

By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law

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ABSTRACT. Equitable crime policy and equity in the process of crime policymaking stand as the two goals most important to criminal-justice reform advocates. It would be a strategic mistake, however, to consider the two of equal importance. Crime-policy reform should be considered *the* first-order principle of the crime-policy reform movement. Fairness in the crime-policymaking process, while key to the pursuit of democratic ideals, is best understood as a secondary consideration. Put simply, the prioritization of fair process risks stifling the crime-policy reform movement by tethering the policy ends of the movement (namely, minimalism in criminal administration) to a pre-ordained means.

INTRODUCTION

A crime-policy reform movement is principally about crime-policy reform. A given model of crime-policymaking process may ultimately serve the goal of policy reform, or it may not. Given this latter possibility, reformers must uncouple the normative pursuit of equity in the process of crime policymaking from the normative pursuit of substantive crime-policy reform. They should likewise prioritize the transformation of substantive crime policy over the transformation of the process of crime policymaking. It might be useful, for instance, to think of “democratic policing” as a process-based movement that runs parallel to the pursuit of equitable policing. The object of a democratic-policing movement is to broaden the distribution of authority over police administration; however, this achievement may be wholly independent of the qualitative transformation of policing itself.

Jocelyn Simonson's pioneering and timely article, *Police Reform Through a Power Lens*,¹ argues for an ambitious egalitarian innovation in crime-policy-making process. Simonson proposes that socially and politically marginalized individuals and groups be given far greater policymaking power in the field of criminal administration. It is a proposal that holds considerable appeal for progressive criminal-justice reform advocates—and for good reason. The oppressive quality of American criminal administration could, in theory, be countered by conveying more power to disfavored racial and economic classes. Simonson argues that these groups, most likely to be subject to the excesses of American criminal administration, have an epistemic advantage in the pursuit of reform. But for Simonson, “power-shifting” in favor of the marginalized is the right thing to do primarily because it limits social domination in the context of the rulemaking process. In this sense, Simonson argues by way of a series of principles of equitable policymaking process for what might be called *policymaking justice*.² She concedes that power-shifting could either narrow or expand the role of the penal state in American life given that the marginalized cannot be assumed to agree on a crime-policy platform. Thus, the justice inherent to power-shifting does not lie in crime-policy outcomes, but rather in the quality of the policymaking process itself.

To be clear, Simonson introduces the goal of shifting rulemaking authority in the direction of the marginalized as complimentary to various other philosophies and strategies used in the reform movement. (“[W]e should incorporate the power lens into the array of objectives of ‘police reform.’”³) However, this contextual frame for the utility of the power lens sags a bit when Simonson openly rejects the instrumentalist’s approach to crime-policy reform. In lieu of a utilitarian approach to crime policymaking, Simonson advocates for specific models of policymaking process reform that are more inclusive and therefore more just. In this way, the power-shifting model reads as being principally focused on the rejection of paternalistic and domineering rulemaking in criminal law, with the net effect of the shift registering as a second-order consideration.

This Response to Professor Simonson’s forthcoming article argues that the debate about the means of crime-policy reform should be centered on the principle of process efficacy rather than the principle of process equity.⁴ In doing so,

1. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 *YALE L.J.* 786 (2021).

2. Simonson describes the goal of power-shifting as “shifting governance and policymaking power from the police to policed populations.” The goal stands separate and apart from traditional goals oriented toward instrumental outcomes. *Id.* at 811.

3. *Id.* at 795.

4. This Response is motivated in part by a theory of power not dissimilar from that offered by Simonson. In *Police Reform Through a Power Lens*, Simonson describes power as, “flow[ing] in multiple directions and sometimes counterintuitive ways—inside and outside the state and

the Response presents a philosophical frame for rulemaking reform that foregrounds the emerging means-ends debate among criminal-legal scholars. There is a branch of the criminal-law reform literature that advocates for crime policymaking to be concentrated among penal bureaucrats and insulated from a perceived punitive populism.⁵ A competing branch argues, in turn, that crime policy—policing policy in particular—has become more punitive given the heightened power of penal bureaucrats together with the diminished influence of the persons and populations most often subject to the grinding wheels of penal administration. This is the right debate. It is an instrumentalist’s debate about which means will deliver the desired policy ends.⁶ It rightly ignores the familiar question of whether the ends justify the means. Whether the most effective means to crime-policy reform is “democratic deliberation” among local neighborhoods or the deliberation of a panel of state experts is not, then, of central importance. The ends—crime policy transformation—should stand as the priority, well ahead of notions of egalitarian process.

I offer this mean-ends philosophical frame in three parts. Part I argues that Jocelyn Simonson’s power-shifting thesis represents an important step forward in the democratic-policing literature. While this literature has generally held that police governance should be more democratic, it continues to wrestle with the question of how to structure expanded democratic influence over the police institution. At the heart of Simonson’s normative contribution is advocacy for inclusivity at the social margins. To this end, Simonson introduces three principles meant to clarify the meaning and practice of democratic police governance: reparation, antisubordination, and contestation.⁷

Part II turns from Simonson’s normative intervention to a philosophical question about how to situate debates regarding the process of crime policymaking within the broader crime-policy reform movement. It argues that while the pursuit of inclusivity in crime policymaking is meaningful in its own right, it should not be conflated with the pursuit of equitable crime policy. It is not merely that inclusive crime-policymaking projects are qualitatively different

in the shadow of racism, heteropatriarchy, and precarity” *Id.* at 812-13. Simonson clearly conveys that she does not advocate for power over crime policy to be concentrated among marginalized individuals and communities for instrumental reasons. *Id.* at 804-05, 811-13. However, as someone committed to crime-policy reform, it is difficult to both accept that power, in terms of its utility, is highly unpredictable and to commit to a highly specific allocation of power as would seem to be required in the adoption of the power lens.

5. See RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019); John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711 (2020).
6. See generally ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* (2009); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2007).
7. Simonson, *supra* note 1, at 838-57.

from the equitable crime-policy project; it is, moreover, that the two projects can and do fall into direct tension.

In light of prospective tensions between the pursuit of equitable crime policy, on the one hand, and the pursuit of a more equitable process of crime policymaking on the other, it would seem incumbent upon reform advocates to choose. In the movement for crime-policy reform, which category of reform should be given priority – crime-policy reform or reform of the processes underlying crime policymaking? Part III argues for a hierarchy of criminal-justice reform principles, and, moreover, that within the hierarchy, the pursuit of equitable policymaking process should take a backseat to that of equitable crime policy. A conscious decision among reform advocates to elevate fair policy above fair process holds considerable value at a moment in which the criminal-justice reform movement begins to engage the broad and diverse range of policymaking processes found across our federalist system of government.

I. A SEAT AT THE TABLE

To realize the goal of democratic crime governance, the state must situate more authority over police administration among historically disempowered race, class, and race-class subordinated individuals and communities. This worthy goal falls among a litany of issues pertaining to social equality that have lodged in the American consciousness in recent years. A cohort of criminal-law academics not only argue for “more democracy” in relation to police governance, they also rightly press for much more precision by academics in their normative theorizing of democratic influence.⁸ Jocelyn Simonson is a leading and essential voice in this literature. Simonson has argued in various fora for the “devolution” of power over crime governance, fashioning “bottom-up forms of participation” as the truest reflection of democratic policymaking.⁹

8. For example, see Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019); Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523 (2020); and Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261 (2007).

9. Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612-13 (2017) [hereinafter Simonson, *Democratizing Criminal Justice*]. Simonson has developed a rich catalogue of work illustrating the asymmetric shape of authority over police administration and cultural, legal, and communal mechanisms that can help to solve for inequity in policymaking procedure. Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016); Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 1 (2019) [hereinafter Simonson, “*The People*” in *Criminal Procedure*]. I write this Response as an admirer of Simonson’s scholarship on the power asymmetries in criminal administration, but also as a skeptic as to the value of assigning a relative moral value to crime-

Simonson's most recent model of inclusive crime policymaking is based upon the notion of "power-shifting."¹⁰ Terminology aside, Simonson appears to be driven by two primary objectives: first, to convey to the public more influence over police, and second, to establish a robust if not radical imagining and convening of the "public" that will exercise this influence.¹¹ The power-shifting thesis thus represents a theoretical extension of the democratic-policing literature as it argues three specific principles by which to guide the democratic-policing project: *reparation* (policymaking reform as a remedy for past harm¹²), *antisubordination* (shifting rulemaking power to those made subordinate by the existing rules structure¹³), and *contestation* (the embrace of an "agonistic" crime politics such that rulemaking process "facilitate[s] collective resistance"¹⁴). These principles suggest power-shifting as being, in principle, a campaign for fair process. Power reallocation in keeping with Simonson's principles will in some instances require the inclusion of individuals and groups at the social margins, giving them the proverbial seat at the table.¹⁵ Alternatively, it may mean something along the lines of minority exclusivity in crime policymaking.¹⁶ In which case, racial minorities, race-class minorities, and those bearing the mark of a criminal record¹⁷ are given not merely a seat at the table, but a table in which every seat is occupied by a member of a subordinate class. In foregrounding those at the social

policymaking processes. My chief concern is that ideological (rather than instrumentalist) commitments to process will, in the context of the criminal-justice reform movement, make the perfect the enemy of the good.

10. Simonson, *supra* note 1, at 795-96.

11. *Id.* at 811-19.

12. *Id.* at 839.

13. *Id.* at 850-51.

14. *Id.* at 852-53.

15. *Id.* at 815-19, 848, 864-67.

16. Based on several of the examples of power-shifting that Simonson presents in Part II of her article, I take "minority exclusivity" as a crime-policymaking submodel that plausibly falls under the banner of "community control." Section II.A provides examples of this specific type of power-shifting where the beneficiary is more precisely understood to be the "communities most harmed by destructive policing," who are "given power *over* policing." *Id.* at 826 (first quoting *Community Control*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/community-control> [<https://perma.cc/U94Z-B2XR>]). Here, power over the formulation of crime policy lies in contrast with mere input into the policymaking process. *Id.* at 815-17.

17. See, e.g., Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC'Y. 937 (2003) (discussing how criminal records serve as barriers to employment and produce labor inequalities).

margins within the normative theory of democratic policing, Simonson addresses much of the ambiguity inherent in the notion of “democratic localism”¹⁸ as it relates to police administration.¹⁹

In this and similar theorizing of criminal-justice reform, Simonson draws the focus of reform advocates to the tip of the spear – police administration. Police are single-handedly responsible for feeding our larger systems of misdemeanor²⁰ and felony case processing,²¹ and the supervisory systems underlying mass imprisonment,²² mass probation,²³ and mass parole.²⁴ There is therefore undeniable value in basing the rulemaking process for police administration on the principle of equity and, by the same token, making these processes more accessible to historically marginalized groups.

Simonson presents the power-shifting thesis to a hotly contested literature regarding the policymaking processes best suited to deliver fundamental and effective crime-policy reformation.²⁵ Nevertheless, her position is clear and uncompromising²⁶: rulemaking authority regarding police administration should

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18. Though Simonson’s primary focus in *Power Lens* is the development of an egalitarian theory of policymaking process, she also provides detail as to the possible institutional features of the local within the larger project of democratic localism. Simonson, *supra* note 1, at 821-31.
 19. See David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005) (delineating the relationship between democracy and police administration).
 20. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2002).
 21. See Sarah K. S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 DEMOGRAPHY 1795 (2017).
 22. See generally BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); (describing the phenomenon of mass incarceration); NAT’L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (same); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004) (describing inequalities in incarceration).
 23. See Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC’Y 53 (2017); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL’Y 51 (2013).
 24. See JOAN PETERSILIA, REFORMING PROBATION AND PAROLE IN THE 21ST CENTURY (2002).
 25. See BARKOW, *supra* note 5; WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); Daniel Epps, *Checks and Balances in the Criminal Law*, 73 VAND. L. REV. (forthcoming 2021); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015); Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017); Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523 (2020); Rappaport, *supra* note 5.
 26. James B. Jacobs, *The Community’s Role in Defining the Aims of the Criminal Law*, in IN THE NAME OF JUSTICE 119 (Timothy Lynch ed., 2009).

shift to race-class subjugated individuals and communities.²⁷ Simonson asks that our normative theory of policing advance beyond the neatly circumscribed public contributions to police governance made by way of notice-and-comment under administrative law as this model would seem to merely nip at the margins of conventional policymaking process.²⁸ Simonson calls instead for a policymaking rupture. For example, under the power-shifting model, individuals with felony criminal records might be recruited to serve on police oversight boards.²⁹ Civilian panels might be given the power to both fire disfavored police commissioners and pass binding police department policy.³⁰ The Movement for Black Lives has described this alternative policymaking paradigm succinctly, arguing for “a world where those most impacted in our communities control the laws, institutions, and policies that are meant to serve us.”³¹

As a method of democratization, the power-shifting thesis thus lends conceptual precision to two overlapping literatures in criminal law: democratic policing³² and local control of police administration (referenced in the criminal-law literature as “democratic localism”).³³ To this end, Simonson answers a question

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27. Simonson, *supra* note 1, at 845-46, 848-52. In terms of local crime policy, Simonson suggests that policymaking be what some scholars have termed, “microlocal.” *Id.* at 790-92, 826-28 (referencing an ordinance proposed by a collection of progressive advocacy groups in Chicago that would convey to individual neighborhoods direct authority over police); see Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323 (2014). Shoked describes the “micro-local” as units smaller than the conventional units of local government, such as the city, county, and school district. Examples include business improvement districts, enterprise zones, and neighborhood councils. *Id.* at 1330.
28. Friedman & Ponomarenko, *supra* note 25, at 1886-87 (discussing the limits of localized “notice-and-comment” rulemaking in police departments). For a summary of similar scholarship on the intersection of criminal law and administrative law, see Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369 (2018).
29. Simonson, *supra* note 1, at 816-17, 862-63.
30. *Id.* at 823-24. For a broad review of the normative vision of “community control” within the Movement for Black Lives, see Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018).
31. Simonson, *supra* note 1, at 851; *Community Control*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/community-control> [<https://perma.cc/XX9V-YB92>].
32. See, e.g., Akbar, *supra* note 30; Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597 (2017); Sklansky, *supra* note 19.
33. See Friedman & Ponomarenko, *supra* note 25 (arguing that administrative rulemaking should be used as a mechanism to allow community input for local police practices); Simonson, “*The People*” in *Criminal Procedure*, *supra* note 9 (arguing that “the People” appear on “both sides of the scale of justice,” therefore, the criminal-legal system should be responsive to the popular will). *But cf.* Elizabeth G. Jánosky, *Defining Local in a Localized Criminal Justice System*, 94 N.Y.U. L. REV. 1318, 1327 (2019) (differentiating between “democratizers” and “localizers” and arguing that under localism local resident interests are the central policy consideration for

that had been dangling idly from both literatures: *What are the guiding principles by which to convey more democratic authority over police administration to local publics?* What specific principles should guide our conception of the “democratic,” of the “local,” and of fair and equitable rulemaking process? Simonson provides a bold and compelling answer to these questions by breaking the various social factions angling to govern police administration into two camps: the race-class subordinated and everyone else. Her power-shifting thesis thus represents a fairly radical reimagining of legitimacy in the process of crime policymaking, to the point where the project of including the socially marginalized in the crime-policymaking process may culminate in a policymaking process exclusive to the marginal. This remedial project, informed by the racial history of policing, is for Simonson the ultimate power play. “If policing is subordinating[,]” Simonson writes, “then shifting power to those who are subject to this subordination promotes equality and democracy, especially when that power is over the very levers of policy-making that control those subordinated systems.”³⁴

II. THE RISK OF FALSE EQUIVALENCE

It would be a categorical mistake to equate the pursuit of an equitable process of crime policymaking – even as it relates to race-class subordinated communities – with the pursuit of equitable crime policy. Plainly stated, the pursuit of equitable crime policymaking pertains to the specific means by which crime policy is promulgated, while the pursuit of equitable crime policy pertains to the substance of crime policy itself.³⁵

The battle lines for the debate regarding crime-policymaking process could not be clearer. One camp, focused primarily on police administration, contends that dysfunction in police administration is largely a function of the insularity of the process by which the rules governing police are crafted and enacted.³⁶ But this claim is not easily proven. Moreover, given the historical record, it cannot be taken as truth that insular administrative rulemaking necessarily correlates with

decisionmakers); Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 373-75 (2001) (objecting to “grounding local autonomy in the rhetoric of community”).

34. Simonson, *supra* note 1, at 851.

35. To be clear, in *Police Reform Through a Power Lens*, Simonson marks this distinction. However, in considering the utility of the power lens it seems important to both revisit the distinction and articulate some of its primary implications.

36. See, e.g., Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1400 (2017); Kleinfeld et al., *supra* note 25; Simonson, *Democratizing Criminal Justice*, *supra* note 9, at 1612.

dysfunctional and abusive policing.³⁷ The point is not to suggest that democratic-policing scholarship has been axiomatic in its claims regarding the value of bringing “more democracy”³⁸ to the policymaking that governs police administration. It is instead to say that if the community-based process of crime policymaking delivers a range of outcomes depending on time and structural context, it seems only prudent to remain agnostic, equivocal, and instrumentalist (rather than ideological or fundamentalist) as to the value of democratic or microdemocratic crime-policymaking process.³⁹

Community-based crime policymaking may produce equitable crime policy, averting a tension between the two normative projects. But there is an alternative scenario in which crime policymaking at the level of community produces inequitable crime policy and inequitable crime-policy outcomes.⁴⁰ Such a scenario

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37. David Sklansky has written about the sequential models of policing in the United States. In the middle of the twentieth century, the nation shifted from “patronage” to “professional” policing, largely because police fell into the practice of enforcing criminal laws based on their political and communal ties rather than in an objective and standard fashion. The professional model meant a shift away from selective enforcement of the criminal law in accordance with personal and political allegiances. See Sklansky, *supra* note 19, at 1742-45. We now realize that the professional model has its own deficiencies. In being relatively insulated from the influence of race-class subordinated groups and perhaps the public at large, police departments have become in some sense antidemocratic. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2083-89 (2017); Friedman & Ponomarenko, *supra* note 25, at 1858-61. But how do we avoid the creep of patronage in the transition from professional policing to an ostensibly democratic model? Will power-shifting to “community,” however imagined, reproduce the problems of the patronage policing model? To argue for power-shifting to specific bounded communities irrespective of consequences would seem to set aside without adequate justification the pathology of American crime politics that some scholars argue lies at the root of penal dysfunction. See, e.g., KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997); TED GEST, *CRIME AND POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* (2001); DIANA R. GORDON, *THE RETURN OF THE DANGEROUS CLASSES: DRUG PROHIBITION AND POLICY POLITICS* (1994); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).
38. BARRY FRIEDMAN, *UNWARRANTED: POLICING WITHOUT PERMISSION* 113 (2017) (“[W]e need to insist that there be rules in place, before police act, that are adopted with democratic input.”).
39. Trevor George Gardner, *Right at Home: Modeling Sub-Federal Resistance as Criminal Justice Reform*, 46 FLA. ST. U. L. REV. 527, 561-64 (2019) (addressing the relative utility of instrumental and ideological subfederal-government refusal to cooperate with various federal programs in public-security administration).
40. See Rappaport, *supra* note 5. While I am not partial to the bureaucratic and evidence-based approaches to crime-policy reform, I do not find these approaches to be fatally flawed from an ethical standpoint, or necessarily less effective for reform purposes than approaches based in populism or popular sentiment among the disenfranchised.

can be the product of any number of factors, but I flag just two here: punitive populism within marginalized communities and dysfunction in the democratic process. In regard to punitive populism, what value is equitable process to the project of criminal-justice reform if the punitive crime politics seemingly endemic to American culture permeate marginal communities? In terms of the credibility of the democratic process, is it realistic to expect fundamental crime-policy reforms among microlocal working-class city neighborhoods if such reforms are not coupled with the transformation of social-welfare policy?⁴¹ If we have not first solved the structural inequality that produces the high rate of violent crime in poor urban neighborhoods,⁴² why would we expect the constituents of these neighborhoods to radically diminish police power?⁴³ For instance, if these residents must first experience violent-crime reduction before embracing ambitious if not radical crime-policy reforms, and this reduction requires social-welfare policy reform, what is the value of locating crime policy at the neighborhood level (assuming this to be coterminous with the community level) when welfare policy transformation is only tenable at the state and federal levels?⁴⁴ It

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41. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* (2015).
42. Notably, African American men are 641% more likely than white men to die from homicide. FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* 73-87 (1997). For an extended treatment of the subject of underenforcement of the criminal law, see Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715 (2006). More recently, criminological theorists have argued based on comparative analysis that it is the unique character of municipal political economies along with residential and educational segregation that produce high crime rates, aggressive yet ineffective policing, and exceptional rates of imprisonment. See Nicola Lacey & David Soskice, *Crime, Punishment, and Segregation in the United States: The Paradox of Local Democracy*, 17 *PUNISHMENT & SOC'Y* 454, 455-60 (2015); see also Lisa L. Miller, *What's Violence Got to Do With It? Inequality, Punishment, and State Failure in U.S. Politics*, 17 *PUNISHMENT & SOC'Y* 184, 197-200 (2015) (noting how fragmentation in U.S. politics contributes to "ratcheted up punishment").
43. For a similar point, see Chad Flanders, *Criminal Justice and the Liberal Good of 'Order'*, 70 *U. TORONTO L.J.* 102 (Supp. I 2020). Flanders argues that communities subject to paralyzing forms of social disorder will likely turn to criminal administration as a "provisional solution." *Id.* at 104. But rather than improving physical security, police interventions frequently worsen disorder through heavy-handed tactics. *Id.* Flanders theorizes the pursuit of "law and order" to demonstrate the logic by which marginalized communities may come to embrace punitive solutions. Moreover, it seems fair to suggest that the embrace of punitive policy as a provisional solution is a downstream effect of neoliberal policy. LOÏC WACQUANT, *PUNISHING THE POOR* 302-03 (2009).
44. Simonson expresses a similar concern. "[T]o shift power in governance will not necessarily lead to profound changes in political power absent other, more structural reforms. This is why the power lens is a lens through which to look, rather than a complete theory of reform." Simonson, *supra* note 1, at 818. However, in the event that power-shifting falls prey to penal

is not that the project of channeling more governing authority to marginalized persons and groups is itself wrong-headed or anything but just; it is instead that one should not mistake the political justice of this reapportionment project for substantive change in the machinery of criminal administration. The two justice projects are not only different; they will inevitably function, at times, at cross purposes.

A. *Punitive Populism*

Simonson's power-shifting model offers a specific vision of what it might mean for the race-class subordinated to exercise substantial control over criminal administration. By way of three principles of inclusive rulemaking process – reparation, antistatization, and contestation – Simonson looks to channel authority within municipal democracies to groups with longstanding grievances against American penal administration. However, as Simonson readily acknowledges, it is not clear that devolution of democratic authority is sufficient to protect against the punitive sensibilities in American culture.⁴⁵ This concession suggests power-shifting, as an end in and of itself, is ideological – based on a moral

populism, it will not be complimentary to the reform methods designed to correct for punitive populism. It is not that the “bureaucratizers” (those claiming that field experts should take on the principal role of crafting crime policy) are right and the “democratizers” (those that look to convey principal crime-policy-making authority to select bounded publics) are wrong. Instead, it is that the dismissal of instrumentalism renders the answer to this question largely irrelevant.

45. Simonson, *supra* note 1, at 797 (“Indeed, there is no guarantee that a power shifting arrangement would on its own lead to any particular outcomes. Communities, however defined, are not monolithic, a reality that has become especially salient as communities of color have disagreed internally over the summer of 2020 about calls to defund the police.”); see Jonathan Simon, *Governing Through Crime Metaphors*, 67 *BROOK. L. REV.* 1035 (2002). Simon traces the uniquely seductive quality of contemporary crime politics to the transformation of the crime victim into an idealized political subject. The crime victim now holds rare power over democratic politics from the far left of the political spectrum to the far right. “Today it is in the experience of criminal victimization and (much more commonly) the imagined possibility of victimization that the political community and its governable interests are being redefined in law making. It is the outlines of this victim subject, projected by advocacy groups, the media, and law itself, that frames the purposes of legislation and the features of the subject that this legislation must take into account.” *Id.* at 1043. For similar treatments of representative democracy as it relates to crime policy, see KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); and NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014). See also Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 *J. CRIM. L. & CRIMINOLOGY* 491 (2019) (demonstrating the progressive embrace of harsh criminal punishment in regard to pet issues such as financial malfeasance and environmental harm).

position regarding fair process – rather than instrumental. While punitive populism is certainly not a feature of the power-shifting project, its manifestation as a result of power-shifting cannot be considered a bug, given that the narrow goal of power-shifting is to give marginal individuals and groups authority over criminal administration irrespective of penal outcomes.⁴⁶ Given the principles underlying power-shifting, the goal of egalitarian policymaking process – of self-determination, autonomy, and political choice as it relates to an identified marginal group – stands on roughly equal footing with the goal of crime policy change.

It would seem prudent, nevertheless, to account for the possibility of punitive populism under the power-sharing model. While the democratic-localism project would channel more authority over criminal administration to individuals and groups generally subject to the excesses and abuses of police administration,⁴⁷ power-shifting, in its primary manifestation, would seem to allocate authority over police administration more narrowly to race-class subordinated geographic communities.⁴⁸ But scholars of crime policy and policymaking reform would do well to disaggregate the race-class subordinated in any attempt to account for the impact of this or any similar democratic-policing project. There is a long line of scholarship showing patterns of African American intragroup-status distinction and bias analogous to that experienced by African Americans in relation to broader society.⁴⁹

46. Simonson, *supra* note 1. Simonson criticizes instrumental approaches to reducing police harms in minority communities, specifically those that call for systematic accounting for the harms associated with police activity. Understandably, Simonson finds it unseemly to talk about police harms through the lens of cost-benefit analysis and likewise, as part of a pursuit of “harm-efficient policing.” *Id.* at 804-05 (referencing Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 792 (2012)). But for those that consider the transformation of on-the-ground criminal administration the first-order principle of criminal-justice reform, the instrumentalist pursuit of harm efficiency may present as a more attractive model than power-shifting, given that power shifting is non-instrumentalist and may translate to a community-control regime that produces more police arrests, more stops-and-frisks, and other tactics that are seen as “tough on crime.” Simonson, *supra* note 1, at 798.

47. Kleinfeld, *supra* note 36, at 1399-1401; Kleinfeld et al., *supra* note 25, at 1700; Simonson, *Democratizing Criminal Justice*, *supra* note 9, at 1612-13 (calling for “bottom-up” forms of participation in the formulation of crime policy).

48. Simonson, *supra* note 1.

49. JAMES FORMAN JR., *LOCKING UP OUR OWN* (2017); EDWARD FRANKLIN FRAZIER, *BLACK BOURGEOISIE* (Free Press 1997) (1957); KARYN R. LACY, *BLUE-CHIP BLACK: RACE, CLASS, AND STATUS IN THE NEW BLACK MIDDLE CLASS* (2007); MARY PATILLO-McCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* (1999); MARY C. WATERS, *BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES* (1999); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

In his classic book, *Code of the Street*, Elijah Anderson offers one of the most prominent sociological monographs detailing African American intragroup other-ing.⁵⁰ By way of ethnographic study of poor and working-class African American city neighborhoods, Anderson found that neighborhood residents split neighbors into two categories – the “street” and the “decent.”⁵¹ Moreover, these categories appeared to map neatly onto class status.⁵² African American working-class residents characterized the poor and chronically unemployed as “street” characters and subjected them to a barrage of negative stereotypes.

People who fit the conception of street are often considered to be lowlife or “bad people,” especially by the “decent people,” and they are generally seen as incapable of being anything but a bad influence on the community and a bother to their neighbors.⁵³

Anderson notes that individuals tagged with the “street” label often seemed to be fighting intractable situations; they were either unable to find a job that paid a decent wage or ravaged by drug addiction.⁵⁴ In many instances their lives appeared to the “decent” as disorganized and their countenance full of frustration.⁵⁵ Anderson cites several examples where African American working-class neighbors were decidedly unsympathetic to these larger structural circumstances bearing down on struggling racial peers. The observed working-class residents resented the disorder and routinely reported “street” neighbors to the police.

In a few of the specific examples that Anderson explores in detail, neighbors that self-identified as “decent” complained about a constant flow of visitors to the disorderly residences in question. The decent neighbors suspected that the people occupying these residences were engaged in narcotics trafficking, prostitution, or both. They became increasingly frustrated at what they perceived to be the blasé attitude of the police department toward these perceived threats to the health of the neighborhood.⁵⁶

Remarkably, a later qualitative study comparing the views of white and African American police officers on African American working-class neighborhoods found that African American police deploy nearly identical tropes.⁵⁷ While

50. ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* (1999).

51. *Id.* at 35-36.

52. *Id.*

53. *Id.* at 46.

54. *Id.* at 46-47.

55. *Id.* at 45.

56. *Id.* at 46-47.

57. Peter Moskos, *Two Shades of Blue: Black and White in the Blue Brotherhood*, 8 L. ENFORCEMENT EXEC. F. 57 (2008). For a theoretical analysis of police diversity, see Devon W. Carbado and L.

white officers tended to broadly characterize African American working-class-neighborhood residents in dehumanizing terms, African American officers viewed themselves as policing these neighborhoods in order to protect the “good” people of the ghetto from “street” characters and street culture.⁵⁸

There is a wealth of sociological evidence indicating that African American communities in general, and African American working-class neighborhoods in particular, are highly moralized spaces rife with symbolic distinctions that inform internal group hierarchy. Social theorists invested in theorizing patterns of group formation tend to think of this sort of distinction among individuals as occurring by way of *social closure*.⁵⁹ In this imagining, race is not the fundamental mode of group distinction. Race is instead a categorization scheme that represents one of several forms of social closure.⁶⁰ Apart from racial markers and identifications, society assigns class identifications and criminal identifications, both of which facilitate social stratification and subordination.⁶¹ Thus, just as subordinated racial groups are subject to social closure, these groups often show internal patterns of social closure that inform intraracial stratification.⁶²

Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979 (2018), which reviews James Forman’s book, *Locking Up Our Own*.

58. *Id.*

59. MAX WEBER, *ECONOMY AND SOCIETY* (1922); Mara Loveman, *Is ‘Race’ Essential? A Comment on Bonilla-Silva*, 64 AM. SOC. REV. 891, 891 (1999).

60. Loveman, *supra* note 59, at 896-97. However, this theory of race should not be taken as equating the impact of race-based social closure with that of other forms. It is instead a theoretical position regarding the quality rather than the degree of race-based marginality, taking race to be epiphenomenal. *Id.* “[T]o empower the majority within a minority community—reminds me of a Russian *matrioshka* doll. When you open that doll, you find another: at every level of the majority/minority issue, we are faced with the same problem—the risk that the majority (now of the minority community) won’t bear the burdens of its laws but instead will infringe upon the liberty of a powerless or despised minority within it.” Bernard E. Harcourt, *Matrioshka Dolls*, in *URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES* 87 (Joshua Cohen & Joel Rogers eds., 1999); *see id.* at 82-83 (“[T]here are too many different voices within African-American communities to attribute one position [on policing] to African-Americans . . . [T]he views expressed within the inner city—as well as the views expressed in the more affluent suburbs—may well be influenced by crime, income and race relations.”); Loveman, *supra* note 59, at 897 (stating that “the concept of social closure can serve as a primary *foundation* for sociological inquiry into the construction, reproduction, or decline of symbolic boundaries” and stating that the concept can account for multiple distinctions).

61. For a similar line of sociological theory on the process of group formation as it relates to group stratification, see generally Michèle Lamont & Virág Molnár, *The Study of Boundaries in the Social Sciences*, 28 ANN. REV. SOC. 167 (2002).

62. Bruce Western, a leading criminologist, describes crime policy as having an inherent tendency to run along the contours of social marginality. WESTERN, *supra* note 22, at 54-58. This characterization suggests majoritarian abuse by way of crime policy as inevitable and the prospects for a truly equitable rulemaking process as relatively low.

We know, for instance, that African Americans have in any number of circumstances been found to take a “just deserts” rather than instrumentalist disposition toward punishment, particularly during periods in which violent crime in African American neighborhoods is relatively high.⁶³ A common explanation for African American support for punitive crime policy is the paucity of policy options available to the African American community given the general public’s lack of support for social-welfare programs.⁶⁴ A second and perhaps complementary explanation – but one that has only occasionally been engaged in the criminal-legal literature⁶⁵ – is that, in any number of circumstances, African Americans may be inclined to reflect the punitive sensibilities that have consumed American culture for the past half-century.⁶⁶

B. *Democratic-Process Dysfunction*

There is also a basic but difficult question regarding the logistics of the democratic process. Can the residents of a race-class subordinated neighborhood dictate the administrative rules that govern police administration in their neighborhood? Is this proposition even plausible given the gap between normative theories of democracy and corresponding practices? The countless variables that factor into the process of local democratic rulemaking together with the multi-layered quality of federalist governance make political self-determination among the urban marginalized a daunting if not quixotic proposition.

63. See generally *supra* note 41. There is now a wide literature describing the African American response to crime waves in African American neighborhoods. See also GOTTSCHALK, *supra* note 37.

64. See, e.g., FORMAN, *supra* note 41, at 11-13. For a more recent discussion of African American ambivalence to punitive responses to violent crime, see Reginald Dwayne Betts, *Kamala Harris, Mass Incarceration and Me*, N.Y. TIMES MAGAZINE (Nov. 8, 2020), <https://www.nytimes.com/2020/10/20/magazine/kamala-harris-crime-prison.html> [https://perma.cc/HT7C-5XVR]. The tease for the essay reads, “Many progressives mistrust [Harris] for her past as a prosecutor. As an ex-convict—and also the son of a crime victim—I can tell you it’s not that simple.” *Id.*

65. For one of the few exceptions, see L. Song Richardson, *The Fallacy of the (Racial) Solidarity Presumption*, 107 CALIF. L. REV. 1993 (2019).

66. In “*Power Lens*,” Simonson is careful not to suggest that the power-shifting model of democratic policing will deliver a particular set of policy outcomes. Simonson, *supra* note 1, at 797-98. Nevertheless, there remain across the democratic-policing literature normative positions that risk advancing a romanticized theory of penal populism.

1. *Local Democracy as a Pandora's Box*

In addition to the question of the reform inclinations among the racially and race-class subordinated, there is the question of political representation for the same groups. Which individuals or self-appointed interest groups accurately represent the views of the race-class subordinated?⁶⁷ Here, we are principally concerned with the capacity of local democratic institutions to surface the perspective of the marginalized in the interest of power-shifting.

Take the example of the New York City Council and public statements made by some of its members regarding the local “Defund the Police” initiative. New York City Councilwoman Vanessa Gibson, identified by the New York Times as a “liberal Black Democrat who represents the West Bronx,” very publicly objected to a push by local progressive activists to cut the New York Police Department’s public funding by one billion dollars.⁶⁸ Gibson argued that working-class minority New Yorkers wanted police to remain in their neighborhoods.⁶⁹ She openly rejected the withdrawal of police services from the local minority neighborhoods reeling from both a global pandemic and a violent-crime wave.⁷⁰ According to Gibson, her constituents wanted police to continue patrolling their streets: “They don’t want to see excessive force. They don’t want to see cops putting their knees on our necks. . . . But they want to be safe as they go to the store.”⁷¹

67. In “Power Lens,” Simonson references efforts among Chicago reform activists to create the Civilian Police Accountability Council (CPAC). CPAC would convey to respective neighborhoods “control of police.” Simonson, *supra* note 1, at 827 n.159 (quoting Curtis Black, *Community Oversight or Control? Coalitions Meet on Competing Police Accountability Standards*, CHI. REP. (July 1, 2020), <https://www.chicagoreporter.com/community-oversight-or-control-coalitions-meet-on-competing-police-accountability-proposals> [https://perma.cc/EQ3T-5F99]). The question of which individuals or groups credibly represent the racial communities or uniquely subjugated internal subgroups was prominent among criminal-legal scholars in the late 1990s. See TRACEY L. MEARES & DAN M. KAHAN, *URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES* (Joshua Cohen & Joel Rogers eds., 1999); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197.

68. Jeffrey C. Mays, *Who Opposed Defunding the N.Y.P.D.? These Black Lawmakers*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/nyregion/defund-police-nyc-council.html> [https://perma.cc/G6ZX-XVNE].

69. *Id.*

70. *Id.*; see also Ashley Southall & Neil MacFarquhar, *Gun Violence Spikes in N.Y.C., Intensifying Debate over Policing*, N.Y. TIMES (Aug. 24, 2020), <https://www.nytimes.com/2020/06/23/nyregion/nyc-shootings-surge.html> [https://perma.cc/64N8-FCHV] (detailing New York City’s rising crime rates).

71. Mays, *supra* note 68.

Gibson's colleagues were not nearly as polite in their critique of the New York City "Defund" campaign. The City Council's majority leader, Laurie Cumbo, also an African American woman, described the Defund initiative as akin to a "colonization" campaign advanced by white progressives.⁷² Other local minority politicians also characterized Defund in racially-charged terms, describing it as "political gentrification" and as a "bourgeois liberal" answer to structural racism.⁷³ In a television interview on MSNBC, Al Sharpton disparaged Defund as likely appealing to the "latte liberal[s]" in the Hamptons who "s[at] around discussing [police violence] as an academic problem," adding that "people living on the ground need proper policing." Sharpton offered the comment as a partial response to the New York City Police Department's report of a 166% increase in shootings in August of 2020 as compared to the same month the previous year.⁷⁴

Collectively, these critiques might be dismissed as a hasty and unwarranted rebuke of an ambitious and timely crime politics advanced by progressive activists. But the New York City blowback over the proposal to defend the city's police department is quite relevant to the democratic-policing debate in so far as it provides an opportunity to investigate some of the assumptions underlying auxiliary models such as *power-shifting*. Within the sprawling geographic and cultural landscape of New York City, who exactly should be taken to represent the race-class subordinated? Do we trust that Gibson, the minority city councilwoman from the West Bronx, speaks for the individuals in her district who normally lack a voice in crime policy deliberations – a seat at the policy table?⁷⁵ Or do we probe the details of city-council elections – voting rates in particular – to get a sense of whether the acutely disadvantaged even participate within this specific channel of local democracy? Finally, to the extent that city councilpersons fail to account for the views of the acutely marginalized in their respective districts – those disillusioned by conventional politics – do we have good evidence that progressive activists accurately reflect the wishes of this neglected contingent?

Broadside attacks on crime-policy reform activists feel both reductive and counterproductive. However, it is only slight exaggeration to suggest that progressive activists in New York City and other large municipalities have drifted

72. *Id.*

73. *Id.* (quoting Robert Cornegy Jr., City Councilor, New York City Council, and Ras Baraka, Mayor, Newark, N.J.).

74. Joe Concha, *MSNBC's Sharpton: Defunding Police 'Something a Latte Liberal May Go for*, HILL (Sept. 8, 2020, 11:16 AM EDT), <https://thehill.com/homenews/media/515448-msnbcs-sharpton-defunding-police-something-a-latte-liberal-may-go-for> [<https://perma.cc/H23Q-N4QM>].

75. For an extended analysis of the complexity of intraracial political representation, see J. PHILLIP THOMPSON III, *DOUBLE TROUBLE: BLACK MAYORS, BLACK COMMUNITIES, AND THE CALL FOR A DEEP DEMOCRACY* (2006).

toward a policy position similar to that of reform-resistant police: race-class subordinated communities are to choose between police services laced with brutality or the substantial withdrawal of these services.⁷⁶ But here, the point is to give some sense of the difficulty in discerning the crime policy preferences of race-class subordinated individuals and groups and translating those preferences into policy. Do local minority politicians successfully execute this agenda? Do progressive activists? Or are the preferences of the truly disadvantaged likely to get lost in the fraught local politics of minority working-class political representation?

2. *Crime Policymaking and Federalism*

Let us assume for the moment that within the context of the local jurisdiction we establish a reliable mechanism by which to discern and act upon the policy preferences of the race-class subordinated. There remains the question of the extent to which the rulemaking authority held by the race-class subordinated conveys control over police and other features of criminal administration. We live in a federalist system in which any one neighborhood is subject to police policies enacted at the city, county, state, and federal levels. Each level of government holds the power to influence police administration. How realistic is it, then, to believe that race-class subordinated neighborhoods can govern police exclusively, or even predominantly? Given the larger system of American federalism, is it plausible for a small microlocal jurisdiction to insulate itself from the influence of the municipal legislature, the mayor, state governments, and the federal government given the importance of city and county budgeting, state-level preemption, and federal conditional-funding streams for public-security administration?⁷⁷

76. See Alec MacGillis, *What Can Mayors Do When the Police Stop Doing Their Jobs?*, PROPUBLICA (Sept. 3, 2020, 5:00 AM EDT), <https://www.propublica.org/article/what-can-mayors-do-when-the-police-stop-doing-their-jobs> [https://perma.cc/M48Z-3JQX]; Ashley Southall, *Shootings Have Soared. Is the N.Y.P.D. Pulling Back?*, N.Y. TIMES (Aug. 24, 2020), <https://www.nytimes.com/2020/07/16/nyregion/nyc-shootings-nypd.html> [https://perma.cc/LM5D-EHWS].

77. For example, the city of St. Louis is subject to a 2017 state law that permits state residents to carry a concealed firearm without a license. St. Louis city leaders have lobbied for a carve out, requesting that the city be allowed to require a permit for concealed carry. Thus far this local lobbying effort has been ineffective. Jacob Barker, *Mayor of St. Louis Urges Missouri Lawmakers to Let City Require Permits to Carry Guns*, ST. LOUIS POST-DISPATCH (Aug. 29, 2019), https://www.stltoday.com/news/local/govt-and-politics/mayor-of-st-louis-urges-missouri-lawmakers-to-let-city-require-permits-to-carry-guns/article_20ff3dea-c424-5542-b135-e2a194582e10.html [https://perma.cc/9SM9-WZ2V].

Microlocal control over police may be possible and may also, if fully realized, deliver some degree of reform. But the costs of working tirelessly to insulate race-class subordinated neighborhoods from the several layers of external governing authority would likely be quite high. In which case, will neighborhood-level policymaking, as an exclusive model of police governance, pay its way? Will the benefits of the fight to make marginal-community governance relatively exclusive exceed the costs? This is to say little of the costs to the broader reform movement of committing to specific sanctioned channels of reform—whether it be community-based or administrative rulemaking—rather than broadening to the array of policymaking opportunities across the federalist system in pursuit of ameliorative crime policy.

III. POLICY REFORMATION AS THE FIRST-ORDER PRINCIPLE

If our goal is to put out the fire—to alleviate a humanitarian crisis broadly referenced in mainstream discourse as “mass incarceration” and “overcriminalization”—what are the specific benefits that flow from making fair policymaking process a first-order principle in the criminal-justice reform movement? What are the benefits separate from the realization and affirmation of the democratic values core to national lore and treasured if not fetishized in the academic disciplines of law and political science?

Consider major crime-policy reform movements of the past several decades. While many large American cities deemphasized the enforcement of state-level marijuana prohibitions, state governments were largely responsible for the process of legalizing marijuana possession through the repeal of related state criminal prohibitions.⁷⁸ Organizations such as the Marijuana Policy Project (MPP) continue to lobby state legislatures to establish state regulatory frameworks for marijuana that reflect those regulating alcohol.⁷⁹

78. See Robert A. Mikos, *Marijuana Localism*, 65 CASE WESTERN RESERVE L.REV. 719, 731-36 (2015) (finding that marijuana-decriminalization states have to contend with opposition from the internal municipalities that seek to reinstate marijuana prohibitions locally); *Id.* at 720. Mikos poses a difficult normative question for those who make similar commitments to democratic localism and criminal-justice reform: What authority should marijuana-criminalization states give internal municipalities to regulate marijuana? *Cf. id.* at 721. If local and microlocal policymaking process is considered more democratic and, by extension, more just, those ideologically invested in just policymaking process will be left to choose between a just process and a just policy. The instrumentalist approach sidesteps this sort of ethical dilemma by abstaining from the assignment of moral value to policymaking process.

79. *About Us*, MPP, <https://www.mpp.org/about> [<https://perma.cc/HD5F-S7CL>]. For similar normative treatment of criminal-justice reform in relation to the federalist system of government, see Gardner, *supra* note 39, at 540-60.

In the “About Us” section of its website, MPP shares that one of its core commitments is to remain attentive to the features of the federalist system: “Our primary goal is to legalize cannabis nationwide, and we believe the most direct path is through the states. We look for the states with the strongest opportunities for success and where we can most effectively impact the national discussion.”⁸⁰ MPP expressly promotes inclusion, equity, and “justice” in the substance of cannabis legislation and in the cannabis industry, but does not appear to be encumbered by a commitment to community control of policymaking process.⁸¹ It claims to be the “driving force” behind ballot initiatives to legalize marijuana in Colorado (2012), Alaska (2014), Maine, Massachusetts, Nevada (2016), and Michigan (2018), and is currently pursuing similar policy change in Connecticut, Delaware, Maryland, Minnesota, New Hampshire, New Jersey, Rhode Island, and Vermont. It will soon introduce medical marijuana measures in less hospitable states such as Kentucky and South Carolina.⁸² A cursory review of MPP’s strategy and ethos shows the organization to be principally driven by its sense of equitable penal outcomes rather than by equity in the policymaking process that produces those outcomes.

To be clear, the MPP example is not offered to assign a negative value or even an absolute value to the democratic-localism project and power-shifting.⁸³ It is instead meant to show that this value should be understood as contingent rather than fixed. If state governments and the federal government are already inclined in a given cultural moment to take major steps toward policy reform, there would seem to be little value in power-shifting to municipal neighborhoods that have historically been unfairly targeted by police.

In the months after police killed George Floyd in Minneapolis, the Trump Administration issued Executive Order 13,929, which required that the Department of Justice withhold federal funds from state and local police departments that permit police use of the chokehold in circumstances apart from those justifying deadly force.⁸⁴ Trump Administration officials did not appoint a racially or class-diverse commission to study the issue. Prior to the order, the administration did not engage race-class subordinated individuals or groups in a meaningful way. Instead, the Administration panicked in the summer of 2020 in the face

80. See MPP, *supra* note 79.

81. *Id.*

82. *Our Work*, MPP, <https://www.mpp.org/about/our-work> [<https://perma.cc/RR6A-PZHY>].

83. Simonson, *supra* note 1, at 796–97.

84. See Exec. Order No. 13,929, 85 Fed. Reg. 37,325, 37,326 (Jun. 19, 2020) (signed Jun. 16, 2020); Trevor George Gardner & Esam Al-Shareffi, *Regulating Police Chokeholds*, J. CRIM. L. & CRIMINOLOGY (forthcoming) (on file with authors).

of intense public scrutiny of police abuse and growing hostility toward the politicians willfully ignoring the problem. Within the same summer, four states banned police use of the chokehold in all circumstances and three others did so with an exception provided for circumstances in which state law gave the officer authority to use deadly force.⁸⁵ The reform community should embrace this sort of hasty response by the federal government and state governments and account for the reach of the associated equity-enhancing policy decisions. To think that reformers should reject or even question these policies on process grounds, based on the notion that such regulation should be left to municipalities or internal microlocal policymaking bodies, seems misguided. To be sure, no one in the reform community has argued otherwise, yet this would seem to be the requisite reform position if a noninstrumentalist, community-control model became the hallmark of legitimate crime-policymaking process.

To agree with this assessment is to endorse an *instrumental* rather than an ideological or moral approach to crime-policymaking process. Reformers, whether they be activists or scholars, need not enlist the race-class subordinated in policy deliberations as a precondition for enthusiastically backing such reforms. However unseemly, policy reform must take priority over policymaking-process reform. Accordingly, crime-policy reform advocates should take full advantage of the fleeting opportunities for crime-policy reform such as those arising in the wake of George Floyd's death. They should not feel encumbered by a parallel movement for a more inclusive crime-policymaking process. In sum, when presented with an opportunity window such as that opened in the summer of 2020, there is little benefit in insisting that such policy changes accord with the principle of "community control" of police.

It would be hard to identify a successful policy movement that operated within such narrow strategic parameters. The immigrant-sanctuary movement targeted states and municipalities, securing policies at both levels that restricted police participation in immigration enforcement.⁸⁶ Deliberation with immigrants may have been instrumental to this process, but in my studies of the immigrant-sanctuary movement I have seen little evidence of concern among sanctuary policy advocates regarding the degree to which local immigrants had been consulted regarding the prospect of limiting local police participation in immigration enforcement.

85. Gardner & Al-Shareffi, *supra* note 84 (manuscript at 10-11).

86. Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313, 319-23 (2015); Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stump, *Understanding "Sanctuary Cities"*, B.C. L. REV. 1703, 1752-73 (2018).

The gun-rights and pro-life movements, two wildly successful right-wing social movements of the past several decades, appear to greedily take policy wins however and whenever they can get them.⁸⁷ There is little evidence that either places emphasis on equitable process.⁸⁸ Granted, the crime-policy reform movement is driven by a contrasting set of values. A commitment to social equality lies at the heart of the movement and such a commitment dictates a certain regard for equitable policymaking process. However, the immediate question is not whether equitable process is a worthwhile value in the criminal-justice reform movement, but whether it should be considered of equal or greater value than what will in all likelihood be a generations-long cultural battle in pursuit of crime policy transformation. The specific worry is that certain top-down policymaking processes are stigmatized and dismissed by reform advocates, not because of their ineffectiveness, but rather because they have been preemptively labeled as fundamentally unfair.

Given that the project of inclusive crime policymaking and that of equitable crime policy have fallen into tension in the past and will inevitably do so in the future, the criminal-justice reform movement should clearly and unapologetically establish one of the two as the priority. For instance, in the debate regarding the relative utility of democratic and administrative processes in crime-policy reform,⁸⁹ reformers would do well to avoid the notion of fundamentally unfair processes. It is at least plausible that expert-level crime policy rulemaking (in the interest of reform) may be necessary in a system in which neighborhoods, cities, and even counties will never be entirely insulated from city, county, state, and federal rulemaking, and will thus remain susceptible to the prospect of punitive populism arising within any one of an array of higher-order bounded publics. In this sense, the viability of democratic localism as a process of crime-policy reform must be assessed within the larger framework of federalist governance.

All of this is to say that despite the ostensibly egalitarian quality of community-based policymaking processes, there is a distinct benefit to being agnostic on the question of fair process, and in expressly making the pursuit of fair policymaking process subordinate to the pursuit of fair policy. If reformers establish

87. For additional research on right-wing social movements, see *Research*, BERKELEY CTR. FOR RIGHT-WING STUD., <https://crws.berkeley.edu/research> [<https://perma.cc/8EVD-QSVU>].

88. Mugambi Jouet, *Guns, Identity, and Nationhood*, 5 PALGRAVE COMM., Art. No. 138, at 3 (2019); Sarah Kliff, *The Pro-life Movement Is Winning. It'll Take More than One Supreme Court Ruling to Change That*, VOX (June 28, 2016, 8:10 AM EDT), <https://www.vox.com/2016/6/28/12043116/abortion-scotus-pro-life> [<https://perma.cc/F7CU-PWHN>]; Christopher Maska, *The Strategy of the Pro-Life Movement: Legislative Options*, TX. ALL. FOR LIFE (Feb. 12, 2020), <https://www.texasallianceforlife.org/the-strategy-of-the-pro-life-movement-legislative-options> [<https://perma.cc/M8B8-VAV7>].

89. BARKOW, *supra* note 5, at 165-85; Kleinfeld, *supra* note 36; Rappaport, *supra* note 5.

the specific process of crime policymaking (and, likewise, power-shifting as an incorporated subtype) as a second-order concern, their efforts will not be weighed down by any one normative theory of fair process. If power-shifting can help to alleviate the criminal-justice crisis, we should power-shift. But if reform must be achieved by pulling one or several of the levers of crime policy rulemaking antithetical to power-shifting, we should pull the alternative levers. If the priority is to address penal outcomes, the lodestar among crime-policy reformation advocates must be transformative crime policy rather than the narrow pursuit of any one of the several normative models of egalitarian crime-policymaking process.

CONCLUSION

Reformers principally invested in transforming crime policy can acknowledge the values intrinsic to democratic approaches to public governance (power-shifting now being prominent among them) without also making a pre-commitment to equity in crime-policymaking process. The more effective play is to subscribe to crime-policymaking processes instrumentally. Crime policy change, be it reform or revolution, should stand as the first-order normative principle, and the means by which such reforms come to be established, a distant second.

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