermediate-level” institutions—counties or regions—are the most democratically sound institutions to make and enforce criminal law. These institutions, although imperfect, are best able to maximize representation while still protecting against the destructive incentives of microlocalism. Democratization can be more democratic, but only when it is calibrated at the right level.

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INTRODUCTION

The American criminal justice system¹ is in a dark moment. We punish severely,² disproportionately so when it comes to minorities,³ which has

¹ The traditional view of the “criminal justice system includes law enforcement, prosecution, defense services, the judiciary, and corrections.” Randolph N. Stone, *Crisis in the Criminal Justice System*, 8 HARV. BLACKLETTER J. 33, 33 (1991).

² The incarceration rate in the United States is the highest in the world, despite comparatively low crime rates. ROY WALMSLEY, *WORLD PRISON POPULATION LIST 2* (12th ed. 2018) (finding that the United States incarcerated more than two million people out of its population of 320 million in 2018). Another four and a half million were under some other form of correctional control, such as parole or probation. DANIELLE KAEBLE & MARY COWHIG, U.S. DEP’T OF JUST., *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 2016, at 2 (2018). Our uniquely high incarceration rate has persisted despite the steady decline in crime rates since the 1990s. See MELISSA S. KEARNEY, BENJAMIN H. HARRIS, ELISA JÁCOME & LUCIE PARKER, HAMILTON PROJECT, *TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 4* (2014). In fact, the United States has only the fiftieth-highest crime rate in the world. WORLD POPULATION REV., *CRIME RATE BY COUNTRY 2021* (2021), <https://worldpopulationreview.com/country-rankings/crime-rate-by-country> [https://perma.cc/9C5R-PU9Q]. The United States also tends to impose lengthier sentences than peer developed nations. JUST. POL’Y INST., *FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 2* (2011).

³ E. ANN CARSON, U.S. DEP’T OF JUST., *PRISONERS IN 2016 5 tbl.3* (2018) (finding that one-third of inmates are Black despite only 13% of the national population being Black). One in three Black males is statistically likely to go to prison in his lifetime. THOMAS P. BONCZAR, U.S. DEP’T OF JUST., *PREVALENCE OF IMPRISONMENT IN THE UNITED STATES POPULATION, 1974–2001*, at 1 (2003). Neither population demographics, nor differential rates of offending, explain these differences. See NAZGOL GHANDNOOSH,

fostered a lack of trust in law enforcement.⁴ These issues, and the many others plaguing the system,⁵ were laid bare by widespread protests against police brutality during the summer of 2020 and beyond.⁶ To no one's surprise, there is a near-universal appetite to alter our criminal justice infrastructure.⁷ But there is nowhere near a consensus on how to do so, owing largely to a disagreement over the right level of government to lead criminal justice reform.⁸ This Note tries to identify that level.

In the debate over who should lead criminal justice reform, scholars split into two broad camps: “democratizers” and “bureaucratic professionalizers.”⁹ Democratizers want to “democratize” the criminal justice system by giving the voting public more control over reforms. In their view, greater layperson control will inject sensibility into a removed and unforgiving criminal justice machine.¹⁰ In practice, this includes reforms like

SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 20–22 (2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/> [<https://perma.cc/WP2J-HFHG>].

⁴ NATHAN JAMES, KRISTIN FINKLEA, NATALIE KEEGAN, KAVYA SEKAR & RICHARD M. THOMPSON II, CONG. RSCH. SERV., R43904, PUBLIC TRUST AND LAW ENFORCEMENT—A DISCUSSION FOR POLICY MAKERS 2 (2018) (finding that only 30% of Black survey respondents and 45% of Hispanic respondents had a “great deal” or “quite a lot” of confidence in the police, compared to 61% of white respondents (citing Jim Norman, *Confidence in Police Back at Historical Average*, GALLUP (July 10, 2017), <https://news.gallup.com/poll/213869/confidence-police-back-historical-average.aspx> [<https://perma.cc/DYZ4-2R3K>])).

⁵ See Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1370 (2017) (“The catalogue of dysfunction starts with mass incarceration, prison conditions, policing, and—the site at which those three lines intersect—racial justice.”).

⁶ The murders of George Floyd, Breonna Taylor, and many others sparked worldwide protests against police brutality in the summer of 2020. See Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Mar. 28, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/4WSJ-DYB3>]; *Protests Across the Globe After George Floyd's Death*, CNN WORLD (June 13, 2020, 3:22 PM), <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html> [<https://perma.cc/S6W8-3ZSQ>].

⁷ See, e.g., Kleinfeld, *supra* note 5, at 1374–75 (discussing how a wide range of academics, judges, practitioners, and politicians agree that criminal justice is in a state of crisis). Indeed, “three-fourths of Americans believe the country’s criminal justice system needs significant improvements.” *Overwhelming Majority of Americans Support Criminal Justice Reform, New Poll Finds*, VERA INST. OF JUST. (Jan. 25, 2018), <https://www.vera.org/blog/overwhelming-majority-of-americans-support-criminal-justice-reform-new-poll-finds> [<https://perma.cc/WV4L-ZT3Q>] (citing ROBERT BLIZZARD, PUB. OPINION STRATEGIES, JUSTICE ACTION NETWORK, NATIONAL POLL RESULTS (Jan. 25, 2018), <https://www.politico.com/f/?id=00000161-2ccc-da2c-a963-fff82be0001> [<https://perma.cc/9JV5-RJBF>])).

⁸ See Kleinfeld, *supra* note 5, at 1375 (“[W]hen it comes to understanding *why* the system has unraveled and *how* it could be set right . . . the consensus evaporates and in its place is what can seem like a cacophony of conflicting voices.”).

⁹ *Id.* at 1377, 1399 (coining these terms).

¹⁰ The 2016 *Northwestern University Law Review* Symposium on *Democratizing Criminal Law* featured many scholars who identify as democratizers. See, e.g., John Braithwaite, *Criminal Justice that*

plea bargaining juries, community policing, and vesting neighborhood or city councils with the power to create substantive criminal law.¹¹ The criminal justice system is broken, according to democratizers, because the power to shape criminal law has shifted from voters to distant government officials. Unlike local voters, who bear the effects of any changes, these officials are incentivized to reduce crime regardless of the cost to individuals and communities.¹² The democratizers' remedy is a dose of folk morality: give the layperson a greater role in criminal justice decision-making—the system should be responsive to us, not out-of-touch bureaucrats.¹³ Bureaucratic professionalizers, or “bureaucratizers,” on the other hand, argue that we should vest power in insulated experts who can make more informed decisions than the public.¹⁴ The criminal justice system is broken, according to bureaucratizers, because a vengeful public pressures its not-so-distant officials to crack down on crime.¹⁵

At the core of this debate is a disagreement over which institution should create and implement criminal law through legislation, enforcement,

Revives Republican Democracy, 111 NW. U. L. REV. 1507, 1524 (2017) (arguing that restorative justice can revive democracy by giving “direct voice” to those adversely affected in adjudications); R A Duff, *A Criminal Law We Can Call Our Own?*, 111 NW. U. L. REV. 1491, 1491–92 (2017) (sketching an “ideal” of criminal law grounded in the republican theory of liberal democracy). For a greater discussion of democratization and its proposals, see *infra* Section I.B.

¹¹ Joshua Kleinfeld, Laura I. Appleman, Richard A. Bierschbach, Kenworthy Bilz, Josh Bowers, John Braithwaite, Robert P. Burns, R A Duff, Albert W. Dzur, Thomas F. Geraghty, Adriaan Lanni, Marah Stith McLeod, Janice Nadler, Anthony O'Rourke, Paul H. Robinson, Jonathan Simon, Jocelyn Simonson, Tom R. Tyler & Ekow N. Yankah, *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1697–1705 (2017) (listing thirty democratization proposals); see also *infra* notes 80–82 and accompanying text (discussing how states can delegate criminal lawmaking power to localities).

¹² See Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1678–79 (2017) (“The most fundamental problem with bureaucratic criminal justice is that it has lost sight of why and how We the People should punish. Bureaucratization breeds an intense concern for efficiency That is a recipe for ‘mass incarceration,’ not moral judgment or public safety.”).

¹³ Kleinfeld, *supra* note 5, at 1397 (suggesting that criminal law should be “more value rational than instrumentally rational” by responding “to public deliberation and to the values embedded in the way we live together as a culture, rather than” to social-management concerns of institutional bureaucracies).

¹⁴ See, e.g., RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 1–3, 168 (2019) (arguing that “[t]he average American citizen is not on equal footing with an expert who studies the data in achieving these goals” and that, as a result, citizen choice would be less accurate and based on emotion).

¹⁵ See, e.g., *id.* at 2 (“[W]e need to change the institutional framework we currently use to make criminal justice policy. Instead of policies designed to appeal to the emotions of voters who lack basic information about crime, we need to create an institutional structure that creates space for experts who look at facts and data to set policies”); see also Kleinfeld, *supra* note 5, at 1376 (“[Bureaucratizers] think the root of the present crisis is the outsized influence of the American public—a violent, vengeful, stupid, uninformed, racist, indifferent, or otherwise wrongheaded American public—and the solution is to place control over criminal justice in the hands of officials and experts.”).

and adjudication.¹⁶ Yet democratizers have not established the contours of which types of power would be transferred to whom.¹⁷ The implications of who holds the keys to reform are far-reaching, not only for the elected branches of state governments and the federal government—which would cede power to local governments under the democratizers’ plan¹⁸—but also for the judicial system. The Supreme Court, for instance, has even relaxed Fourth Amendment standards because of the presence of civilian review.¹⁹

Given the implications of community-created laws, it is crucial to ensure that these laws *are* the product of community choice—that democratization is actually more democratic. Many democratizers assume that more localized governance is more democratic. Such an argument is intuitive: localized governments are likely more responsive to voters’ desires because they represent a smaller subset of voters who likely have a more homogenous set of preferences.²⁰ This Note challenges that assumption. Local control could prove disastrous or a step in the right direction—the critical variable is how local we go.

Other scholars have recently questioned democratization. In his comprehensive critique, *Some Doubts About “Democratizing” Criminal Justice*, Professor John Rappaport argues that democratization will not fix the criminal justice system’s ills and it might even exacerbate them.²¹ Professor Rappaport raises a catalogue of issues with the movement—such as its faulty premise that community members have fungible preferences and are thus better represented at the local level—and argues that the movement

¹⁶ See John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 813 (2020) (“The critical questions are what values we want our criminal justice system to serve and *what kind of democracy* is likeliest to realize them. The latter question . . . requires us to contemplate how best to blend accountability to the public with various kinds of criminal justice expertise. These are difficult questions that I put off for another day. But they are ones we should be asking.”).

¹⁷ See *infra* Section I.B (discussing the democratizers’ failure to define what community control entails).

¹⁸ See *infra* notes 80–82 and accompanying text (discussing how states can delegate criminal lawmaking power to localities).

¹⁹ In *Hudson v. Michigan*, the Supreme Court considered whether the police’s failure to knock and announce their presence before a search implicated the Fourth Amendment’s exclusionary rule—a doctrine that prohibits the inclusion of illegally obtained evidence at trial. 547 U.S. 586, 588 (2006). The Court declined to apply the exclusionary rule, reasoning that the community itself could hold police accountable, thus reducing the need for the exclusionary rule. According to the Court, in a prediction that did not age well, “the increasing use of various forms of citizen review can enhance [police] accountability,” and so police have little incentive to commit these violations in the first place. *Id.* at 599.

²⁰ See David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 768 (describing the widely held view that more localized governments are more responsive to voters).

²¹ Rappaport, *supra* note 16, at 758.

would create more severe criminal law, among other negative externalities.²² In addition, Elizabeth Janszky canvassed democratization scholarship and identified a subset of democratizers she termed “localizers.” Localizers, the focus of this Note, want to place power in the hands of local communities in particular, rather than increase public participation more generally.²³ Like Professor Rappaport, Janszky argues that localizing criminal justice leads to representational problems because of the lack of political institutions at the local level, low voter-turnout rates, and high barriers to entry into local political processes.²⁴

Although previous scholarship touches on the representation and accountability concerns created by democratization, it does not offer a comprehensive treatment of those issues. This Note fills that void by making two main contributions, one narrower and one broader than previous work.

First, this Note is narrower than previous scholarship because it zeroes in on the representation and accountability issues produced by democratization, rather than providing a broad critique of democratization’s externalities. This Note examines the democratization movement through the lens of democratic theory and asks whether democratization is actually more democratic. Fundamental to any theory of democracy is the principle that the people make basic normative policy choices.²⁵ Political legitimacy therefore

²² *Id.* at 719, 739–50, 775 (“A growing comparative literature investigates the determinants of penal policies. Nearly all of it suggests that populism makes criminal justice more, not less, severe.”). For example, one review of these types of studies comparing many countries found that “a populist view that criminal justice policy should be strongly influenced by public sentiment and partisan politics” was a notable risk factor of a more punitive criminal system. Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 6 (2007). “[A] predominate view that criminal justice policy falls appropriately within the province of expert knowledge and professional experience,” on the other hand, was a protective factor against such a system. *Id.*

An externality is an economic term for when the benefit (in the case of a positive externality) or a cost (a negative externality) of an action or transaction impacts an uninvolved third party. *See, e.g.*, Thomas Helbling, *Externalities: Prices Do Not Capture All Costs*, INT’L MONETARY FUND (Feb. 24, 2020), <https://www.imf.org/external/pubs/ft/fandd/basics/external.htm> [<https://perma.cc/875A-QD8H>] (“In the case of pollution—the traditional example of a *negative externality*—a polluter makes decisions based only on the direct cost of and profit opportunity from production and does not consider the indirect costs to those harmed by the pollution.”). The negative externalities this Note is concerned with are the negative effects of one locality’s choices about criminal justice policy on other localities.

²³ *See* Elizabeth G. Janszky, Note, *Defining “Local” in a Localized Criminal Justice System*, 94 N.Y.U. L. REV. 1318, 1320 (2019) (“Unlike some democratizers, who care primarily about increasing public participation in the criminal system through a variety of means, localizers specifically want to push power down into the hands of the ‘local community.’”); *see also infra* Section I.B (discussing the definition of “community”).

²⁴ Janszky, *supra* note 23, at 1337–40.

²⁵ Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 761–62 (1989) (“[A] fundamentally democratic

depends “primarily on *who* is to make fundamental policy judgments, rather than on what those decisions ultimately are.”²⁶ The most important quality in a democratic system is, in other words, self-determination.²⁷ This Note analyzes democratization through a democratic lens, asking to what extent it allows for self-determination in the criminal justice system.

Second, this Note is broader than previous scholarship because it goes beyond existing democratization proposals to consider a larger question underlying the criminal justice debate: what is the right-sized institution to make and enforce criminal law? This Note analyzes the democratic implications of criminal lawmaking at three levels of government—neighborhood, intermediate (regional or county), and state or federal—and argues that intermediate institutions are the most democratic institutions to lead criminal justice reform.²⁸ Previous scholarship assumes a false dichotomy: lawmaking and enforcement decisions can occur at either a broad, statewide or nationwide level or at a hyperlocal level.²⁹ But there is a wider range of possibilities. Rather than treating democratization as either

society assumes as its ultimate normative political premise some notion of self-determination, if only indirectly through a representational structure.”). This idea is supported in the historical and political literature. Tocqueville, for example, stated that “the principle of the sovereignty of the people has acquired, in the United States, all the practical development which the imagination can conceive.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 51 (Henry Reeve trans., New York, George Adlard 3d Am. ed. 1839) (“Whenever the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin In America, the principle of the sovereignty of the people is not either barren or concealed . . . it is recognized by the customs and proclaimed by the laws”); *see also* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 9 (1960) (“Governments . . . derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers.”).

²⁶ Redish, *supra* note 25, at 762.

²⁷ Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *YALE L.J.* 71, 76 (1984) (“The essential element of any democratic society is at least some level of majoritarian self-determination.”); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* 9 (1982) (“We in the United States are philosophically committed to the political principle that governmental policymaking . . . ought to be subject to control by persons accountable to the electorate.” (emphasis added)). Self-determination is even a goal of the democratization movement itself. *See, e.g.*, Kleinfeld et al., *supra* note 11, at 1697 (“Rules, standards, and institutional practices that violate community views of justice . . . should be eliminated from criminal law and procedure unless . . . [they] are the only means of promoting an[other] interest that the community agrees to be more important . . .”).

²⁸ The category in which a municipal government falls varies depending on the municipality’s size, thus making municipal governments difficult to classify. In smaller cities, municipal governments exhibit many of the characteristics of neighborhood governments. *See infra* Section II.B (discussing neighborhood-level governance). Larger city governments may be closer to intermediate institutions, but they still lack the ability to capture transient populaces in the way that regional or county governments often can. *See infra* Part III (discussing intermediate-level governance).

²⁹ *See, e.g.*, Rappaport, *supra* note 16, at 745 (“[T]he democratizers tend to focus on the microlocal. There is a theory of neighborhoods, not cities.”).

local or nonlocal, we must consider how democratization affects democratic principles across a spectrum of localization.³⁰

This Note therefore offers a friendly critique to both democratizers and bureaucratizers. To democratizers, it suggests a way forward—intermediate institutions—that is consistent with their underlying motivation of returning power to the people. But it also offers a warning: if democratization is not calibrated appropriately, democratization will undermine itself. To bureaucratizers, this Note suggests that their critiques unfairly assume democratization is a fundamentally narrow proposal. Democratization can occur in varying degrees and at varying levels. By focusing on hyperlocal or hyperbroad extremes, bureaucratizers ignore the benefits of a potential compromise. To be sure, this Note only identifies the “right” institution from the perspective of democratic representation and accountability. As bureaucratizers point out, factors beyond the scope of this purely democratic inquiry should also weigh in the calculus—such as the expertise available to each institution or the ability of law enforcement to operate in various jurisdictions with different laws.³¹ The most democratic institution may not, at the end of the day, be the most desirable.³² But because democracy is a fundamental part of our political system, if we sacrifice democratic ideals to achieve other goals, we should at least be aware that we are doing so.

Part I begins with an overview of the democratization movement. It considers the theoretical underpinnings of localization and reviews existing democratization proposals, pointing out that “community” lacks a stable definition in the existing literature. Parts II and III then measure democracy at three levels of government using the three factors most critical to self-determination in criminal lawmaking: (1) maximization of policy preferences, (2) inclusion of voters active in the community, and (3) displacement and diffusion. Part II considers control over criminal justice at the two levels already considered in previous scholarship—neighborhood and state or federal—and catalogues the problems inherent in each. Part III considers control over criminal justice at the intermediate level, including

³⁰ Cf. Kleinfeld, *supra* note 5, at 1399 (“[D]emocracy is a ‘more or less,’ not an ‘either/or’ concept.”).

³¹ See, e.g., Barkow, *supra* note 14, at 3 (suggesting that insulated administrative officials should lead criminal justice reform because experts are better informed and more rational); cf. Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 86 GEO. WASH. L. REV. 1490, 1493–94 (2018) (discussing how decision-makers have begun relying more on evidence-based methods to improve policing, public safety, and the quality of evidence in courtrooms, as well as to reduce incarceration).

³² The word “democracy,” of course, is imbued with powerful rhetorical force. See Rappaport, *supra* note 16, at 716. In reality, our political system is full of compromises between democracy and other values. The very first words of our Constitution after the preamble sacrifice some democracy for some expertise. See U.S. CONST. art. 1, §§ 1–6 (creating a representative, rather than a direct, democracy). So while this Note informs an important aspect of the criminal justice reform debate, it does not claim to settle that debate.

regional governance, which covers a city and its suburbs, and county governance.³³ The three self-determination factors show that the intermediate level—the least explored level to date—is the most democratic vehicle for criminal justice reform.

I. WHAT IS COMMUNITY CONTROL?

Despite its prevalence in democratization literature, the term “community” lacks a stable definition. Democratizers sometimes use the term to refer to a neighborhood, sometimes a city, and sometimes without respect to a unit of government.³⁴ But defining community is vital to any discussion of democratization because the term implicates democratic principles in different ways, depending on its scope. In general, community-based democratization proposals seek to place lawmaking and enforcement power in the hands of some community smaller than a state.³⁵ While not all democratization scholarship is community based, the transfer of power to local communities is a large part of the democratization agenda.³⁶ In line with previous scholarship, this Note refers to community-based democratizers as “localizers.”³⁷

This Part first discusses the history of community-based democratization and then dissects democratization and its proposals in greater detail, ultimately identifying a common problem: community is seldom defined.

A. *The Theoretical Underpinnings of Community-Based Criminal Law*

While democratization and bureaucratic professionalism are new terms, their debate has old roots. The origins of community-based democratization are arguably as old as the nation itself. Thomas Jefferson championed

³³ See *infra* Part III (discussing intermediate-level governance).

³⁴ See *infra* Section I.B. Part of the problem is that “community” is simply difficult to define. Even the dictionary definition of “community” is ambiguous about how a community relates to its surrounding geographic area. See *Community*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/community> [<https://perma.cc/N9JZ-KYNW>] (defining “community” as “a unified body of individuals: such as . . . [a group of] . . . people with common interests living in a particular area”).

³⁵ See Rappaport, *supra* note 16, at 729 (“The concept of ‘community’ is central to the democratization agenda.”).

³⁶ Recall that Janszky defines localizers—those who want to return political power to the community level—as only a subgroup of the larger democratization movement. See Janszky, *supra* note 23, at 1320. Indeed, some democratizers are not concerned with local community control. See, e.g., Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 216–19, 233–34 (2012) (suggesting that moral credibility be defined at the statewide level and that legitimacy should arguably be evaluated at a smaller jurisdictional level—although doing so may not be possible).

³⁷ See Janszky, *supra* note 23, at 1320.

“localized, small-scale participatory governance in ‘little republics,’”³⁸ while James Madison criticized localism on the grounds that it would lead to a tyranny of the majority. According to Madison, without the check of multiple competing factions, which is less likely in a smaller-scale government, a dominant group would oppress the minority.³⁹

If Thomas Jefferson is the intellectual grandfather of democratization, then Professor Bill Stuntz is its father.⁴⁰ Professor Stuntz, who would today be considered a localizer, desired a return to the Gilded Age—the late 1870s to 1929—a time he believed contained “the most egalitarian criminal justice in American history,”⁴¹ at least outside of the Jim Crow South, where Black people were victimized in an anarchic and authoritarian social order.⁴² This period was egalitarian, according to Professor Stuntz, because the “system was both more localized and more democratic.”⁴³ Criminal justice decision-making power was vested in local jurors, local politicians, and in voters from the neighborhoods where crime was concentrated.⁴⁴ For example, police chiefs and prosecutors were selected on a citywide basis during the Gilded Age, a time when the big-city machines often determined local nominations. Those machines, in turn, depended “on the votes of the working-class immigrants whose streets most needed patrolling”—making police and prosecutors beholden to the people they were policing and prosecuting.⁴⁵ Local communities thus wielded substantially more control than they do today—at least until the Great Migration, in which Black people concentrated in poor urban neighborhoods and white people fled to suburbs. Despite migrating to the suburbs, white people still held more political power over urban criminal justice because prosecutors and judges were elected at

³⁸ Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 370 (2018) (quoting Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in 6 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES, MARCH TO NOVEMBER 1813, at 562–68 (J. Jefferson Looney ed., 2010)).

³⁹ See THE FEDERALIST NO. 10 (James Madison) (Jacob E. Cooke ed., 1961) (arguing that one dominant faction, which is more likely in small democratic units, would lead to oppression).

⁴⁰ See Kleinfeld, *supra* note 5, at 1403 (identifying Professor Stuntz as a “founding father of the democratization point of view”).

⁴¹ William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1975 (2008). *But see* Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1055 (2013) (arguing that minority communities outside the South were not policed by “their own” and often mistrusted police by the end of the Gilded Age).

⁴² Stuntz, *supra* note 41, at 1983–85.

⁴³ *Id.* at 1975.

⁴⁴ *Id.* (“In the past, local democratic control of criminal justice appears to have produced equality and lenity.”).

⁴⁵ *Id.* at 1995.

the county level.⁴⁶ But because suburban whites enjoyed historically low crime rates, they largely stayed out of criminal justice issues.⁴⁷ As a result, from the 1930s onwards, power drifted away from the voters and to distant “professionals and experts”—technocrats not directly elected by the people—which “changed the justice system almost entirely for the worse.”⁴⁸ If only those in urban neighborhoods where crime rates are highest had the ability to control those who govern them, Professor Stuntz argued, criminal justice would return to the fairer ways of the Gilded Age.⁴⁹

Like Professor Stuntz, localizers today think that government functions better when it is responsive to a smaller area with fewer people. Localizers offer five main justifications for such a system.⁵⁰ First, localism gives a layperson a greater degree of relative autonomy over political outcomes.⁵¹ Second, local jurisdictions narrowly tailor laws to the needs and interests of a community.⁵² Third, people can “vote with their feet” and move to the community that best aligns with their values.⁵³ Fourth, localized government increases public participation in the political system.⁵⁴ Lastly, localism

⁴⁶ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7 (2011). Counties grew to contain populous suburbs, granting these suburbs a greater share of the voting power than inner-city neighborhoods. See Stuntz, *supra* note 41, at 1995.

⁴⁷ STUNTZ, *supra* note 46, at 7, 35.

⁴⁸ *Id.* at 193–94.

⁴⁹ Stuntz, *supra* note 41, at 2040 (“[T]he key to a more egalitarian [criminal] justice system is greater local control.”); see also *id.* at 1986–87 (emphasizing a study which found that Black murder defendants fared about as well as white murder defendants in Philadelphia during the Gilded Age).

⁵⁰ In the localism literature, the first three justifications are distinct but generally considered under the umbrella term of “efficiency.” See, e.g., Richard Briffault, Symposium, *Localism and Regionalism*, 48 *BUFF. L. REV.* 1, 15–17 (2000) (categorizing the advantages of localism).

⁵¹ See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *COLUM. L. REV.* 346, 444 (1990) (arguing that when government operates at a local level, decision-makers are primarily concerned with the interests of local residents).

⁵² See Briffault, *supra* note 50, at 15 (“[L]ocal autonomy permits public policy decisions to match distinctive local conditions. If all political decisions were taken at a highly centralized level, it would be difficult to vary policies in light of diverse local needs and preferences.”); see also Logan, *supra* note 38, at 375 (“To advocates, a chief virtue of localism lies in its capacity to tailor constitutional norms to local needs and preferences, resulting in a possible broadening of constitutional protection.”).

⁵³ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416, 418 (1956) (“[At the local level,] the consumer-voter moves to that community whose local government best satisfies his set of preferences.”). This reasoning, however, is flawed—many people do not, and often cannot, move solely because of political ideology. See Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 *VA. L. REV.* 1537, 1548–51, 1557 (2019).

⁵⁴ See Erika K. Wilson, *The New School Segregation*, 102 *CORNELL L. REV.* 139, 182 (2016) (“Localism purportedly increases citizen participation because the small size of local governments affords people opportunity for the exercise of genuine power and decision making. This, in turn, creates more of an incentive for citizens to participate in their own governance.”).

encourages localities to experiment with policies, which increases innovation.⁵⁵

In sum, the call of localism is clear when framed relative to larger scale governance: align the incentives of the criminal system with those of local communities and not with those of states or nations.

B. Community-Based Proposals and Their Definitional Problem

Less clear, however, is what localism means in an absolute sense because scholars have struggled to define what exactly constitutes a local community and, in turn, at which level we should localize to capture the will of that community. The lack of a stable definition for “community” presents a foundational limitation for democratizers because democratization relies heavily on the idea of community preferences.⁵⁶ Janszky defines localizers as those who have “a preference for decentralized, small, local government structures, usually at the municipal level.”⁵⁷ But that could include anything from a small neighborhood to a major city or county.⁵⁸ This Section explores the democratizers’ proposals in an attempt to determine what “community” means: would democratizers vest power in neighborhoods, cities, or some other unit of governance?⁵⁹

The blueprint Professor Stuntz laid out for democratization seems, at first glance, to be a directive for self-governance at the neighborhood level.⁶⁰ While modern democratizers also urge localization, their proposals do not always tell us at which level to localize. Even when democratizers do suggest a level, they often reach different conclusions or provide unclear definitions.

⁵⁵ Logan, *supra* note 38, at 375 (“Another potential benefit of localism is that it holds promise of beneficial experimentation, akin to that envisioned by Justice Brandeis . . .”). Justice Louis D. Brandeis envisioned states having more freedom to engage in social and economic experimentation. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁵⁶ *See* Rappaport, *supra* note 16, at 729 (“The concept of ‘community’ is central to the democratization agenda.”).

⁵⁷ Janszky, *supra* note 23, at 1326.

⁵⁸ Arizona’s Maricopa County, for example, has 4.4 million residents, making it larger than many states. *See Maricopa County Quick Facts*, MARICOPA CNTY., <https://www.maricopa.gov/3598/County-Quick-Facts> [<https://perma.cc/7NZB-5YR6>].

⁵⁹ *See* Janszky, *supra* note 23, at 1332–33 (“Based on what localizers critique in their scholarship, we know what ‘local community’ is not—it is not bureaucracies, state governments, or the federal government—but aside from that, it is unclear whether localizers are referring to neighborhoods, precincts, cities, or counties.”).

⁶⁰ *See* Schulhofer, *supra* note 41, at 1080 (“More central to Stuntz’s book, however, is its ambition to restore political power to local neighborhoods.”). But as Professor Stephen Schulhofer points out, Professor Stuntz does not explain *how* power should be given back to the community. The closest Professor Stuntz comes is proposing that we draw juries from neighborhoods where crime happens. Otherwise, Professor Stuntz proposed leaving decision-making power in the same place: with actors, such as district attorneys and judges, who are elected on a citywide or countywide basis. *Id.* at 1080–81.

Most notably, a large group of democratizers wrote a white paper proposing criminal justice reforms.⁶¹ They argue that criminal justice should be more “*community-focused* and responsive to lay influences,”⁶² and twenty-two of their thirty proposals hinge on community views to some extent.⁶³ For example, they suggest decriminalizing crimes that are not considered wrongful according to “community views of justice,”⁶⁴ creating citizen advisory boards that would draw members from the community to advise legislators and police,⁶⁵ and redrawing prosecutorial districts to make prosecutors “responsive to smaller and more cohesive communities.”⁶⁶ Despite relying on the idea of community, the white paper does not define what a community is, whom a community includes, or which values a community holds. It does not explain, for example, whose views we should consult in decriminalizing offenses or which type of locality we should draw prosecutorial districts around.

Some democratization literature has admittedly proposed solutions that include a definition of the community at issue. After suggesting that “localities” make greater use of criminal laws, Professor Lauren Ouziel identifies localities as cities. She then offers two lawmaking avenues: a city could craft criminal ordinances itself, or a state could create criminal laws that apply only to certain cities.⁶⁷ By contrast, Professor Christopher Slobogin defines communities as neighborhoods and proposes that neighborhood councils should approve surveillance systems before they are installed in a neighborhood.⁶⁸

For the most part, however, the suggested unit of governance is unclear. For example, Professor Richard Bierschbach proposes “[p]ushing more criminal justice power—legislative, enforcement, adjudicative, and penal—down to directly affected *communities and neighborhoods*” before suggesting that “[c]ity councils . . . be given real power to craft their own

⁶¹ See Kleinfeld et al., *supra* note 11, at 1697–1705.

⁶² *Id.* at 1694 (emphasis added).

⁶³ *Id.* at 1697–1705. Eighteen proposals explicitly reference the “community.” Four more proposals—pertaining to grand juries, equitable trial juries, and sentencing juries—are explained in an earlier proposal to incorporate community viewpoints. *Id.* at 1697 (“All juries, including grand, trial, and sentencing juries, should be drawn from within the immediate, local community in which the crime was committed . . .”).

⁶⁴ *Id.* at 1698.

⁶⁵ *Id.* at 1699–1700.

⁶⁶ *Id.* at 1702.

⁶⁷ Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2323–24 (2014) (“With respect to lawmaking, localities should consider more robust use of local laws.”).

⁶⁸ Christopher Slobogin, *Community Control over Camera Surveillance: A Response to Bennett Capers’s Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 993, 996–97 (2013).

substantive criminal codes.”⁶⁹ He does not explain whether both neighborhoods and cities should exercise legislative power, whether these proposals are mutually exclusive, or whether cities should create laws that apply uniquely to certain neighborhoods. The answers to such questions raise important implications for major cities, where the differences between neighborhood and municipal control are sizable. In a different article, Professor Bierschbach and then-Professor Stephanos Bibas support community control at the *county* level. They do so by defending the California Public Safety Realignment Act, which transferred inmates from the state prison system to county jails and gave counties discretion—over both incarceration and parole—to craft policies according to their “local priorities, preferences, and needs.”⁷⁰

Relatedly, Professor Laura Appleman advocates for community prosecution, community courts, and community policing.⁷¹ Under Professor Appleman’s plan, prosecutors would be assigned to, but not elected by, specific neighborhoods. Yet Professor Appleman does not define the level at which community policing would operate, only stating that it should “establish partnerships” with local residents.⁷²

Lastly, some democratizers even argue that courts should afford constitutional deference to locally crafted laws.⁷³ In *City of Chicago v. Morales*, the Supreme Court struck down an antiloitering ordinance that the City of Chicago enacted to combat gang crime, finding the ordinance unconstitutionally vague.⁷⁴ “The ordinance was to be enforced only after consultation with ‘local leaders’ and ‘community organizations,’” something that Professors Dan Kahan and Tracey Meares think is crucial.⁷⁵ They argue

⁶⁹ Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1452 (2017) (emphasis added).

⁷⁰ Richard A. Bierschbach & Stephanos Bibas, *What’s Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1503–07 (2016).

⁷¹ Laura I. Appleman, *Nickel and Dime into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1529–33 (2016).

⁷² *Id.* Professor Appleman’s proposal might allow prosecutors and judges to tailor their actions to a community, but if judges are appointed or elected on a statewide level, the proposal may not necessarily increase community control.

⁷³ See, e.g., Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1184 (1998) (arguing that judges should evaluate community policing under relaxed scrutiny “when they are confident that the political community has meaningfully internalized the burden that such policing puts on individual liberty”).

⁷⁴ 527 U.S. 41, 64 (1999) (“In our judgment . . . the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police ‘to meet constitutional standards for definiteness and clarity.’” (quoting *City of Chicago v. Morales*, 687 N.E.2d 53, 64 (Ill. 1997))).

⁷⁵ See Kahan & Meares, *supra* note 73, at 1183 (“Enforcement of the ordinance was implemented through regulations that clearly specified who counted as a ‘gang member,’ what kinds of behavior

that because the ordinary citizen’s “decisions about the appropriate balance between liberty and order” deserve respect, the Court should have granted deference to community views when evaluating the ordinance.⁷⁶ The Court never addressed that argument, but there is some evidence the Justices might be open to revisiting the issue. Six years after *Morales*, in *Hudson v. Michigan*, the Court applied a relaxed standard of the Fourth Amendment’s exclusionary rule—a doctrine that prohibits the inclusion of illegally obtained evidence at trial.⁷⁷ The Court held that the police’s failure to knock and announce their presence did not mandate the suppression of all evidence obtained in their search, in part because of “evidence that the increasing use of various forms of citizen review can enhance police accountability,” which apparently reduces the likelihood that police will violate the Amendment.⁷⁸

In sum, although many scholars call for localized criminal law, they have not reached a consensus on the appropriate level of localization. A survey of the literature reveals proposals ranging from the neighborhood level to the county level. The democratizers have a clear aim in a relative sense—government smaller than the state or federal level—but not in an absolute sense. The choice over which level to localize at, however, has dangerous implications for democracy.

II. MEASURING DEMOCRACY

Despite their calls for community-based lawmaking and enforcement, democratizers have not identified the level of government in which lawmaking and enforcement decisions should be made. But this choice is critical to the amount of representation and accountability accompanying criminal justice reform. To operationalize this inquiry into which political institution optimizes representation and accountability, Parts II and III examine the democratic implications of criminal lawmaking and enforcement at three levels of government: neighborhood, county or region, and state or federal. There is no panacea, as each institution creates unique tradeoffs between certain democratic values, but some institutions are more democratic than others. If we were to assign a hypothetical democracy score to each level of government, the intermediate level—county and regional governments—would earn the highest score.

Two things constrain the scope of this analysis. First, this Note examines each level of government *only* through the perspective of

counted as ‘loitering,’ which officers could enforce the law, and in what neighborhood areas it could be enforced.”).

⁷⁶ *Id.*

⁷⁷ 547 U.S. 586, 597, 599 (2006).

⁷⁸ *Id.* at 599.

democratic representation and accountability. There are sound arguments for and against localization that are beyond this basic democratic inquiry.⁷⁹ Take, for instance, the possibility of discrimination. This Note concludes that county or regional legislatures are the most democratic institutions, but a shift to these institutions could have serious implications for racial minorities in majority-white areas. Recall that Professor Stuntz praised the Gilded Age as the most egalitarian time in U.S. history outside the South—but what about the South? A localized criminal justice system can pose serious discrimination risks, which should not be ignored. This Note focuses only on democracy—an important, but not dispositive, factor in criminal justice reform.

Second, the Constitution vests most criminal lawmaking authority in the states by virtue of their police powers.⁸⁰ States can delegate that power to localities, but localities have only the powers granted to them by the state under state constitutional “home rule.”⁸¹ So even if, as a normative matter, a locality should exercise criminal lawmaking and enforcement powers, it may still lack such powers. Some state constitutions even explicitly prohibit delegating criminal lawmaking powers to local government,⁸² although localities may be able to functionally modify state law through nonenforcement.⁸³ The practical realities presented by each state constitution are beyond the scope of this Note. Instead, this Note asks if there is an ideal institution from the standpoint of democratic representation. That answer should then inform our judgments of these state constitutional provisions.

⁷⁹ For example, bureaucrats would heavily value the level of expertise available to lawmakers at each level of government. *See, e.g.*, BARKOW, *supra* note 14, at 1–3, 168 (arguing that experts arrive at more accurate decisions than laypeople).

⁸⁰ *See* U.S. CONST. amend. X (reserving for the states “powers not delegated to the United States by the Constitution”); *see also* *United States v. Morrison*, 529 U.S. 598, 599 (2000) (“[T]here is no better example of the police power . . . than the suppression of violent crime and vindication of its victims.”).

⁸¹ Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 468 (2020) (“[A local government’s] power is traditionally limited to those specifically enumerated in its respective state constitution These limited powers . . . are often referred to as ‘home rule’ powers.”). This relationship functions much like the inverse of the states’ relationship with the federal government. There, the federal government has a limited set of enumerated powers, with the rest reserved for the states and the people. *See* *Gamble v. United States*, 139 S. Ct. 1960, 1990–91 (2019) (Ginsburg, J., dissenting) (describing federalism principles). But here, states have general police powers, with only a set of enumerated powers reserved to localities in their state constitutions. Fields, *supra*, at 468.

⁸² *See, e.g.*, JOHN MARTINEZ, 1 LOCAL GOVERNMENT LAW § 4:7, Westlaw (database updated May 2021) (noting that the South Dakota Constitution, for example, “gives local governments general power to legislate on any subject except private relationships and criminal laws”).

⁸³ Much as how “sanctuary cities” resist federal immigration laws, some localities are refusing to enforce state gun-control measures. *See* Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1710–11 (2018); Fields, *supra* note 81, at 485–89 (describing how some localities could resist state gun-control laws through nonenforcement).

Section II.A identifies and defines three factors that measure the democratic credentials of criminal law institutions. Section II.B then applies these factors to neighborhood institutions, and Section II.C applies them to state or federal institutions.

A. Defining the Three Factors of Democratic Representation

To assess the democratic strength of each level of government, we need tools that measure democratic principles in a criminal law context. Self-determination—the idea that voters should exercise control over the laws that affect them—begs two fundamental questions. First, can voters *control* which laws are enacted by electing candidates who share their preferences? Second, are the voters *affected* by those laws? This Note operationalizes these questions into three factors: (1) preference maximization, (2) inclusion, and (3) displacement and diffusion.⁸⁴ These factors have never before been applied to a democratic inquiry into criminal law, but they derive from the localist and regionalist literatures, which have long recognized their value.⁸⁵ Each factor contributes to “allocational efficiency,” in which districts are drawn so that the political process best represents as many people as it can.⁸⁶ In turn, this Note assumes that the most democratically sound institution to make and enforce criminal law is the institution that best optimizes these factors.

First, “preference maximization” refers to the idea that voters are better represented when jurisdictions group together like-minded voters. This factor measures the likelihood that voters can *control* which laws are enacted. If we draw districts around people who tend to agree, then districts can more easily maximize the policy preferences of their voters.⁸⁷ Suppose three jurisdictions each want to take a different approach to criminal justice. If laws are made at a centralized level governing all three, then two outcomes are possible: the preferences of one jurisdiction will win out to the detriment of the other two jurisdictions, or the centralized government will reach a compromise that only partially satisfies each jurisdiction. In either scenario, two or all three of the jurisdictions will not be completely satisfied with the outcome. But if each jurisdiction can instead make its own laws, then each

⁸⁴ While there are undoubtedly other factors that measure how democratic an institution is, such as interest-group influence, I believe these factors measure the most fundamental elements of self-determination in criminal law. Throughout this Note, I sometimes refer to the third factor only as displacement for concision.

⁸⁵ See *supra* notes 50–55 and accompanying text.

⁸⁶ See Briffault, *supra* note 50, at 15–16.

⁸⁷ See Erin Adele Scharff, *Hyper Preemption: A Reordering of the State–Local Relationship?*, 106 GEO L.J. 1469, 1491 (2018); see also Briffault, *supra* note 50, at 15 (arguing that decentralization allows local governments to tailor laws to the needs of their voters).

can pass laws tailored to its own preferences. Of course, democracy always produces winners and losers—some voters will still find themselves in the minority, no matter how efficiently we draw districts.⁸⁸ But preference maximization measures whether a democratic structure is producing the most winners possible.

Second, “inclusion” stands for the idea that those who have an interest in a jurisdiction’s criminal laws should be able to vote for the officials that enact and enforce those laws. In other words, inclusion measures whether voters have a say in the laws that *affect* them.⁸⁹ For example, if a voter spends significant time in a jurisdiction or owns property in a jurisdiction, inclusion might suggest that she should have a vote in that jurisdiction, even if she is not formally a resident there.

Third, “displacement” addresses the idea that criminal behavior is not static. Like inclusion, this factor measures whether voters have a say in the laws that *affect* them, but from a different perspective—namely, that attempts to address crime in one jurisdiction can have spillover effects in neighboring jurisdictions that the neighboring voters never voted for.⁹⁰ People engage, at least in part, in a cost–benefit analysis when deciding whether to commit a crime.⁹¹ One jurisdiction raising the costs of committing a crime—by increasing the probability of detection or the severity of the expected sanction—might deter a person from committing crime in that jurisdiction. This makes nearby jurisdictions that have not imposed similar costs relatively more attractive destinations for criminal activity.⁹² Research

⁸⁸ See *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 166 (1977) (“Some candidate, along with his supporters, always loses.”).

⁸⁹ Inclusion naturally follows from the premise that the people should make basic normative policy choices because to make such choices, people must be able to vote on the policies affecting them. See Redish, *supra* note 25, at 762–64.

⁹⁰ Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1839 (2005) (“[J]urisdictions may shift criminal activity to neighboring jurisdictions . . . by affecting the ex ante decision about where to commit certain crimes.”). The type of displacement at issue here is known as spatial displacement, meaning that offenders switch from targets in one location to targets in another location. Other types of displacement, such as target displacement (offenders change from one type of target to another) and temporal displacement (offenders change the time at which they commit the crime) also exist but are not relevant here. See ROB T. GUERETTE, U.S. DEP’T OF JUST., OFF. OF CMTY.-ORIENTED POLICING SERVS., *ANALYZING CRIME DISPLACEMENT AND DIFFUSION* 3 (2009).

⁹¹ Teichman, *supra* note 90, at 1829.

⁹² See *id.* at 1839–40.

has shown this pattern with respect to robbery⁹³ and prostitution,⁹⁴ although displacement does not always occur after the costs of committing crime increase.⁹⁵

Social scientists have also observed the opposite effect, known as “diffusion.” Diffusion is the *reduction* of crime in one nearby area because of a targeted response in another—what one neighborhood does about crime can deter criminal activity in other neighborhoods.⁹⁶ Even though diffusion appears to provide a benefit to neighboring voters, both displacement and diffusion conflict with self-determination.⁹⁷ Displacement does so because voters experience higher crime in their jurisdiction as a result of criminal justice policies for which they did not vote. Diffusion, though seemingly a positive byproduct, also harms self-determination because it strips voters in the affected jurisdiction of the right to calibrate their own criminal-punishment regime. Lower crime rates carry a cost, and the affected jurisdiction might not want to lower crime rates at the cost of harsher penalties and locking up its own.⁹⁸

In sum, three factors—preference maximization, inclusion, and displacement and diffusion—best measure the democratic credentials of criminal lawmaking and enforcement institutions. The rest of Part II and Part III apply these factors to three broad levels of government and reveal that intermediate institutions best handle the representational tradeoffs made in criminal lawmaking and enforcement.

⁹³ See Christian Grandjean, *Bank Robberies and Physical Security in Switzerland: A Case Study of the Escalation and Displacement Phenomena*, 1 SEC. J. 155, 157–58 (1990). *But see* Anthony A. Braga, David L. Weisburd, Elin J. Waring, Lorraine Green Mazerolle, William Spelman & Francis Gajewski, *Problem-Oriented Policing in Violent Crime Places: A Randomized Controlled Experiment*, 37 CRIMINOLOGY 541, 567–69 (1999) (finding problem-oriented policing interventions do not lead to displacement of robbery calls and incidents).

⁹⁴ Phil Hubbard, *Community Action and the Displacement of Street Prostitution: Evidence from British Cities*, 29 GEOFORUM 269, 278–80 (1998).

⁹⁵ Some studies found “considerable evidence of spatial displacement . . . as a result of police crackdowns, especially during drug enforcement.” Dennis P. Rosenbaum, *The Limits of Hot Spot Policing*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 252–53 (David Weisburd & Anthony A. Braga eds., 2006). But a comprehensive review found displacement only in 23% percent of instances. Rob T. Guerette & Kate J. Bowers, *Assessing the Extent of Crime Displacement and Diffusion of Benefits: A Review of Situational Crime Prevention Evaluations*, 47 CRIMINOLOGY 1331, 1346–47 (2009).

⁹⁶ The same comprehensive review that found displacement in nearly one-quarter of instances found diffusion in 37% percent of instances. Guerette & Bowers, *supra* note 95, at 1334, 1346.

⁹⁷ See Redish, *supra* note 25, at 761–62 (describing self-determination).

⁹⁸ See *infra* notes 124–128 and accompanying text.

B. Neighborhood Institutions

The purest application of the democratization agenda is neighborhood-level control.⁹⁹ From the perspective of self-determination, neighborhood-level control is also the most dangerous application because it excludes relevant voters from the process and displaces crime to nearby neighborhoods. Adding to this, it is not even clear that neighborhood-level control produces its purported benefit: preference maximization.

Neighborhood-level control could take two forms. The first is neighborhood self-governance, whereby neighborhood residents create their own criminal codes and enforcement policies through elected representatives or popular vote. The most obvious example of neighborhood self-governance is an elected neighborhood council, but other proposals—such as neighborhood-level prosecutorial elections—also fall into this category.¹⁰⁰ The second form neighborhood-level control could take is state-level governance tailored to certain neighborhoods, where a state legislature makes legislative and enforcement decisions that apply uniquely to certain neighborhoods according to the so-called will of those neighborhoods.¹⁰¹

As a practical matter, the second form is easier to implement because many neighborhoods lack existing governments.¹⁰² And even where neighborhood governments do exist, they are presently unfit to democratize criminal law. For example, Los Angeles, which boasts an extensive array of neighborhood councils, is one of the rare exceptions to the lack of neighborhood governments throughout the country. Supporters praise the city's neighborhood-council system because it aims to increase minority

⁹⁹ See STUNTZ, *supra* note 46, at 6–8 (arguing that urban neighborhoods must take back control over criminal justice decision-making in order for “criminal justice . . . to grow more just”). But a neighborhood, like a community, is inherently difficult to define. The term describes many things in the English language, including groups of houses, the area surrounding a local institution like a church, or political wards and precincts. *What Is a Neighborhood?*, DATA CTR., <https://www.datacenterresearch.org/data-resources/neighborhood-data/what-is-a-neighborhood/> [<https://perma.cc/EAN3-JBCE>]. This Note uses the term “neighborhood” to refer to subsections of a city that are formally recognized by a city government as “neighborhoods” in a political or social context. See, e.g., *Chicago Ward, Community Area and Neighborhood Maps*, CITY OF CHI., https://www.chicago.gov/city/en/depts/dgs/supp_info/citywide_maps.html [<https://perma.cc/C3VC-XDH9>] (showing neighborhoods recognized by the Chicago Office of Tourism). But just as political and social boundaries can change, so too can neighborhood names and boundaries.

¹⁰⁰ See Kleinfeld et al., *supra* note 11, at 1697–1705 (listing reforms).

¹⁰¹ See, e.g., Ouziel, *supra* note 67, at 2323 (proposing state criminal laws that apply uniquely to certain cities).

¹⁰² See Janszky, *supra* note 23, at 1337 (“Many neighborhoods (especially in big cities), for instance, do not have any political institutions governing them.”).

participation, although the councils have had mixed success in practice.¹⁰³ But even Los Angeles’s neighborhood councils are “advisory-only” institutions, meaning they lack the ability to *make* law—instead, they craft ordinances subject to the approval of the mayor.¹⁰⁴ Because neighborhood governments are rare and the few that do exist lack criminal lawmaking powers, if criminal law does move toward neighborhood control, decisions will likely continue to be made at the state or city level by virtue of inertia. This presents serious risks for self-determination because state- or city-level governance that applies uniquely to certain neighborhoods is also the most dangerous iteration of neighborhood control from a representational and accountability perspective.¹⁰⁵

The following three Sections assess the first form of neighborhood control, neighborhood self-governance, against the self-determination factors: preference maximization, inclusion, and displacement. The fourth Section then turns to the second form of neighborhood-level control, state- or city-level governance tailored to specific neighborhoods, which carries risks distinct from neighborhood governments.

1. Preference Maximization

Professor Rappaport identified a key premise of the democratization movement: people live in homogenous communities that have distinct and identifiable views of criminal justice.¹⁰⁶ If this were true, neighborhood

¹⁰³ See Erwin Chemerinsky & Sam Kleiner, *Federalism from the Neighborhood Up: Los Angeles’s Neighborhood Councils, Minority Representation, and Democratic Legitimacy*, 32 YALE L. & POL’Y REV. 569, 577 (2014) (describing the key advantage of the councils as “their ability to bring traditionally under-represented communities into the political process”). But in practice, the council system has had mixed success in increasing minority participation. See Douglas Houston & Paul M. Ong, *Determinants of Voter Participation in Neighborhood Council Elections*, 41 NONPROFIT & VOLUNTARY SECTOR Q. 686, 688–99 (2012) (finding that Asian Americans and Latinos participate in the councils at lower levels than non-Hispanic whites and African Americans). In addition, extremely local governments, like Los Angeles’s city councils, come with dangers of their own. See Elliot Louthen, Note, *Prerogative and Legislator Vetoes*, 115 NW. U. L. REV. 549, 589–91 (2020) (describing Los Angeles council members’ use of a hyperlocal “legislator veto” to block affordable housing developments in their districts). Besides neighborhood councils, there are some other existing microlocal governance structures, like business-improvement districts or school boards, but none exist for the purpose of making decisions about criminal law. See Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1336–49 (2014) (describing two types of “micro-local” structures: school districts and historic districts); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 509–21 (1997) (describing four types of economically focused “sublocal” structures: enterprise zones, tax increment finance districts, special zoning districts, and business-improvement districts).

¹⁰⁴ See Chemerinsky & Kleiner, *supra* note 103, at 574 (explaining that the councils can only advise the city and therefore have a limited role in formal decision-making).

¹⁰⁵ See *infra* Section II.B.4.

¹⁰⁶ Rappaport, *supra* note 16, at 739 (discussing how democratizers presume “that Americans reside in reasonably cohesive communities that are capable of forming and expressing . . . ‘community values’ and ‘community views’ of justice”).

governments would maximize preferences.¹⁰⁷ Yet there is little evidence that this level of agreement exists at the neighborhood level. For example, neighborhoods today are more racially heterogeneous than the democratizers acknowledge. Racial segregation, while still high, is sharply lessening.¹⁰⁸ The democratizers' idea of protecting minorities by empowering the inner-city neighborhoods they live in¹⁰⁹ does not reflect reality. As of 2016, 52% of Black Americans in the country's largest metropolitan areas live in the surrounding suburbs of those areas.¹¹⁰ In fact, only 42% of Black Americans live in majority-Black neighborhoods as of 2016.¹¹¹ And even racially homogenous neighborhood residents possess divergent interests according to class and age.¹¹² Whatever a community is today, it is not necessarily a neighborhood.¹¹³

Some democratizers point to a body of research that has found “a high degree of agreement about judgments of justice across all demographics,” at least for “the core of wrongdoing.”¹¹⁴ But as Professor Rappaport pointed out, there are two significant problems with this finding. First, the finding overstates the degree of lay consensus on criminal justice issues because it only shows that people uniformly oppose the very worst crimes, such as murder or rape, but not that people agree on what kind of behavior constitutes these crimes.¹¹⁵ Second, although the research finds that people agree on how severely offenses should be punished in a relative sense—in ranking offenses

¹⁰⁷ See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1124 (1996) (“Decentralization allows local bodies to tailor services, regulation, and taxation to the needs and desires of their particular constituents . . . [L]ocal autonomy can increase the ability of government to respond to those preferences.”).

¹⁰⁸ See Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI L. REV. 1329, 1343–48 (2016) (surveying evidence on racial segregation).

¹⁰⁹ See, e.g., Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 3 UTAH L. REV. 543, 566 (2014) (“A democracy-enhancing theory of criminal law . . . prioritiz[es] the empowerment of low-income and minority individuals and communities to participate more fully in the formation and implementation of criminal justice policies.”).

¹¹⁰ Alana Semuels, *No, Most Black People Don't Live in Poverty—or Inner Cities*, ATLANTIC (Oct. 12, 2016), <https://www.theatlantic.com/business/archive/2016/10/trump-african-american-inner-city/503744/> [<https://perma.cc/YDE3-84KH>].

¹¹¹ Paul Jargowsky, *Are Minority Neighborhoods a Disaster?*, CENTURY FOUND., (Oct. 14, 2016), <https://tcf.org/content/commentary/minority-neighborhoods-disaster> [<https://perma.cc/F6AT-YCE5>].

¹¹² See Rappaport, *supra* note 16, at 745–47.

¹¹³ See *supra* Section I.B (discussing the difficulty in defining “community”); see also STEVE HERBERT, *CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY* 12 (2006) (finding that “many people do not understand community as spatially bounded; urban residents often seek community outside their neighborhood”).

¹¹⁴ Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1567 (2017) (reviewing the literature on community views of criminal justice).

¹¹⁵ Rappaport, *supra* note 16, at 743–44.

in order of severity—it does not find that they agree on the absolute level of punishment that should accompany each offense.¹¹⁶

There is also a third problem: even if we accept the research as true, it would not support localization. The researchers argue there is a consensus among people “across all demographics” *without* accounting for geography.¹¹⁷ But if people share similar views on criminal justice no matter where they live, then localized control would not better represent them because people already share similar views at the state or federal level. For example, if 60% of voters in a state support a reform measure and 60% of voters within a particular neighborhood support that same measure, neighborhood-level governance would not better maximize voter preferences as compared to state-level governance. Lessening the size of government will logically only maximize preferences when the smaller units of a larger body have distinct views from the aggregate views of the larger body. But, as discussed, there is little evidence of these conditions at the neighborhood level.¹¹⁸ Of course, some hyperlocal areas likely exist where people do share higher levels of agreement on criminal justice policies than all voters within a city or state do when considered as a whole. Yet even if preference maximization is possible in some instances of neighborhood-level governance, the other two factors measuring self-determination—*inclusion and displacement or diffusion*—counsel against neighborhood governance.

2. *Inclusion*

Although neighborhood-level governance may appear closer to voters,¹¹⁹ it is both overinclusive and underinclusive. Drawing boundary lines around neighborhoods would both exclude from the political process nonresidents with an interest in a locality’s criminal lawmaking and enforcement decisions and include residents without an interest in such decisions.

In the United States, a person’s ability to vote and run for office in a jurisdiction often depends on her residency in that jurisdiction.¹²⁰ The people

¹¹⁶ *Id.*

¹¹⁷ See Robinson, *supra* note 114, at 1567.

¹¹⁸ I have found no research showing these conditions at the neighborhood level. But ample evidence of these conditions exists at the intermediate level. See *infra* Part III (describing intermediate institutions).

¹¹⁹ See Schleicher, *supra* note 20, at 763.

¹²⁰ See Eugene D. Mazo, *Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 FLA. ST. U. L. REV. 611, 632 (2016) (“Most states impose durational residency requirements on both voters and political candidates, but the individuals affected, the period of duration required, and the justifications given for each of these distinct durational residency requirements differ

who vote for and serve on a neighborhood council would thus be residents of that neighborhood. But a residency requirement on such a small scale is based on an anachronistic premise. We no longer live in colonial villages where we can hop from the general store, skip to the tavern, and jump home.¹²¹ Instead, people today work, live, and socialize across many small areas that they are not necessarily residents in.¹²² So while neighborhood governments are closer to the people, they are not necessarily closer to the people they should be representing.

Neighborhood-level voting is both overinclusive and underinclusive. Imagine two people: one resident of a neighborhood and one nonresident. The resident is a student who spends all her time in another jurisdiction but still lists her parents' address in the neighborhood as her voting address.¹²³ The nonresident works, shops, and socializes in the neighborhood but cannot afford to live in it. Why should the resident—but not the nonresident—have a say in the neighborhood's criminal justice policies? In fact, we would expect a mirror image of such a result in a representational democracy. Neighborhood governance presents a political process that represents us in some parts of our lives, namely where we reside, but not others, undermining a core premise of both representational democracy and the democratization movement: people should have a say in the normative policy choices that affect them. Issues with inclusion can of course arise even when jurisdictional boundaries are larger because some people will inevitably live near borders and spend time in multiple jurisdictions, but as explained in

significantly.”); *see also* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68–69 (1978) (holding that voting may be restricted to residents of a locality); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 319–20 (1993) (“Local government law . . . gives priority to a single place-bite within the metropolitan area: the place where people live. Indeed, residency has always been at the center of local government law’s conception of people’s relationship to the space around them.”). Some scholars, however, have suggested voting schemes not based on residency requirements. *See, e.g., id.* at 329 (proposing a system that gives each person five votes to use in “whatever local elections they feel affect their interest”); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1909 (1994) (proposing that we give all residents of a city or state the ability to vote in all local elections).

¹²¹ *See* Frug, *supra* note 120, at 320 (conceding that “[p]erhaps this emphasis on residency was justifiable when . . . home, work, family, friends, [and] market” were all in one community).

¹²² Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 421 (2001) (“[P]eople . . . conduct their lives across various political and social communities everyday, working in one, playing in another, going to school in another, sleeping in another, and voting in another.”). Professor Frug argues that the residency requirement “romanticizes the home as a haven in a heartless world.” Frug, *supra* note 120, at 320 (citing CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED (1977)). Because “[m]ost people spend most of their day in other parts of the region . . . a person’s territorial identity should not be reduced to his or her address.” *Id.*

¹²³ For additional context, *see* Frug, *supra* note 120, at 320 (“But these days some people do not even live at their place of residence: students who spend full-time out-of-state, people who are serving in the military, and business-people who are assigned abroad are all residents of the town they are never in.”).

Section III.B, inclusion problems are more likely to arise in a smaller jurisdiction.

3. *Displacement and Diffusion*

Since criminal law is not static, localized jurisdictions also present another set of problems. One neighborhood's approach to criminal law can affect—through displacement and diffusion—crime in nearby neighborhoods.¹²⁴ As Professor Rappaport put it, “The democratizers’ vision of . . . America . . . ignores the critical ways in which neighborhoods themselves are interconnected.”¹²⁵ This interconnectedness creates two related problems.

First, as previously discussed in Section II.A, displacement and diffusion conflict with self-determination. Imagine Neighborhood A votes to increase criminal penalties for robbery, which displaces robbery crime to Neighborhood B. The residents of Neighborhood A have functionally made a policy choice for the residents of Neighborhood B, who did not choose to accept the consequential risk of increased crime. The same criticism applies to diffusion, even though diffusion reduces crime in nearby neighborhoods. If Neighborhood A enacts harsher penalties that diffuse crime away from Neighborhood B, it still impinges upon the ability of Neighborhood B's residents to calibrate their own criminal justice policies because Neighborhood B's residents did not participate in the democratic process that led to the decision causing such an effect.¹²⁶ Imagine those in Neighborhood B wish to take a reformist approach and rehabilitate offenders in their neighborhood, rather than locking them up. Maybe they want to take a step back from the War on Drugs and break the unjust cycle of mass incarceration.¹²⁷ Neighborhood B can still formally enact its own policies, but it does so against a landscape largely determined by another jurisdiction—especially if Neighborhood A is imprisoning Neighborhood B's own residents for crimes committed while visiting Neighborhood A.¹²⁸ What may seem like a windfall for Neighborhood B from the perspective of crime control is not a windfall from the perspective of many of the other

¹²⁴ See *supra* notes 90–97 and accompanying text.

¹²⁵ Rappaport, *supra* note 16, at 757.

¹²⁶ Schragger, *supra* note 122, at 444–45 (“The spillover effects of local decisions undermine localism not because those outsiders who are affected have not contracted into the norms . . . but because [they] have not been included in the democratic process that preceded adoption of those norms.”).

¹²⁷ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2–9 (2010) (describing how mass incarceration leads to a system of racialized social control similar to that of the Jim Crow era).

¹²⁸ See *supra* Section II.B.2 (discussing inclusion).

considerations voters take into account when calibrating a criminal justice regime.

Relatedly, democratizers argue that a jurisdiction should internalize the financial costs of its criminal policies.¹²⁹ This idea acts as a check on jurisdictions by preventing them from instituting policies that they themselves would not want to pay for. But why stop at monetary costs? If the goal is to prevent negative externalities, then a jurisdiction should also internalize the practical costs of its criminal policies. When Neighborhood A enacts harsher criminal laws and enforcement policies, it shifts the practical cost of these policies—displaced crime—to Neighborhood B. But displacement is seemingly incompatible with cost internalization because displacement shifts costs outside of a jurisdiction by nature, so there is a tension in advocating for both neighborhood governance and cost internalization.

Second, displacement could lead to a “race to the bottom,” in which neighborhoods perpetually raise their criminal penalties in fear of becoming the most crime-friendly area.¹³⁰ In the above robbery hypothetical, Neighborhood B could respond by raising its own penalties to the same level as or higher than Neighborhood A. But this approach risks creating “an arms race between local communities attempting to drive crime to their neighbors.”¹³¹ After Neighborhood B responds with harsher penalties to reduce the newly increased rates of robbery, the crime flows back into Neighborhood A. Then Neighborhood A responds with even harsher sanctions, and so on. Crucially, the protectionist mentalities of the two neighborhoods may lead to much harsher criminal justice policies than the residents of each locality may have chosen absent the risk of displacement. And while the residents in this scenario are still determining what they want, they are only doing so to preempt the threat of another locality determining it for them. Instead of creating criminal laws based on their own values, the residents of both neighborhoods are driven by a fear of losing an arms race with the other.

Admittedly, displacement and diffusion can occur even when criminal law is made on a larger scale. There is even some evidence of displacement occurring on a statewide level,¹³² and the policies of areas near borders will

¹²⁹ See, e.g., Kleinfeld et al., *supra* note 11, at 1705 (proposing “[c]ost [i]nternalization,” where “[t]he county or other political unit with the authority to decide whether and how to prosecute or sentence an individual should also bear the financial costs of prosecuting or carrying out the sentence, subject to safeguards to correct for resource disparities among communities” (emphasis omitted)).

¹³⁰ Teichman, *supra* note 90, at 1834, 1859.

¹³¹ *Id.* at 1834.

¹³² *Id.* at 1848–49 (describing how Oklahoma drug laws displaced crime to neighboring states).

always risk displacing crime to other jurisdictions. But there is good reason to believe that the chances of displacement and diffusion increase as the size of a jurisdiction decreases. Research suggests that people typically commit offenses close to their homes.¹³³ More to the point, a case study found that diffusion and displacement were most evident in the areas immediately adjacent to the jurisdiction that increased its policing or penalties, and further analyses found that the rates decayed with increased distance.¹³⁴ Because people seeking to commit crimes are less likely to travel great distances to find more favorable jurisdictions, displacement and diffusion are much greater risks at the neighborhood level than at larger levels of government.

4. *Statewide or Citywide Control Tailored to Certain Neighborhoods*

In addition to neighborhood governing bodies such as neighborhood councils, neighborhood-level control could also take the form of tailored state- or city-level governance—where a state or city creates policies that apply only to a certain neighborhood.¹³⁵ Tailored state- or city-level control circumvents the need for neighborhood governments altogether by asking the existing state legislature, city council, governor, or mayor to make law and enforcement decisions according to the will of each neighborhood. This option may even guard against some risks created by neighborhood governments. A state legislator, for example, is better positioned to consider the risk of displacement and diffusion because they also represent surrounding neighborhoods. That said, tailored state- or city-level governance is not a viable alternative to neighborhood self-governance—in fact, tailored control is the least democratic means of neighborhood governance. Tailored control creates three interrelated issues: there is a lack of true representation, the state or city policies are imbued with a false sense of legitimacy, and neighborhood voters lack a political remedy. Taken together, these issues illustrate how the will of the neighborhood is elusive and difficult for state or city actors to ascertain.

First, the neighborhood views conveyed to the state legislature will not necessarily be representative of actual neighborhood views. Tailored control

¹³³ Wim Bernasco & Paul Nieuwebeerta, *How Do Residential Burglars Select Target Areas? A New Approach to the Analysis of Criminal Location Choice*, 44 BRIT. J. CRIMINOLOGY 296, 310 (2005). This research further corroborates several empirical studies which “found that the likelihood of an offender’s choosing a particular target decreases with the distance of the target from his home.” *Id.* at 299.

¹³⁴ Shane D. Johnson, Kate J. Bowers, Chris Young & Alex F.G. Hirschfield, *Uncovering the True Picture: Evaluating Crime Reduction Initiatives Using Disaggregate Crime Data*, CRIME PREVENTION & COMM. SAFETY 7, 7–16 (2001).

¹³⁵ Professor Ouziel proposed a similar arrangement, in which state legislatures would craft laws tailored to cities. Ouziel, *supra* note 67, at 2323. Because of the impracticality of neighborhood self-governance, state- or city-level governance tailored to neighborhoods is one alternate avenue that neighborhood-level democratization might take.

requires a state or city legislature to, in some way, ask the neighborhood what it desires. But the tavern owner has different interests from the priest; the homeowner from the homeless person; the senior citizen from the teenager.¹³⁶ Tailored control creates an ambassador problem—who speaks for the neighborhood?

The most obvious solution to the ambassador problem is town halls because they provide a theoretically open forum for neighborhood residents to communicate their needs to state-level representatives. Unfortunately, town halls have two big problems: they amplify the loudest voices in the room, and already-dominant groups disproportionately participate in them.¹³⁷ These two problems are well documented in community policing literature¹³⁸ and were further explored in a recent study on neighborhood zoning boards. Researchers found that residents who are older, male, long-term residents, or homeowners tend to participate more in neighborhood zoning boards than other groups.¹³⁹ This “participatory bias” then translates into a greater opportunity to influence government officials.¹⁴⁰ Town halls on criminal justice run the risk of relaying similarly unrepresentative messages to legislatures.

Another possible solution to the ambassador problem is something democratizers have already suggested: a citizen advisory board. Democratizers envision advisory committees that “include a diverse mixture of lay citizens . . . [and] community leaders,” who would “aid legislatures in the process of crafting substantive and procedural criminal law.”¹⁴¹ But given the array of divergent interests in a neighborhood, could we ensure that these boards are appropriately representative?¹⁴² Assuming the ambassadors are picked at random, there is no guarantee that they would be representative. Of course, if a statistically significant number of ambassadors were picked at random, we could be fairly confident that the results would be representative. But a state would probably not run hundreds of trials for a citizen advisory

¹³⁶ See Schulhofer, *supra* note 41, at 1082 (“Property owners, tenants, shopkeepers, senior citizens, teenagers, and the homeless have divergent interests,” so “[w]ho speaks for this ‘community?’”).

¹³⁷ See Rappaport, *supra* note 16, at 749–50 (“In short, participatory democracy will always favor those who have the time and wherewithal to participate, and the human capital to dominate.”).

¹³⁸ See, e.g., HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 146 (1977) (“[P]ersons representing special interests, such as the business community, become the strongest voices through the default of others.”); WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 107–09 (1990) (finding that white people and property owners were more likely to participate in community policing programs).

¹³⁹ Katherine Levine Einstein, Maxwell Palmer & David M. Glick, *Who Participates in Local Government? Evidence from Meeting Minutes*, 17 *PERSPS. ON POL.* 28, 33–34 (2019).

¹⁴⁰ *Id.* at 37–39.

¹⁴¹ Kleinfeld et al., *supra* note 11, at 1699.

¹⁴² See Schulhofer, *supra* note 41, at 1082.

board for practical and financial reasons. Alternatively, if the ambassadorial positions were voluntary, citizen advisory boards would suffer from the same problem as town halls: those who can and want to participate likely hold views that are not representative of the neighborhood at large.¹⁴³ To be sure, it is possible for a state to accurately discern what a neighborhood wants without using ambassadors. The state could, for instance, conduct reliable polling or simply guess correctly. Even in those unlikely events, tailored state- or city-level governance is still inherently flawed because of the issues of false legitimacy and the lack of a political remedy.

Second, town halls or citizen advisory boards could attach undue legitimacy to the laws or enforcement decisions they produce. Although these laws or decisions are likely to be unrepresentative, as explained above, some courts and scholars argue that laws made according to a neighborhood's will deserve increased deference.¹⁴⁴ Recall that Professors Kahan and Meares argue that the Supreme Court should have granted deference to a city ordinance in *Chicago v. Morales* because it was supported by Black local leaders and community organizations.¹⁴⁵ Theirs is only one side of the story. As Professors Albert Alschuler and Stephen Schulhofer note, the ordinance was far from unanimously endorsed by the city's Black community. The ordinance was drafted by white aldermen, was denounced by both Chicago's leading Black newspaper and its NAACP chapter, and saw more Black aldermen vote against it than for it.¹⁴⁶ State- or city-level decisions tailored to particular neighborhoods may masquerade as legitimate exercises of the will of those neighborhoods, regardless of whether they actually are, which threatens to provide these decisions with an undeserved layer of protection in courts.

Third, the false legitimacy accompanying tailored governance would also decrease the likelihood of a political remedy for erroneous decisions. Under ordinary voting conditions, if a legislature passes a law based on an inaccurate understanding of its constituents' preferences—possibly because of an unrepresentative town hall or advisory board—then voters have a remedy available: they can communicate their true preferences at the voting

¹⁴³ See *supra* notes 137–140 and accompanying text.

¹⁴⁴ See Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 *FORDHAM URB. L.J.* 133, 169 (2017) (“Courts typically defer widely to local enactments, particularly on matters relating to land use or school control, on the grounds that such decisions embody the collective will of the community.”).

¹⁴⁵ See *supra* notes 74–76 and accompanying text.

¹⁴⁶ Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights: A Response to Professors Meares and Kahan*, 1998 *U. CHI. LEGAL F.* 215, 217–20; see also Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 *J. CRIM. L. & CRIMINOLOGY* 775, 822–26 (1999) (surveying the conflicting community opinions).

booth through the candidates they choose. But suppose that, because of a believed neighborhood preference, a state legislature enacts a law that only applies to a certain neighborhood.¹⁴⁷ Those community members can no longer respond by voting out the representatives who enacted the law because they lack the voting power to do so. Even though the law applies uniquely to their community, the neighborhood's voters make up only a tiny fraction of the statewide voting population.

Such a situation parallels a phenomenon that election law scholars call "lockup," in which political structures make it difficult for voters to change the status quo despite popular support for the change.¹⁴⁸ The classic example is when incumbents entrench themselves in office by gerrymandering their districts to give themselves a safe majority. What was before a 51%–49% district in favor of the incumbent becomes a 90%–10% district. If the 10% oppose the gerrymander, no political remedy is available to them because they no longer hold the voting power to remove the incumbent in favor of a representative who will redraw the map back to its pre-gerrymandered state.¹⁴⁹ State- or city-level governance tailored to neighborhoods entrenches laws similarly to how gerrymandering entrenches politicians because neighborhood voters do not have enough voting power on a statewide level to elect or pressure representatives to change the law.

The only avenue for a political remedy is if the rest of a state's voters know that the law at issue is unrepresentative of the neighborhood that the law affects and help the disenfranchised neighborhood by voting for candidates who will repeal the law. But statewide voters are unlikely to know whether a law is representative of a neighborhood. They may not know that the law exists in the first place and, if they do, the law may enjoy a false sense of legitimacy unless voters know that town halls, advisory committees, and other methods of assessing a neighborhood's views are susceptible to misinterpretation. Not to mention that even assuming statewide voters know all this, they may still prioritize other interests.

Even if the state correctly interpreted the will of the community when it enacted the law, the political process effectively locks a neighborhood into

¹⁴⁷ The same effect would occur if a city enacted a law applicable only to a certain neighborhood.

¹⁴⁸ Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648–49 (1998) (first identifying and defining political lockup); see also Jarret A. Zafran, Note, *Referees of Republicanism: How the Guarantee Clause Can Address State Political Lockup*, 91 N.Y.U. L. REV. 1418, 1421 (2016) ("Lockup describes a system where the rules and structures of politics have made changing the status quo more difficult than it should be considering majoritarian preferences.").

¹⁴⁹ For an argument that the courts should play a greater role when the political process is unable to provide a remedy for gerrymandering, see *Colgrove v. Green*, 328 U.S. 549, 567, 572 (1946) (Black, J., dissenting).

that choice. If the neighborhood's voters change their mind in the future, they lack the voting power to convince a state legislature to overturn or modify the law. When neighborhood-specific law is made on a statewide or citywide level, policymakers get one bite at the apple. After that, political lockup makes a remedy unlikely. Worse yet, policymakers must often take that bite with their eyes closed because of the dubious nature of town halls and advisory boards.

C. State or Federal Institutions

Given that neighborhood governance is not viable, we turn next to the status quo: state or federal governance. Unfortunately, this too is plagued by representational issues. To be sure, state and federal institutions score better than neighborhood institutions on the second and third factors—inclusion and displacement. Because state and federal jurisdictions are larger and contain fewer borders than a nation full of neighborhood-level institutions, the risks of underincluding relevant voters and displacing crime decrease—there are simply fewer adjacent areas to displace crime into and fewer worthy voters to exclude.¹⁵⁰ But state or federal governance brings its own baggage when it comes to preference maximization. Owing to a sharp rural–urban political divide in the United States, such large jurisdictions do not maximize voters' criminal-justice-policy preferences.¹⁵¹ So while neighborhood governance suffers from jurisdictions that are too small, state or federal governance suffers from jurisdictions that are too large.

A centralized jurisdiction, such as a state or nation, must represent a wide array of voters, so it struggles to capture the diverse needs of each smaller community included within it. This is even truer in the United States today because of a large rural–urban divide in which the views of people in rural areas differ sharply from the views of people in urban areas. There is almost a perfect correlation between an area's population density, or how urban it is, and its political affiliation.¹⁵² Unsurprisingly, urban areas tend to

¹⁵⁰ State- or federal-level institutions do, however, run the risk of overincluding voters. *See infra* notes 187–189 and accompanying text.

¹⁵¹ *See* Scharff, *supra* note 87, at 1491–93 (emphasizing that decentralization obviates the concern “that rural state legislators are voting on policies that affect urban residents and urban state legislators are voting on policies that affect rural residents”).

¹⁵² Stahl, *supra* note 144, at 139; Paul A. Diller, *Reorienting Home Rule: Part 1—the Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 292–97 (2016) (describing the rural–urban divide and noting that “density of an area’s population is an extraordinary predictor of which way it will vote in a presidential election”); *see also* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 202–05 (2008) (describing the relationship between political affiliation and population density during George W. Bush’s presidential campaigns); Richard

be more liberal, while rural areas tend to be more conservative.¹⁵³ What is more, the rural–urban divide might even extend beyond the ballot box. According to some scholars, political parties represent not only political views but also cultural norms. Professors Christopher Achen and Larry Bartels, for example, “argue that parties are all-encompassing social groups,” not just collections of people with common political views.¹⁵⁴ Another scholar “similarly argues that today’s partisan divisions represent competing lifestyles with . . . mutually opposed . . . cultures, beliefs, interests, politics, and geography.”¹⁵⁵

Can we infer from this division of political views a comparable rural–urban divide on criminal justice reform? The data suggest we can. True, there is some agreement among Republicans and Democrats on criminal justice issues, such as reducing the prison population.¹⁵⁶ But even on this fairly

Florida, *America’s Class-Divided Electorate*, BLOOMBERG CITYLAB (Oct. 27, 2016, 11:52 AM), <https://www.bloomberg.com/news/articles/2016-10-27/what-divides-clinton-and-trump-voters-class-and-culture> [<https://perma.cc/W6QT-ASEE>] (describing the relationship between political affiliation and population density during Donald Trump and Hillary Clinton’s presidential campaigns); Alan Greenblatt, *Beyond North Carolina’s LGBT Battle: States’ War on Cities*, GOVERNING (Mar. 23, 2016), <https://www.governing.com/archive/gov-states-cities-preemption-laws.html> [<https://perma.cc/A22Y-4XMR>] (“[T]raditional regional rivalries almost perfectly align with partisan divisions.”).

¹⁵³ Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1262–65 (2014) (discussing the left-leaning preferences of big-city residents); Jonathan A. Rodden, *The Long Shadow of the Industrial Revolution: Political Geography and the Representation of the Left* 60 (Mar. 25, 2011) (unpublished manuscript), <http://web.stanford.edu/~jrodden/wp/shadow.pdf> [<https://perma.cc/2V4D-YXEQ>] (finding that “a relatively tight correlation between population density and left voting is quite ubiquitous in industrialized societies” and tracing the pattern back to residential behaviors during the Industrial Revolution); BISHOP, *supra* note 152, at 202–05 (discussing the rural trend toward conservatism). Consider, for example, the rising Democratic support in cities and suburban areas that helped Democrats flip Georgia in the 2020 general presidential election and senatorial runoff elections. See Jan Nijman, *Georgia’s Political Shift: A Tale of Urban and Suburban Change*, U.S. NEWS & WORLD REP. (Nov. 9, 2020), <https://www.usnews.com/news/cities/articles/2020-11-09/georgias-political-shift-a-tale-of-urban-and-suburban-change> [<https://perma.cc/J3S5-ZTX3>]. This is not to diminish the important role that many rural communities of color played in the elections. See Jim Burrell, *Experts Deconstruct How Georgia’s Rural Communities of Color Delivered for Democrats in November, Senate Runoffs*, WABE (Jan. 12, 2021), <https://www.wabe.org/experts-deconstruct-how-georgias-rural-communities-of-color-cemented-a-democratic-victory-in-november-senate-runoffs/> [<https://perma.cc/6T7Z-7JNB>].

¹⁵⁴ Stahl, *supra* note 144, at 149 (citing CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 307 (2016)). The divide even extends to how one thinks. See generally JONATHAN HAIDT, *THE RIGHTIOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 3–4 (2012) (arguing that liberals and conservatives have entirely different intuitions about right and wrong).

¹⁵⁵ Stahl, *supra* note 144, at 149 (citing BISHOP, *supra* note 152, at 22–23).

¹⁵⁶ According to a study conducted on behalf of the ACLU, “81% of Democrats, 71% of Independents and 54% of Republicans” agree that “it is important for the country to reduce its prison populations.” Danny Franklin, *ACLU Nationwide Poll on Criminal Justice Reform*, ACLU (July 15, 2015), <https://www.aclu.org/other/aclu-nationwide-poll-criminal-justice-reform> [<https://perma.cc/EJC5->

bipartisan topic,¹⁵⁷ there is still a 27% difference between Democrats and Republicans.¹⁵⁸ Even among those who agree the prison population should be reduced, Democrats and Republicans often have different motives—such as reducing incarceration itself versus reducing government spending.¹⁵⁹ Partisan division likely lies just beneath the surface of this supposedly bipartisan topic.

Take Illinois as an example: 55% of Illinois residents agree that “[t]he criminal justice system is biased against black people,” while 35% disagree.¹⁶⁰ Mapping these results against location shows that the rural–urban divide exists on a spectrum—the farther respondents were from a city, the less they tended to agree with the statement. The poll found 63% agreement among Chicago residents, 60% agreement among residents of Chicago’s suburbs, and only 42% agreement among downstate residents.¹⁶¹ Reflecting on the results, Professor John Jackson noted that “race, party, and place of residence are driving forces in shaping the voters’ views on bias in the criminal justice system” and that “many Illinois voters live in two different worlds when it comes to matters of race and contact with the criminal justice system.”¹⁶² Researchers identified a similar trend, though less steep, when

EE74]; *see also id.* (finding that “87% of respondents agree that drug addicts and those with mental illness should not be in prison, [and that] they belong in treatment facilities”).

¹⁵⁷ *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391 (Dec. 21, 2018) (codified in scattered sections of 18 U.S.C., 21 U.S.C., 34 U.S.C.) (reforming federal prisons and sentencing laws, among other things). This act is recognized as a “culmination of a bi-partisan effort.” *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/overview.jsp> [<https://perma.cc/3PC8-AXCU>].

¹⁵⁸ *See* Franklin, *supra* note 156 (conducting a nationwide poll on criminal justice reform).

¹⁵⁹ Shaila Dewan & Carl Hulse, *Republicans and Democrats Cannot Agree on Absolutely Anything. Except This.*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/us/prison-reform-bill-republicans-democrats.html> [<https://perma.cc/VLZ5-BJET>]. Similarly, even Democrats and Republicans who opposed the First Step Act of 2018 did so for diametrically opposed reasons. Republican Senator Tom Cotton, for example, argued that the legislation would lead to increased crime by letting offenders out of prison early. *See* German Lopez, *The First Step Act, Explained*, VOX (Feb. 5, 2019, 9:42 PM), <https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform> [<https://perma.cc/GLU3-WVAY>]. On the other hand, a number of prominent Democrats, like Senator Dick Durbin and Congressman John Lewis, initially opposed the bill because it did not go far enough in reforming sentencing. *See* Justin George, *Is the “First Step Act” Real Reform?*, MARSHALL PROJECT (May 22, 2018), <https://www.themarshallproject.org/2018/05/22/is-the-first-step-act-real-reform> [<https://perma.cc/E6SX-W65G>].

¹⁶⁰ *Illinois Voters Have Strong Views on Major Issues Facing the State: Simon Poll*, SIU NEWS (Mar. 19, 2018), <https://news.siu.edu/2018/03/031918-simon-poll-state-issues.php> [<https://perma.cc/NQA6-5VNW>] [hereinafter *Illinois Voters Have Strong Views*].

¹⁶¹ *Id.* The study also showed division along partisan and racial lines: 73% of Democrats agreed, compared with only 29% of Republicans; 50% of white voters agreed, compared with 79% of Black voters and 63% of Hispanic voters. *Id.*

¹⁶² *Id.*

they asked voters if the state should remove barriers that make it more difficult for previously incarcerated people to find work.¹⁶³

Federal-level governance may contain an even sharper rural–urban divide. Voting data show there are fewer moderates in heavily conservative states, which suggests there may be an even greater disagreement on criminal justice issues between rural residents of more conservative states and urban residents of more liberal states than between rural and urban residents within the same state.¹⁶⁴ This would make federal-level governance even less representative than state-level governance because representatives are forced to compromise between an even larger array of diverse interests and needs.

That said, the rise of political polarization—with parties primarily appealing to the extremes—might render the differences between the federal and the state levels small. Research suggests that politics is increasingly a zero-sum game rather than an exercise in appealing to a middle ground: political parties seek to maximize the preferences of their ideological bases, rather than represent the preferences of the entire voting jurisdiction. According to Professor Kenneth Stahl, both major parties have given up on compromise “and have instead devoted their resources to achieving victory through demography”—a fight not over the issues but over the franchise of voting itself.¹⁶⁵ The most notable example is the recent wave of legislation in Republican-controlled states that makes it more difficult to vote.¹⁶⁶ The upshot? Republican legislators answer almost exclusively to rural residents and Democratic legislators answer almost exclusively to urban residents. Each set of representatives is thus incentivized only to represent its base.¹⁶⁷ Such a system inefficiently realizes policy preferences, since it does so only for very particular groups. The premise of self-determination—voters have

¹⁶³ The poll found that 80% of Chicago voters and 77% of suburban Chicago voters agreed, but only 71% percent of downstate voters agreed. *Id.*

¹⁶⁴ *Political Ideology by State (2014)*, PEW RSCH. CTR. (2014), <https://www.pewforum.org/religious-landscape-study/compare/political-ideology/by/state/> [<https://perma.cc/YQ4B-DP74>] (showing that more conservative states tend to have a greater proportion of conservative voters to moderate voters).

¹⁶⁵ See Stahl, *supra* note 144, at 159–61 (noting that both Republicans and Democrats in power have enacted voting rules that benefit their party).

¹⁶⁶ See Ryan P. Haygood, *Hurricane SCOTUS: The Hubris of Striking Our Democracy’s Discrimination Checkpoint in Shelby County & the Resulting Thunderstorm Assault on Voting Rights*, 10 HARV. L. & POL’Y REV. S11, S35–S49 (2016) (surveying voting restrictions in Republican-controlled states, such as polling-place closures and voter-roll purges); see also *State Voting Bills Tracker 2021*, BRENNAN CTR. FOR JUST. (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021> [<https://perma.cc/9B84-RDY9>] (finding that over 361 bills to restrict voting access are in circulation in forty-seven states as of March 24, 2021). Democrats, on the other hand, “have responded by attempting to expand the [voter] pool” to include people such as convicted felons. Stahl, *supra* note 144, at 160.

¹⁶⁷ See Stahl, *supra* note 144, at 154.

control over policy choices that affect them—is surely offended if small sets of voters are making policy choices on behalf of the voting pool at large.

But the rural–urban divide is not necessarily a negative feature of our democracy. There are practical reasons why it exists. Rural and urban voters might not just *want* different criminal laws but *need* different laws. Take gun control as an example. As Professor Shawn Fields argues, there may be good reasons why firearm laws should be different in rural and urban areas.¹⁶⁸ Rural residents use firearms for activities that are not possible in urban areas, such as hunting and outdoor target shooting, and use different types of firearms than urban residents.¹⁶⁹ Most notably, rural gun owners use firearms for self-defense in different ways from urban gun owners.¹⁷⁰ In urban areas, gun owners favor a concealable weapon “to provide short-term deterrence until law enforcement can arrive.”¹⁷¹ But in rural areas, gun owners instead must “supplement” traditional law enforcement in “fast-moving life-and-death situations” because law enforcement takes longer to arrive—something that might require more than a concealable handgun.¹⁷² So rural residents use different firearms, in different ways, and for different reasons. Making gun-control laws on a federal or state level, then, cannot possibly maximize both urban and rural residents’ gun-control preferences. There are, of course, sound reasons to have uniform gun laws—such as preventing people from buying guns in rural areas and taking them back to urban areas—but preference maximization is not one of those reasons.

The rural–urban divide places representation in tension with federal or state governance. Rural and urban residents have distinct preferences, sometimes driven by distinctly different realities. Self-determination therefore necessitates a unit of governance smaller than federal- or state-level institutions to more efficiently maximize policy preferences but a unit large enough to reduce the risks of displacement and lack of inclusion.

III. INTERMEDIATE INSTITUTIONS

The drawbacks of neighborhood, state, and federal governance inform what the democratic ideal *would* look like. Superior institutions would better maximize policy preferences, encapsulate a transient populace, and prevent displacement between jurisdictions. These institutions do, in fact, exist. This Note defines them as “intermediate-level” institutions, which includes

¹⁶⁸ Fields, *supra* note 81, at 474–76.

¹⁶⁹ *Id.* at 474.

¹⁷⁰ *Id.* at 474–75 (“[G]eographical variance informs how [the Second Amendment right to self-defense] will be exercised.”).

¹⁷¹ *Id.* at 475.

¹⁷² *Id.*

county and regional governments. In the urban context specifically, a regional legislature—rather than a city or county legislature—is the most democratically sound institution to make or enforce criminal law.

The intermediate level includes jurisdictions that are larger than a neighborhood but smaller than a state—units such as counties, regions, or major cities. This Part does not seek, however, to label units as intermediate or not, but instead to define the qualities of intermediate institutions. Classifying particular institutions as intermediate requires a case-by-case approach because we assign similar labels to dissimilar institutions. For example, the City of Chicago has a population of just under 2.7 million, while the City of Vidalia has a population of just over 10,000.¹⁷³ One is a dense Midwestern urban area, while the other is located in rural south Georgia. Even though both are cities, each area predictably has distinct representational needs, so considering them together is unhelpful. The most democratically sound institutions satisfy a few self-determination factors, but depending on geography, the types of units (cities, counties, or regions) that satisfy these factors will vary.

Importantly, no single institution represents the ideal. The intermediate level is *generally* more representative than the neighborhood, state, and federal levels. Although they are not perfect, after considering a series of tradeoffs, intermediate institutions represent the best-fit model for representation in criminal lawmaking and enforcement decisions. Even choosing among intermediate institutions involves tradeoffs.

The focus of this Part is threefold. First, it explains why intermediate institutions are a better choice than neighborhood, state, or federal institutions. Second, it catalogues the tradeoffs made when selecting among intermediate institutions. Finally, this Part explores how regional governance would work in practice.

A. The Relative Appeal

From a representational perspective, intermediate-level institutions are better suited to control criminal lawmaking and enforcement than neighborhood, state, and federal institutions.

¹⁷³ Compare *QuickFacts: Chicago City, Illinois*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/quickfacts/fact/table/chicagocityillinois,US/PST045219> [https://perma.cc/JG6E-56M6] (estimating that Chicago's population is 2,693,976), with *QuickFacts: Vidalia City, Georgia*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/quickfacts/fact/table/vidaliacitygeorgia/HSG495219> [https://perma.cc/C225-PQEL] (estimating that Vidalia's population is 10,402).

1. *Versus Neighborhood-Level Institutions*

Intermediate-level institutions possess two chief advantages over neighborhood-level institutions: they are better equipped to include a transient populace and less likely to displace crime between jurisdictions.

As to inclusion, the larger a jurisdictional boundary is drawn, the lower the chance that residency restrictions will disenfranchise nonresidents who deserve a voice in a jurisdiction's criminal justice policy-making.¹⁷⁴ Self-determination requires that individuals can influence the policies that affect them, so a jurisdiction must include those who are active within its boundaries. Data suggest that the average person's day-to-day scope of activity exceeds the boundaries of a neighborhood but not that of a broader unit, such as a region. In 2017, a person's average trip distance to or from work in the United States was 12.2 miles.¹⁷⁵ The average distances to the store (7.9 miles), errands (7.9 miles), school or church (7.0 miles), and social activities (11.4 miles) were all similar.¹⁷⁶ Other research shows that people embarking on trips of this length are likely to travel through more than one neighborhood, at least in urban areas. The Centers for Disease Control and Prevention found that the average distance an urban resident travels to a food establishment is only 2.6 miles.¹⁷⁷ But even when urban residents travel only 2.6 miles, they reach different neighborhoods in approximately two-thirds of those trips.¹⁷⁸ This suggests that other daily activities with greater average trip distances, such as going to work or school, also take people out of the neighborhoods they live in. Intermediate-level jurisdictions encompass this transience between neighborhoods but not at a size that would fall prey to the preference-maximization problems posed by the rural–urban divide, such as state- or federal-level institutions would. Placing the power to make criminal laws with an intermediate-level legislature therefore allows people to have a say in the criminal laws governing the areas that they spend time in on a day-to-day basis.

¹⁷⁴ See *supra* note 89 and accompanying text (describing inclusion).

¹⁷⁵ U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., SUMMARY OF TRAVEL TRENDS: 2017 NATIONAL HOUSEHOLD TRAVEL SURVEY 17 (2018), https://nhts.ornl.gov/assets/2017_nhts_summary_travel_trends.pdf [<https://perma.cc/2H3E-5TCF>]; see also ELIZABETH KNEEBONE & NATALIE HOLMES, METRO. POL'Y PROGRAM AT BROOKINGS, THE GROWING DISTANCE BETWEEN PEOPLE AND JOBS IN METROPOLITAN AMERICA 3 (2015) (finding that the average commute distance in Atlanta is 12.8 miles).

¹⁷⁶ U.S. DEP'T OF TRANSP., *supra* note 175, at 17.

¹⁷⁷ Jodi L. Liu, Bing Han & Deborah A. Cohen, *Beyond Neighborhood Food Environments: Distance Traveled to Food Establishments in 5 US Cities, 2009–2011*, PREVENTING CHRONIC DISEASE, Aug. 2015, at 1, 1 (finding a standard deviation of 3.7 miles).

¹⁷⁸ *Id.* (measuring neighborhoods by neighborhood census tracts).

As to displacement, intermediate institutions are less likely than neighborhood institutions to displace crime by virtue of their larger size.¹⁷⁹ Research suggests displacement is less likely to occur as jurisdictional size increases.¹⁸⁰ Intermediate institutions could, of course, still displace crime—even state-level jurisdictions have been shown to do so.¹⁸¹ But the risk of displacement is severely lessened between entire cities or regions, as opposed to small neighborhoods.¹⁸²

Intermediate-level governance derives its two advantages over neighborhood governance—inclusion and displacement—largely because of its size. This raises the question: why doesn't state- or federal-level governance come with the same advantage over intermediate-level governance? As it turns out, bigger is not always better.

2. *Versus State- and Federal-Level Institutions*

Intermediate-level institutions are also more representative than state or federal institutions. As to preference maximization, intermediate institutions avoid the sharp rural–urban divide from which state and federal institutions suffer because intermediate institutions can cover urban and rural areas with separate governance structures.¹⁸³ Recall that political affiliation and views on criminal justice reform tightly track population density.¹⁸⁴ Most states divide into three main units of density—rural, suburban, and urban—which all have distinct viewpoints.¹⁸⁵ Polling data on both political ideology and criminal justice reform suggest that these views exist on a spectrum: cities are the most left-leaning, suburbs are also left leaning but not as heavily, and rural areas are right leaning.¹⁸⁶ So three distinct groups exist, and two of those

¹⁷⁹ See *supra* Section II.C (discussing the reduced risk of displacement at the state or federal level in comparison to the neighborhood level).

¹⁸⁰ See *supra* notes 132–134 and accompanying text.

¹⁸¹ Teichman, *supra* note 90, at 1848–49 (describing how Oklahoma drug laws displaced crime to neighboring states).

¹⁸² See *supra* notes 132–134 and accompanying text (describing the increased risk of displacement in smaller jurisdictions).

¹⁸³ For a greater discussion of the rural–urban divide and the problems it creates, see *supra* Section II.C.

¹⁸⁴ See *supra* notes 152–163 and accompanying text.

¹⁸⁵ UNIV. OF CHI. HARRIS PUB. POL'Y & ASSOC. PRESS-NORC CTR. FOR PUB. AFFS. RSCH., HOW THE URBAN/RURAL POLITICAL DIVIDE PLAYS OUT IN AMERICA'S SUBURBS 4 (2019) [hereinafter UNIV. OF CHI. HARRIS PUB. POL'Y], https://apnorc.org/wp-content/uploads/2020/02/UChicagoHarrisApNorcPoll2_Final-1.pdf [<https://perma.cc/YV7B-FKWT>] (finding that 42% of rural residents are Republicans, while 28% are Democrats; 39% of suburban residents are Republicans, while 46% are Democrats; and 17% of urban residents are Republicans, while 58% are Democrats).

¹⁸⁶ See *id.*; see also notes 148–151 and accompanying text (discussing the phenomenon of “lockup”—when political structures entrench the status quo despite majoritarian support for change—as applied to popular desire for criminal justice reform).

groups are significantly different from the third. Institutions that group all three together, as states and nations do, are a poor fit to maximize the preferences of all three groups. By contrast, an intermediate institution—such as a city, county, or region—can represent a single group and thus more easily maximize its preferences. While intermediate institutions will never perfectly capture groups with homogenous viewpoints, they are small enough to capture a rural or metropolitan area with greater precision, avoiding the extreme divides that state and federal institutions capture. By representing discrete subsets of people, which we know exist with a degree of empirical certainty, intermediate institutions can make it so that voters are no longer forced to settle for either an unsatisfactory compromise or a winner-takes-all approach.

As to inclusion, intermediate institutions also capture relevant voters with greater precision because state and federal institutions are overinclusive. Recall that data show that people's average trip distances are around twelve miles and under.¹⁸⁷ While many people commute from suburbs to a city, which will be addressed in more detail below,¹⁸⁸ the data suggest people's daily activity is at most regional in scope, not statewide or nationwide. For example, in surveying the distances people commute to work in ninety-six large metropolitan areas, one study found that no area registered a median higher than 12.8 miles.¹⁸⁹

Although displacement might, on its face, seem to weigh in favor of states because displacement decreases as size increases,¹⁹⁰ research suggests that displacement might tail off after the intermediate level. In other words, there might not be much difference between intermediate-level displacement and state-level displacement. Because research suggests that offenders are less likely to commit crimes the farther they are from their routine spaces or homes, the chances of displacement might be negligible by the time a city, county, or regional boundary is reached.¹⁹¹ That said, there is no denying that the risk of displacement is always heightened near jurisdictional borders—and intermediate governance would create more borders than state governance. The federal level, containing only borders with other countries, is likely then the safest from a displacement perspective. But whether either

¹⁸⁷ See *supra* notes 175–176 and accompanying text.

¹⁸⁸ See *infra* Section III.B.2.

¹⁸⁹ KNEEBONE & HOLMES, *supra* note 175, at 20–21.

¹⁹⁰ See *supra* notes 179–180 and accompanying text. Recall, however, that displacement does not disappear altogether at the statewide level. See Teichman, *supra* note 90, at 1848–49.

¹⁹¹ See Johnson et al., *supra* note 134, at 14 (“[D]isplacement . . . would be expected to peak in . . . adjacent areas and decay across greater distances.”).

state- or federal-level governance causes meaningfully less displacement than intermediate-level governance is less clear from existing research.

Representational self-determination in criminal law finds its sweet spot in the middle. At either end—hyperlocal or hyperbroad—representation scores poorly. But at the intermediate level, representational principles peak.

B. *Which Intermediate Institution Is Best?*

One question remains: which institution *within* the intermediate category best represents voters? Again, this analysis is guided by the three self-determination factors: preference maximization, inclusion, and displacement. These factors—not a particular institution—should be the starting point for any inquiry into representational democracy in criminal law. The United States is a diverse country with geography, demographics, and needs that vary from place to place. Applying the three factors in one location might yield a different result than in another.

This Note does not contend that cities, counties, or regions are best able to represent people in all circumstances—after all, even institutions with the same name can describe vastly different places, such as the City of Chicago and the City of Vidalia. Instead, the point of this Note is to lay out considerations that can be applied on a case-by-case basis. Such an approach circumvents a central problem in the democratization movement: defining a “community.”¹⁹² Because intermediate institutions are identified on a case-by-case basis, we do not need a one-size-fits-all definition of community—flexibility in identifying a community and its unique needs is already built into intermediate institutions.

But there are patterns. The case-by-case analysis yields a consistent result in metropolitan areas, where regional governance best represents voters. In rural areas, which are less uniform, county or regional legislatures are likely to best represent voters. This Section concludes by discussing the practical realities of regional governance and what criminal justice reformers can do with these findings.

1. *Rural Institutions*

A county or regional government will, in general, best represent voters in rural areas.¹⁹³ But because population differs widely from place to place in

¹⁹² See *supra* Section I.B.

¹⁹³ In accordance with the U.S. Census, this Note considers rural areas to have a population of less than 50,000. See *Defining Rural Population*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/rural-health/about-us/definition/index.html#:~:text=Under%20this%20definition%2C%20about%2021,is%20still%20classified%20as%20rural> [https://perma.cc/WA5G-VMPN] (describing rural areas as those with fewer than 50,000 people and those which do not qualify as an urban cluster with between 2,500 and 50,000 people in a concentrated area).

rural America, a uniform solution is both unlikely and undesirable. Instead, we must use a more flexible approach to best represent rural voters, especially when homogenous groups exist across county lines.

As a starting point, rural institutions should not be treated coequally with urban institutions bearing the same name—or even with other rural institutions bearing the same name. For example, the urban neighborhood of Hyde Park in Chicago has more than twice as many residents as the rural City of Vidalia, despite the fact Hyde Park is formally a smaller unit of governance.¹⁹⁴ There are also important differences between rural and urban areas beyond population. Rural cities and towns are often geographically larger than urban neighborhoods, which means they often do not possess the same level of risk of underinclusion or displacement as an urban neighborhood with the same number of residents.¹⁹⁵

Next, although the choice should depend on the unique factors of each rural area, counties are a reasonable place to begin the inquiry. Most rural counties feature a population with high levels of agreement, allowing county governance to maximize preferences, and an area large enough to reduce displacement.¹⁹⁶ As to inclusion, according to census data, “30% of rural residents commute 30 minutes one way to work and 4% travel as much as 90 minutes.”¹⁹⁷ These data seem to suggest that rural people’s daily scope of activity exists largely within one county. So according to the self-determination factors, county-level governance is likely a good fit in many rural areas.

But we need not stop there. Perhaps a political jurisdiction that does not currently exist would represent voters even more efficiently. Indeed, some rural areas might warrant an outside-the-box solution. Imagine a large, politically homogenous group of people that is evenly distributed among two adjacent counties, where either county’s jurisdiction standing alone would

¹⁹⁴ Compare UNIV. OF CHI. MED., COMMUNITY PROFILE: HYDE PARK 1 (2019), <https://www.uchicagomedicine.org/-/media/pdfs/adult-pdfs/community/chna-community-profiles/hyde-park-community-profile.pdf> [<https://perma.cc/8Y7V-WMTN>] (estimating that Hyde Park’s population is 26,573), with *QuickFacts: Vidalia City, Georgia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/vidaliacitygeorgia/HSG495219> [<https://perma.cc/J6CT-25MK>] (estimating that Vidalia’s population is 10,402 as of 2019).

¹⁹⁵ See *supra* Sections II.B.2–II.B.3 (describing the inclusion and displacement risks in urban neighborhoods).

¹⁹⁶ See *supra* notes 152–153 and accompanying text (describing the high levels of political agreement in rural areas); see also *supra* notes 190–192 and accompanying text (describing the reduced risk of displacement as jurisdictional size increases).

¹⁹⁷ See Opinion, *Getting from Here to There in Rural America—Solutions for the Carless*, APOLITICAL (Dec. 12, 2018), <https://apolitical.co/solution-articles/en/getting-from-here-to-there-in-rural-america-solutions-for-the-carless> [<https://perma.cc/W4VK-BWEX>].

insufficiently represent the group according to the three factors. Here, the best possible jurisdiction is a regional one.¹⁹⁸

How, then, should we decide when to use county governance and when to use regional governance in rural areas? To decide between the two, states must poll rural areas or make use of data already available in resources such as the census.¹⁹⁹ Rural areas are presently difficult to represent only because without area-specific data, it is difficult to predict *ex ante* how best to represent each area—more data on an area’s criminal justice preferences, general scope of activity, and displacement will make the choice easier as states make these case-by-case determinations. Of course, collecting these data would create financial costs. But costs that drastically improve the efficacy of our democratic system are worth bearing. After all, if our system does not adequately represent voters on an issue as critical as criminal justice reform, then it is not much of a democratic system at all.

2. *The Urban–Suburban Problem: Toward a Regional Government*

In metropolitan areas, instead of city or county governments, regional governments are best equipped to represent voters. In line with previous scholarship, a region is defined as a jurisdiction that covers a metropolitan area,²⁰⁰ which is an area containing a large population nucleus—a city of 50,000 or more people—“with adjacent communities having a high degree of economic and social integration with that” nucleus.²⁰¹ In other words, a region covers a city and its suburbs. While proposals for regional

¹⁹⁸ As shown in the next Section, a regional government is sometimes necessary to best represent voters. *See infra* Section III.B.2 (discussing regional governance in metropolitan areas).

¹⁹⁹ *See* MICHAEL RATCLIFFE, CHARLYNN BURD, KELLY HOLDER & ALISON FIELDS, U.S. CENSUS BUREAU, *DEFINING RURAL AT THE U.S. CENSUS BUREAU* 3 (2016), https://www2.census.gov/geo/pdfs/reference/ua/Defining_Rural.pdf [<https://perma.cc/58V7-R3Y7>] (discussing the ways in which rural communities are delineated in the census).

²⁰⁰ *See* Briffault, *supra* note 50, at 3.

²⁰¹ *Metropolitan and Micropolitan: About*, U.S. CENSUS BUREAU (2020), <https://www.census.gov/programs-surveys/metro-micro/about.html> [<https://perma.cc/7JFX-PPSJ>].

governments are rare²⁰² and actual regional governments are rarer,²⁰³ states can delegate power to these institutions under their constitutional home rule powers.²⁰⁴ This Section describes why regional governments are up to the task of leading criminal justice reform, and the next Section describes what regional governments could look like.

First, although preference maximization could weigh against regional representation, any negative effects can be mitigated. Suburban voters create a representational headache for regional representation—and as “perhaps the largest single bloc of the electorate in many states,”²⁰⁵ they are an important group to represent. Generally, views of suburban voters track population density, meaning denser suburbs are more left leaning. Indeed, suburbs closer to cities tend to vote for Democrats, while suburbs farther away from cities tend to vote for Republicans.²⁰⁶ The difference in views could also vary among metropolitan areas. In a metropolitan area like Chicago, for example, a regional government would not maximize preferences significantly less than the city government. Recall that in the poll discussed in Section II.C—where voters were asked two questions about criminal justice—there was only a 3% disagreement between urban and suburban voters.²⁰⁷ Other areas, however, likely have higher levels of disagreement between their cities and suburbs. A nationwide poll found that 39% of suburban residents are Republicans, while 46% are Democrats, and that 17% of urban residents are

²⁰² Briffault, *supra* note 50, at 6 (“Proposals for full-fledged regional governments are rare, but regionalists regularly call for new regional processes, structures, or institutions that can identify regional problems, formulate regional solutions, implement those solutions, and coordinate regional actions over a wide range of policy domains.” (footnote omitted)). For examples of such proposals, see DAVID RUSK, CITIES WITHOUT SUBURBS 85 (1993) (advocating for metropolitan governments as a “much better [alternative] than trying to get multiple local governments to act like a metropolitan government” because they have a “more lasting and stable framework for sustained, long-term action”); Thomas A. Brown, *Democratizing the American Dream: The Role of a Regional Housing Legislature in the Production of Affordable Housing*, 37 U. MICH. J.L. REFORM 599, 601 (2004) (calling for the creation of a regional housing legislature).

²⁰³ Portland, Oregon’s Metropolitan Service District is the only elected regional government in the United States. See *What Is Metro?*, OR. METRO, <https://www.oregonmetro.gov/regional-leadership/what-metro> [<https://perma.cc/QC2K-3WK8>] (“Metro . . . bec[ame] the nation’s first directly elected regional government.”); Carl Abbott, *Metro Regional Government*, OR. ENCYCLOPEDIA (Mar. 17, 2018) [<https://perma.cc/ZV3C-4J6Z>] (“Metro has remained the only directly elected regional government for any United States metropolitan area.”); see also RUSK, *supra* note 202, at 104 (describing the district). The Twin Cities in Minnesota also have a regional government, although not an elected one. See *Who We Are*, METRO. COUNCIL, <https://metro council.org/About-Us/Who-We-Are.aspx> [<https://perma.cc/CAV4-D787>].

²⁰⁴ See *supra* notes 80–83 and accompanying text (describing state constitutional home rule powers).

²⁰⁵ Stahl, *supra* note 144, at 139 n.23.

²⁰⁶ *Id.*

²⁰⁷ See *Illinois Voters Have Strong Views*, *supra* note 160.

Republicans, while 58% percent are Democrats.²⁰⁸ And because political affiliation is correlated with views on criminal law,²⁰⁹ disagreement in other metropolitan regions may be greater than in Chicago. When a city and its suburbs do not share high levels of agreement, a state might face a choice between representing people only in their places of residence, with one government for the city and one for the suburbs—which runs afoul of inclusion but maximizes policy preferences—or representing people across their entire daily scope of activity with a regional government—which potentially decreases preference maximization.

These challenges to preference maximization, however, can be mitigated with precise line drawing. The facts that population density heavily correlates with political preferences and that suburbs closer to cities are more liberal²¹⁰ can inform where a state draws the boundaries of regional governments. States can also directly measure preference maximization by polling the areas in question. Alternatively, states could allow cities and suburbs to self-sort by giving them the choice to opt in or out of metropolitan governments through a vote. This might result in two, or possibly more, regional governments in a metropolitan region: one encompassing a city and its most similar nearby suburbs and the other encompassing a city's more conservative and more distant suburbs.

Second, a regional government is superior to a city or county government largely because of inclusion: regional governments best capture the daily movements of voters in metropolitan areas. Rather than spending their lives in one city or neighborhood, people tend to move across cities within a region.²¹¹ Today, regions—not cities—function as labor markets, housing markets, and customer bases.²¹² Modern travel data illustrate this, showing a substantial flow of two groups of people between cities and suburbs. The first group—traditional commuters—travel from a suburb to a city. For example, Manhattan's population nearly doubles in the daytime,²¹³

²⁰⁸ See UNIV. OF CHI. HARRIS PUB. POL'Y, *supra* note 185, at 4.

²⁰⁹ See *supra* notes 156–163 and accompanying text.

²¹⁰ See Stahl, *supra* note 144, at 139 n.23.

²¹¹ See Briffault, *supra* note 50, at 3 (“[P]eople . . . do not concentrate their daily lives within any one locality but, rather, regularly move back and forth among multiple municipalities across a region.”); see also Neal Peirce, *Regionalism and Technology*, 85 NAT'L CIVIC REV. 59, 59 (1996) (“[M]etropolitan regions—‘citistates’[—]are the true cities of our time . . .”).

²¹² See Briffault, *supra* note 50, at 3 (“[B]usinesses look to the region, rather than to the localities in which they are located, for their suppliers, workers, and customers.”).

²¹³ See Emily Badger, *The Most Important Population Statistic that Hardly Ever Gets Talked About*, BLOOMBERG CITYLAB (May 30, 2013, 2:33 PM), <https://www.citylab.com/transportation/2013/05/most-important-population-statistic-hardly-ever-gets-talked-about/5747/> [<https://perma.cc/6HQG-7FCP>] (reporting that, based on American Community Survey data collected between 2006 and 2010, Manhattan's daytime commuter-adjusted population is 3,083,102).

Washington, D.C.'s increases by 78% percent and Boston's by 40%.²¹⁴ The second group—reverse commuters—travel from a city to a suburb. Reverse commuters comprise 4.8 million members of the U.S. population, according to the Census Bureau.²¹⁵ In Philadelphia, for example, over 146,000 workers reverse commute each day.²¹⁶ Because people no longer confine their lives to one city, the inclusion factor counsels for regional representation over municipal representation.

Inclusion also favors regional representation over county representation. Although a county may, in some instances, capture both a city and its suburban areas, counties cannot do so with the tailor-made precision of regional governments. For example, Cook County covers Chicago and some, but not all, of its suburbs.²¹⁷ And Fulton County covers part of Atlanta and some of its most populous suburbs, such as Alpharetta and Roswell,²¹⁸ but not much of Atlanta's eastern half or other populous suburbs, such as Marietta.²¹⁹ Unlike with counties, which were drawn before the economic and social scope of modern life developed, we can draw regional government lines according to the modern realities of metropolitan populaces to include as many relevant voters as possible.

Lastly, displacement may not heavily affect the choice between a regional government and a city or county government.²²⁰ True, regions are by nature bigger than the cities they include, so displacement—which is dependent mostly on size—may marginally decrease at the regional level.²²¹

²¹⁴ LYNDIA LAUGHLIN, PETER MATEYKA & CHARLYNN BURD, U.S. CENSUS BUREAU, CHARACTERISTICS OF DAYTIME URBAN COMMUTERS FOR 20 U.S. CITIES: GENDER, WORK, AND FAMILY 4 fig.1 (2015) (displaying commuter-adjusted population change in twenty U.S. cities); *see also* *Census Bureau Reports 253,000 Workers Commute into Philadelphia County, Pa., Each Day*, U.S. CENSUS BUREAU (Mar. 5, 2013), <https://www.census.gov/newsroom/archives/2013-pr/cb13-r20.html> [<https://perma.cc/4MF7-5V2R>] (reporting that 27.4% of Philadelphia workers commute outside the county where they live).

²¹⁵ *Why More People Are Commuting from Cities to Suburbs*, JLL (June 25, 2018), <https://www.us.jll.com/en/trends-and-insights/cities/why-more-people-are-commuting-from-cities-to-suburbs> [<https://perma.cc/X9BA-N4HJ>].

²¹⁶ *See id.*

²¹⁷ *See* Rich Reinhold, *New Standards and Geographic Definitions for Metropolitan Statistical Areas*, ILL. DEP'T OF EMP. SEC., https://www2.illinois.gov/ides/lmi/Pages/New_Standards_and_Geographic_Definitions.aspx [<https://perma.cc/HZZ8-UM9E>].

²¹⁸ *See* *Fulton County Cities*, FULTON CNTY., <https://www.fultoncountyga.gov/inside-fulton-county/cities-in-fulton-county> [<https://perma.cc/8RX3-QVN9>].

²¹⁹ *See id.*; *Voting Districts Maps Viewer*, FULTON CNTY., <https://gismaps.fultoncountyga.gov/portalpub/apps/webappviewer/index.html?id=c9290d15d93148eab7412de12ba45629> [<https://perma.cc/8FVT-445T>].

²²⁰ *See supra* notes 90–95 and accompanying text (describing displacement).

²²¹ *See id.* (describing displacement).

But, as discussed, the effects of displacement may already be negligible by the time jurisdictions are drawn on an intermediate level.²²²

On balance, a regional legislature is best positioned to represent metropolitan voters. The second and third factors—inclusion and displacement—favor regional institutions. Preference maximization, on the other hand, weighs less certainly in favor of regional governance, but the damage to preference maximization at the regional level can be mitigated through careful line drawing or by allowing cities and suburbs to self-sort into regional legislatures.

C. *Regional Governance in Practice*

In theory, regional governments are among the best suited institutions to reform the criminal justice system, especially in metropolitan areas—but what would they actually look like? Regional governments could take the form of regional legislatures or regional compacts between existing city governments. Realistically, the chances of governments adopting such schemes might be slim. That reality does not, however, lessen the importance of recognizing regional governments as often the most democratic institutions to lead criminal justice reform. Instead, the reasons that regional governments are democratically sound institutions should inform our decisions about criminal justice reform at whatever level it takes place because they shed light on what democratizing entails in different settings.

The first form that regional governance could take is a regional legislature. Examples of regional governments already exist in Portland, Oregon and the Twin Cities in Minnesota. The Portland Metropolitan Service District (Metro), which covers Portland and twenty-three other nearby cities, is the only elected regional government in the United States.²²³ Metro received a home rule charter in 1992²²⁴ and manages the region's waste, growth, and parks, among other things.²²⁵ The Twin Cities have a similar government—albeit not an elected one—called the Metropolitan Council. The Metropolitan Council consists of seventeen representatives, one from each district in the region, who are appointed by the Governor of Minnesota.²²⁶ The council establishes policies on city planning, transport, and sewage, among other things, and it even has the power to supersede local government laws, although it does not have the power to make criminal law

²²² See Johnson et al., *supra* note 191 and accompanying text.

²²³ See *What Is Metro?*, *supra* note 203 (describing Portland's Metro).

²²⁴ RUSK, *supra* note 202, at 104.

²²⁵ See *What Is Metro?*, *supra* note 203.

²²⁶ See MINN. STAT. ANN. § 473.123 (West 2014).

or enforcement decisions.²²⁷ Given the range of authority both these regional governments have, it is not difficult to imagine the creation of specialized regional governments that can make criminal law or criminal enforcement decisions. Regional governments could consist of existing elected representatives from major cities and the suburbs they share high levels of agreement with or, much like Portland's Metro, representatives elected specifically to serve on the regional government.²²⁸

Another option is regional compacts—agreements between cities or counties. Regional compacts already exist and, because they incorporate existing governance structures rather than create new ones, they might be easier to implement. Take, for example, the Southeast Florida Regional Climate Change Compact—a compact between counties in Florida to develop legislative programs that mitigate climate change.²²⁹ States, too, regularly form compacts with other states to coordinate legislation.²³⁰ Consider Portland again. Under a regional compact, instead of forming an elected regional government as they did, the local governments of Portland and each of its twenty-three suburbs could simply enter into an agreement to jointly craft and enforce criminal justice policies, such as police body-camera requirements or use-of-force protocols. Regional compacts reach the same result as formal regional governments—preference maximization of likeminded metropolitan voters, inclusion of all voters active in the region, and a decreased likelihood of displacement owing to the size of the region—but they might be more palatable to states unwilling to change the status quo and institute entirely new regional governance institutions. With regional compacts, localities need only enter into agreements they can leave at any point, and the state need not commit to full-scale institutional change.

Some might argue that regardless of institutional inertia, both proposals—regional governments and regional compacts—are infeasible because they would create confusion for law enforcement, who would have to enforce multiple criminal codes. But this concern is unlikely and easily avoidable. Police departments already operate at the city, county, and state levels, and state police typically enforce only laws that are outside the

²²⁷ See *id.* § 473.129.

²²⁸ See *What Is Metro?*, *supra* note 203 (noting that the council consists of a president, who is elected regionwide, and six councilors elected by district).

²²⁹ See *What Is the Compact?*, SE. FLA. REG'L CLIMATE CHANGE COMPACT, <https://southeastfloridaclimatcompact.org/about-us/what-is-the-compact/> [<https://perma.cc/6DJK-DABG>] (describing the compact).

²³⁰ See generally JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS 75–147 (2d ed. 2002) (surveying the many interstate compacts from criminal to environmental to tax law).

jurisdiction of city or county police.²³¹ When cities or counties form regional governments or compacts, they could take into consideration whether their new jurisdiction maps onto existing law enforcement jurisdictions—after all, police departments belong to the very bodies that would be part of the regional governments or compacts. For example, if the greater Chicago area formed a regional government, it could include entire jurisdictions—such as the City of Chicago and the City of Evanston—that already have their own law enforcement departments, rather than splitting cities or counties down the middle. This is all to say that, with proper planning, regional governance is unlikely to pose jurisdictional problems greater than those that already exist under existing state and local governance structures.

Admittedly, instituting regional governments or compacts would require a radical overhaul of our political structures. But before we dismiss them, consider two points. First, should we care if criminal justice reform requires a radical change to our political structures? The status quo, in which voters are shoehorned into arbitrarily drawn districts, is not necessarily desirable. And although we are used to such a system, it is not even much of a status quo, historically speaking.²³² Professor Charles Tiebout famously proposed the idea of “voting with your feet”: if you do not like your local laws, you can simply move to a jurisdiction with better ones.²³³ As many have pointed out, this proposal is detached from reality because people do not, and often cannot, move on a whim.²³⁴ So let’s flip it on its head—if voters cannot move to the right jurisdiction, move the right jurisdiction to them. A representative democracy represents we the people, not the land on which we live. As the way in which we live changes, our jurisdictional boundaries might, from time to time, need to change with us. Not to mention, if regional

²³¹ See Fraser Sherman, *Difference Between a State Trooper & a Sheriff*, CHRON. (June 28, 2018), <https://work.chron.com/difference-between-state-trooper-sheriff-22502.html> [<https://perma.cc/9SA9-V64E>]; see also William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, 15 CRIME & JUST. 231, 242 (1992) (emphasizing that police responsibilities are fragmented by geographical jurisdiction). Some states even confine the jurisdiction of state police by law. See, e.g., GA. CODE ANN. § 35-2-32 (West 2021) (confining the primary role of state police to public roads and highways).

²³² Robert T. Ford, *Law’s Territory (a History of Jurisdiction)*, 97 MICH. L. REV. 843, 843 (1999) (“[T]erritorial jurisdictions—the rigidly mapped territories within which formally defined legal powers are exercised by formally organized governmental institutions—are relatively new . . . developments.”).

²³³ Schragger, *supra* note 53, at 1550 & n.64, 1557 (2019) (attributing the concept to Professor Tiebout but noting that Professor Tiebout did not coin the term “voting with your feet”); see also Tiebout, *supra* note 53, at 419; Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 776 (1995) (“If I dislike the laws of my home state enough and feel tyrannized by them enough, I always can preserve my freedom by moving to a different state with less tyrannous laws.”).

²³⁴ See e.g., Schragger, *supra* note 53, at 1548–51 (arguing that most firms and workers do not or cannot move due to various constraints).

governance is the most democratic avenue for criminal lawmaking, perhaps future scholarship will show that it is also the most democratic institution for other areas of law and policy, making the radical change even more worthwhile.

Second, even without a radical change in governance structures, this Note should be instructive to any reform contemplated at the neighborhood, state, or federal level because it has examined the deficiencies in each. An awareness of those deficiencies will aid lawmakers and activists in crafting laws and enforcement policies through more democratic means. Rather than charging into democratization with our eyes shut, we must be acutely aware of what democratization entails in each jurisdictional setting and how different jurisdictions affect avenues for criminal justice reform on the ground.

CONCLUSION

The democratization of criminal justice—if calibrated at the right level—would produce a more democratic criminal justice system than the one we have today. But that’s a big “if.” The level of governance at which reform takes place is critical to democracy because it mediates the amount of representation afforded to voters in the criminal lawmaking process. As the disregarded voices of so many cry for changes in our criminal justice system, there is no time like the present to institute more democratic structures to ensure that those voices are heard.²³⁵ But we must change in the right way.

To choose the right institution to make and enforce criminal law, we must understand the tradeoffs inherent in our decisions. Smaller institutions, like neighborhood councils, are underinclusive and threaten to displace or diffuse crime. Larger institutions, like state or federal governments, create representational dilemmas because of a sharp rural–urban divide in viewpoints. Now is the time—at least in the criminal justice sphere—to think about capturing voter interests in an outside-the-box manner: on a regional level. The United States is no longer comprised of residents of one state or another, or of one neighborhood or another, but of rural residents, suburban residents, and urban residents. These residents no longer travel short distances by horse and carriage; they commute, shop, and socialize across many smaller areas, all in a single day. Given this new reality, the best way to optimize democracy in criminal law is to administer it at a regional level.

²³⁵ See *supra* notes 6–7 and accompanying text.

