The Criminal Prosecution of Local Governments

Stuart P. Green

THE CRIMINAL PROSECUTION OF LOCAL GOVERNMENTS

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In this Article, Stuart Green argues that when local governments adopt policies resulting in official acts that violate federal criminal law, such entities should be subject to criminal prosecution.

The Article begins by tracing the history of local governmental liability for crimes under state law. Mr. Green shows that, in the nineteenth and early twentieth centuries, though both local governments and private business corporations were immune from prosecution for mens rea crimes, each entity could be convicted of non-mens rea, "public harm" offenses. He argues that, in light of the law that now applies to private business corporations, it is an anachronism that local governments are still viewed as incapable of forming criminal intent.

Mr. Green then argues that a collection of key federal criminal statutes involving the environment, civil rights, and antitrust should be construed to apply to local governments. In addition, Mr. Green suggests that, while local governments might be immune from prosecution in limited circumstances, they enjoy no immunity from prosecution generally. The Article concludes with a discussion of the policy considerations underlying the criminal liability of local governments.

One of the most disturbing questions raised by the infamous beating of Rodney King is whether that beating was the act of an isolated group of city employees or was, instead, the result of official or unofficial Los Angeles Police Department policies.[1] This Article does not purport to resolve that

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1. For an example of how this issue figured in the federal trial of the case, compare Gale Holland, *SWAT Chief Defends Clubbing of King*, SAN DIEGO UNION-TRIBUNE, Mar. 20, 1993, at A3 (reporting on defense witness testimony that official police policy on controlling unruly suspects at the time of the King beating was to "beat them into submission") with Rogers Worthington, *Police Expert: Many Blows to King "Flagrant,"* CHI. TRIB., Mar. 4, 1993, at 14 (reporting on prosecution witness testimony that defendant officers' beating of King while he was on the ground was clearly in violation of police department policy). *See also* INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (CHRISTOPHER COMMISSION), REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 29-94 (1991) (finding that a significant

difficult factual question. Instead, it offers a remedy for cases in which prosecutors *do* demonstrate that acts regarded as criminal under federal law are the consequence of policies adopted by a local government or its agencies.[2]

The facts of *Webster v. City of Houston*,[3] a 1984 case in the Fifth Circuit, provide a vivid illustration of how municipal policies can lead to criminal activity.[4] The case involved the unlawful use of a "throw-down" gun—an unregistered weapon carried by police and laid next to the victim of a police shooting to make an unjustified death appear justified.[5] The evidence showed that some form of throw-down weapon was carried by, or available to, seventy-five to eighty percent of Houston police officers; that instructors at the police academy taught the use of such weapons; and that Houston city officials either condoned or deliberately ignored the practice, despite broadly worded pronouncements to the contrary.[6]

Houston's "policy" of condonation had tragic and appalling consequences. Randy Webster, a seventeen-year-old youth from Shreveport, Louisiana, stole a van from an automobile dealership and was pursued by Houston police.[7] At the conclusion of a high speed chase, Webster "had his hands up and was trying to get out of the stolen van, unarmed, offering no resistance, when the police, to whom he wished to surrender, forced him to the ground and shot him in the back of the head."[8] Webster died almost instantly.[9] Nervous about the consequences of killing an unarmed teenager who was trying to surrender, the police officers acted in accordance with

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number of Los Angeles police officers repeatedly misused force despite written policy that allowed officers to use only the minimum amount of force necessary to deal with credible threats, a problem that was aggravated by racism and bias within the department).

2. Except as indicated otherwise, the terms "local government," "municipality," and "city" are used interchangeably to refer to regional governments smaller than states. This is the usual practice in the literature on local government law. *See, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1061 n.4 (1980); *cf.* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 346-48 (1990) (commenting on the various meanings of the term "city").

Although this Article does not directly consider whether federal and state agencies might be subject to prosecution under federal criminal law, both issues are referred to below. *See infra* note 107.

3. 735 F.2d 838 (5th Cir.) (per curiam) (en banc), *aff'd in part and rev'd in part*, 739 F.2d 993 (5th Cir. 1984) (per curiam) (en banc).

4. Although the case involved a private claim for punitive and compensatory damages, *id.* at 843, the facts could just as easily have provided the basis for federal criminal prosecution.

5. *Id.*

6. Webster v. City of Houston, 689 F.2d 1220, 1232 (5th Cir. 1982) (Goldberg, J., concurring), *vacated and remanded*, 735 F.2d 838 (5th Cir. 1984) (per curiam) (en banc), *aff'd in part and rev'd in part*, 739 F.2d 993 (5th Cir. 1984) (per curiam) (en banc).

7. *Id.* at 1232 (Goldberg, J., concurring).

8. *Id.* (Goldberg, J., concurring).

9. *Id.* (Goldberg, J., concurring).

what was, in effect, Houston Police Department policy: They planted a throw-down gun near Webster's corpse and formed a plan to perjure themselves in any future proceedings.[10]

This Article argues that in cases like *Webster*, in which local governments and their agencies intentionally adopt policies that authorize, encourage, or condone acts that are properly treated as criminal under federal law, those entities (rather than, or in addition to, the officials who work for them) can and, in some cases, should be criminally prosecuted.[11] The argument proceeds in three parts. Part I discusses the extensive nineteenth and early twentieth century precedent for the state criminal prosecution of local municipalities.[12] Part II shows that much of the statutory and doctrinal apparatus for the prosecution of such entities already exists under federal law.[13] Part III argues that such prosecutions would, in appropriate cases, fairly and efficiently promote important federal criminal law interests without unduly harming local governments or their citizens.[14]

The time for such an argument is ripe.[15] Municipal governments now regularly authorize conduct that, if engaged in by private individuals or corporations, would violate criminal law. A recent article regarding the District of Columbia, for example, has described a "heartless, incompetent government that systematically screws its neediest out of legally required entitlements and basic city services[,] . . . ignores local laws, disregards federal statutes, and tramples basic constitutional rights."[16] And the problem is not limited to instances of police brutality and other civil rights viola-

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10. *Id.* (Goldberg, J., concurring).

11. For a discussion of the factors that should be considered in deciding whether to prosecute the entity alone or both the entity and the responsible officials, see *infra* note 228.

12. *See infra* notes 21-100 and accompanying text.

13. *See infra* notes 101-214 and accompanying text.

14. *See infra* notes 215-73 and accompanying text.

15. There appear to be only a handful of prior discussions of this subject: James D. Barnett, *The Criminal Liability of American Municipal Corporations*, 17 OR. L. REV. 289 (1938) (dealing primarily with the history of such prosecutions under state law); 1 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY §§ 2:05-:07 (2d ed. 1992) (recognizing importance of such prosecutions to the development of corporate criminal liability); WOLFGANG FRIEDMANN, LAW IN A CHANGING SOCIETY 211 (1972) (offering a broad policy argument in favor of prosecuting governmental agencies); 17 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 49.88-49.94.50 (3d ed. rev. vol. 1993) (collecting cases).

16. David Plotz, *Guilty! Guilty! Guilty!*, WASH. CITY PAPER, March 25, 1994, at 22; *see also* WASHINGTON LEGAL CLINIC FOR THE HOMELESS, COLD, HARSH, AND UNENDING RESISTANCE: THE DISTRICT OF COLUMBIA GOVERNMENT'S HIDDEN WAR AGAINST ITS POOR AND HOMELESS *passim* (1993) (describing pervasive pattern in which D.C. city government systematically violates laws concerning homelessness, mental health, prison conditions, public housing, foster care, and other public benefits).

For a general assessment of the causes and extent of police brutality in this country, see JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE *passim* (1993).

tions. There are also indications that local governments are among the nation's worst polluters[17] and that they engage in serious per se antitrust violations.[18]

These three areas of the criminal law—civil rights, environmental, and antitrust—are the focus of much of this Article. The reason for this focus is that these crimes seem more likely than crimes such as bribery, fraud, and racketeering to result from the collective decisionmaking process that justifies prosecuting the entity rather than, or in addition to, the individual.[19]

This Article does not attempt to quantify or systematically identify particular instances of "municipal crime." It accepts as a premise that such crime occurs and that it is sometimes the result of official or unofficial municipal policy. The Article also does not offer an argument as to why certain serious cases of civil rights, environmental, and antitrust illegality should be addressed through federal criminal sanctions; it simply adopts Congress's judgment that they should.[20] Instead, the Article seeks to establish that the policies which recommend the use of criminal sanctions when

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17. *See* Steven Ferrey, *The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 200-02 (1988). State and federal governmental entities have also been identified as major polluters. *See, e.g.*, SETH SHULMAN, THE THREAT AT HOME: CONFRONTING THE TOXIC LEGACY OF THE U.S. MILITARY *passim* (1992); Bruce van Voorst, *A Thousand Points of Blight*, TIME, Nov. 9, 1992, at 68.

18. *See generally* MARK R. LEE, ANTITRUST LAW AND LOCAL GOVERNMENT 47-165 (1985) (discussing local government antitrust violations, including such per se violations as price fixing); Stephen D. Susman & William H. White, *The Perspective of a Plaintiff's Lawyer*, *in* ANTITRUST AND LOCAL GOVERNMENT: PERSPECTIVES ON THE *BOULDER* DECISION 21, 28 (James V. Siena ed., 1982) [hereinafter ANTITRUST AND LOCAL GOVERNMENT]. *Cf. infra* note 107 (discussing a federal grand jury antitrust investigation of a state university).

19. For a further discussion of why enterprise liability is more appropriate in the case of some crimes than others, see *infra* note 216.

20. This Article also is not intended to advocate an expansion of federal criminal law. The author recognizes that "overcriminalization"—*i.e.*, the application of the criminal laws to conduct that has not traditionally been regarded as criminal—tends to rob the criminal law of its distinctive force. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 235-36 (1991); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1876 (1992) [hereinafter Coffee, *Paradigms*]; Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 437-38 (1963); *see also* Naftali BenDavid, *How Much More Can Courts, Prisons Take?*, LEGAL TIMES, June 7, 1993, at 1 (describing growing resistance to the federalization of "petty" crimes).

Moreover, the author does not mean to suggest that municipalities should be criminally prosecuted *whenever* the law allows, or even in every case in which a business corporation would be prosecuted. The Article recognizes that the criminal law is an unwieldy tool for effecting social policy, a "last resort to be used selectively and discriminatingly when other sanctions fail." Kadish, *supra*, at 426. Indeed, the author acknowledges that this "last resort" view of criminal law may be particularly appropriate when the defendant is a local government, given the extensive control the federal government is able to exercise over such entities by means of "bribes" and other forms of conditional spending. *See* DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 534-53 (3d ed. 1990) (discussing law regarding ability of

the defendant is a governmental official or private corporation also recommend the use of criminal sanctions when the defendant is a local governmental entity.

I. THE CRIMINAL PROSECUTION OF LOCAL GOVERNMENTS UNDER STATE LAW

For more than a century and a half, from about 1819 until as late as 1975, American local governments were subject to criminal prosecution under state law.[21] Prosecutors acting on behalf of the State filed informations, and grand juries issued indictments, setting forth criminal charges against cities;[22] municipal corporations;[23] towns;[24] boroughs, counties, townships, and parishes;[25] city councils, boards of freeholders, and aldermen;[26] parks and public works authorities;[27] and even the "inhabitants" of a place.[28] It was during this same period, particularly during the middle part of the nineteenth century, that the legal status of the municipality was transformed. Once a relatively autonomous association of citizens operating according to its own rules and frequently owning property, the municipality changed, over time, into an inferior creature, a "mere subdivision" of the state subject to almost complete state regulation and control.[29]

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federal government to condition spending on state and local governments' compliance with federal policy objectives).

21. The first reported case involving the criminal prosecution of a local government seems to have been Commonwealth v. Inhabitants of Dedham, 16 Mass. 141 (1819); the last, Commonwealth v. Fleetwood Borough Auth., 346 A.2d 867 (Pa. Commw. Ct. 1975).

22. *E.g.*, People v. City of Chicago, 100 N.E. 194 (Ill. 1912); City of Newport v. Commonwealth, 55 S.W. 914 (Ky. 1900); State v. City of Portland, 74 Me. 268 (1883); Commonwealth v. City of Boston, 33 Mass. (16 Pick.) 442 (1835); State v. Dover, 46 N.H. 452 (1866); State v. Canterbury, 28 N.H. 195 (1854).

23. *E.g.*, People v. Corporation of Albany, 11 Wend. 538 (N.Y. 1834); State v. Corporation of Shelbyville, 36 Tenn. (4 Sneed) 176 (1856).

24. *E.g.*, State v. Town of Cumberland, 6 R.I. 496 (1860); State v. Town of Burlington, 36 Vt. 521 (1864); State v. Town of Whitingham, 7 Vt. 390 (1835); Town of Byron v. State, 35 Wis. 313 (1874).

25. *E.g.*, Commonwealth v. Lansford Borough, 14 Pa. 376 (1894); Commonwealth v. Borough of Wilkinsburg, 37 Pa. Super. 160 (1908).

26. *E.g.*, White v. Commissioners of Chowan, 90 N.C. 437 (1884); Commonwealth v. Bredin, 30 A. 921 (Pa. 1895); State v. Mayor & Aldermen of Knoxville, 12 Tenn. 146 (1883).

27. *E.g.*, State v. Commissioners of Cross Roads of Charleston, 3 S.C.L. (3 Hill) 149 (1836); State v. Metropolitan Park Dist. of Tacoma, 171 P. 254 (Wash. 1918).

28. *E.g.*, State v. Inhabitants of Madison, 62 Me. 546 (1874); *see also* Barnett, *supra* note 15, at 289-306 (tracing the development of municipal liability in England and the United States); 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 27 (1971) (discussing criminal liability of municipal corporations); 64 C.J.S. *Municipal Corporations* § 2215 (1950) (same).

29. For a discussion of this transformation, which seems to have occurred in different jurisdictions at different times during the 19th century, see OSCAR HANDLIN & MARY F. HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY 93 (rev. ed. 1969) (dealing with Massachusetts); HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE

Unfortunately, the criminal prosecution of local governments did not fit neatly into this transformative process. There are simply too few reported cases, spread across too many jurisdictions, to justify any general conclusions about how such prosecutions did or did not reflect this change in legal status.[30] Instead, Part I explores three propositions that help to illustrate, in more selective terms, how such prosecutions related to the development of local government law in the nineteenth century.

First, the definition of what was "criminal" for municipalities was derived (like much of local government law) from the more general law of corporations.[31] This definition referred not to acts requiring mens rea, but instead to non-mens rea acts that harmed the public at large, such as the creation of, or failure to abate, a nuisance.

Second, courts viewed state-initiated criminal prosecution as an efficient alternative to private tort suits.[32] By making municipalities both liable for criminal prosecution brought by the government and immune from tort suits brought by a potential "multitude" of private plaintiffs, it was possible to deter municipalities from wrongdoing without overdeterring them from socially beneficial acts.

Third, the imposition of criminal liability frequently hinged on a determination of whether a municipality was acting in a "governmental" (rather than "proprietary") or "discretionary" (as opposed to "ministerial") capacity.[33] Although these distinctions are now more familiar in the context of private tort suits against municipalities, they had one rationale that was unique to state criminal prosecutions: namely, that making municipalities immune from criminal prosecution when acting in their capacity as the

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POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 189-91 (1983) (dealing with New York); and Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 392-438 (1985) (comparing Massachusetts to New York). *See also* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 6-18 (1990) (reviewing the traditional assumption of the legal powerlessness of local governments).

30. In each of the 12 states in which a record of such proceedings has been found, there are no more than a handful of reported cases. *See supra* notes 21-28. Nevertheless, the criminal prosecution of local governments was regularly treated in the leading 19th- and early 20th-century treatises on both the criminal law, *see* 1 JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 1082 (6th ed. 1877); WILLIAM L. CLARK, JR., HANDBOOK OF CRIMINAL LAW 80 n.83 (1894); HERSCHEL B. LAZELL, A TREATISE ON THE LAW OF CRIMES § 113 (2d ed. 1912); 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 93 (8th ed. 1880); and local government law, *see* ROGER W. COOLEY, HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS § 162 (1914); 2 JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS §§ 745, 746 (2d ed. 1873); CHARLES B. ELLIOTT, THE PRINCIPLES OF THE LAW OF PUBLIC CORPORATIONS § 358 (1898).

31. *See infra* notes 34-59 and accompanying text.

32. *See infra* notes 60-68 and accompanying text.

33. *See infra* notes 69-90 and accompanying text.

"state" would relieve the state of the possibility that it might be prosecuting "itself."

After exploring these three propositions, the Article offers several thoughts on why the state criminal prosecution of local government entities occurred at all and why, during the early years of this century, such prosecutions virtually disappeared.

A. *Municipalities as "Corporations" Subject to Prosecution for Non-Mens Rea, Public Harm Offenses*

The criminal prosecution of local governments during the nineteenth and early twentieth centuries was, in large part, a species of corporate criminal law. Cases involving the criminal liability of business corporations were regularly cited as support in decisions and scholarly treatises involving the criminal liability of local governments[34] and vice versa.[35] The close relation between the criminal liability of municipalities and business corporations was not surprising; it reflected a broader identity between corporate and local government law—or, more accurately, the lack of a real distinction between the two—in the early and middle part of the nineteenth century.[36] And it was a relationship that existed even though many municipalities were technically not incorporated.[37]

The basic nineteenth-century rule was that municipalities and business corporations were immune from prosecution for crimes requiring mens rea,[38] but subject to prosecution for non-mens rea acts that harmed the public at large.[39] The emphasis on the public at large is important; acts that

34. *E.g.*, State v. City of Portland, 74 Me. 268, 273 (1883); 2 DILLON, *supra* note 30, § 746 & n.1.

35. *E.g.*, CLARK, *supra* note 30, § 42 at n.83; LAZELL, *supra* note 30, § 111 at n.329.

36. HARTOG, *supra* note 29, at 184.

37. Frug, *supra* note 2, at 1095.

38. *See* McKim v. Odom, 3 Bland 407, 421-22 (Md. 1829) (noting that "the members of a body politic, in their corporate capacity, cannot commit a crime, or perpetrate a felony"); Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. (2 Gray) 339, 345 (1854) ("Corporations cannot be indicted for offences which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony; of perjury or offences against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them."); State v. Morris & Essex R.R., 23 N.J.L. 360, 370 (1852) ("[T]here are crimes (perjury for example) of which a corporation cannot, in the nature of things, be guilty. There are other crimes, such as treason or murder, for which the punishment imposed by law cannot be inflicted upon a corporation. Nor can they be liable for any crime of which a corrupt intent or *malus animus* is an essential ingredient."); WHARTON, *supra* note 30, at 58; *see also infra* note 30.

39. 1 BISHOP, *supra* note 30, § 236 (arguing that "if a nuisance affects the public it is indictable, while actionable if it affects only individuals"); *id.* § 235, at 138 (asserting that if the "thing is done to the injury of the whole community, and sufficient in magnitude for the tribunals to notice, it is cognizable criminally") (footnote omitted); *see also* Commonwealth v. Ashley Borough, 37

harmed only a part of the public were either not actionable or, in the case of some types of municipality, actionable in tort.[40] The reason for such a scheme of immunity was that municipalities, like other types of corporations, were regarded as incapable of forming criminal intent and of serving the prison sentence that was associated with mens rea crimes.[41]

The "public harm" requirement typically took one of two forms. First, municipalities were subject to criminal prosecution when they actively created a harm to the public, an offense usually referred to as misfeasance.[42] Second, they were criminally liable when they failed to carry out some duty—usually prescribed by statute[43]—that was owed to the public. Such

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Pa. Super. 254, 259 (1908) (affirming conviction of town indicted for dumping sewage into a public creek and thereby maintaining a public nuisance; to the extent that a downstream property owner would suffer harm "not because he happens to be a riparian owner, but because he is a citizen, a unit in the community, with the right to demand that the health and comfort of that community shall not be threatened or impaired," the proper remedy is by "public prosecution"); State v. Mayor and Aldermen of Knoxville, 12 Tenn. 146, 156 (1883) (reversing conviction of town that sought to protect interests of the community at large by burning smallpox-infested clothing and bed linens, even though such burning did cause temporary inconvenience to relatively small group of persons who lived nearby).

For a further discussion of strict liability or "regulatory" crimes in the 19th century, see LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 113-16 (1993); Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 212-16 (1965); Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM L. REV. 55, 56-67 (1933).

40. *See, e.g.*, *Ashley Borough*, 37 Pa. Super. at 260 (stating that to the extent a downstream property owner suffered an injury which would be particular to him, and would not "affect the people at large," his remedy was by civil tort action); HARTOG, *supra* note 29, at 189 (maintaining that municipal corporations could be held liable in tort, while unincorporated municipalities could not).

41. CLARK, *supra* note 30, § 42 ("A corporation, being impersonal, cannot commit felonies, because it cannot entertain felonious intent, nor can it commit crimes involving the element of natural malice . . . ."); COOLEY, *supra* note 30, § 162 ("A municipality is not indictable for a felony, since it is incapable of felonious intent, and can neither be hanged nor imprisoned."); 2 DILLON, *supra* note 30, § 746; JAMES E. GRIGSBY, THE CRIMINAL LAW § 141 (1922) ("[A]rtificial persons, not possessing the spiritual, mental or physical attributes of the natural persons, cannot form the necessary evil or wicked intent to commit these crimes."); 17 MCQUILLIN, *supra* note 15, at § 49.88; 64 C.J.S. *Municipal Corporations* § 2215 (1950); *see also supra* note 38.

When corporate or governmental officials engaged in conduct that did involve mens rea, such as bribery, they could be prosecuted individually. *See, e.g.*, Walsh v. People, 65 Ill. 58, 62 (1872); 2 DILLON, *supra* note 30, § 747 n.3; 2 WHARTON, *supra* note 30; § 1572*b* (noting that "[p]ublic officers, including justices of the peace, are indictable for corruption if they accept or offer to accept, under color of office, any money or other benefit calculated in any way to influence their official course").

42. *E.g.*, *Ashley Borough*, 37 Pa. Super. at 259 (affirming conviction of town indicted for dumping sewage into public creek and thereby maintaining public nuisance).

43. *See, e.g.*, State v. Canterbury, 28 N.H. 195, 227 (1854) (stating that criminal liability for neglect rests substantially on statute, although it resembles the common-law offense); *see also* COOLEY, *supra* note 30, § 162 (asserting that "indictments against municipal corporations have been confined to statutory offenses"); 2 DILLON, *supra* note 30, § 746 (maintaining that municipalities are indictable for offenses "plainly enjoined by the legislature").

duties included the obligation to build or repair a bridge[44] or perform some other public function.[45] Failure to carry out these duties was usually referred to as "nonfeasance."[46]

The susceptibility of municipalities to criminal prosecution for creating or failing to abate a public nuisance reflected, in part, a more general rule regarding the division of law and equity that prevailed in most jurisdictions during much of the nineteenth century. This rule provided that although private nuisances could be remedied either by a private damages suit at law or a suit for injunctive relief in equity, public nuisances could be addressed only by a state-initiated indictment or information in a court of law.[47]

The lines between "criminal" and "civil," however, were not always entirely clear. There was, for example, confusion about whether an information brought in response to a public nuisance was, strictly speaking, a criminal proceeding and, therefore, beyond the jurisdiction of the courts of

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44. *See, e.g., Canterbury*, 28 N.H. at 227-28; State v. Inhabitants of Hudson, 30 N.J.L. 137, 142 (1862).

45. In Commonwealth v. Inhabitants of Dedham, 16 Mass. 141 (1819), for example, a town was convicted of violating a Massachusetts statute that required every community containing 200 families or households to provide its public grammar schools with a schoolmaster of "good morals, well instructed in the *Latin*, *Greek* and *English* languages." *Id.* at 144. In upholding the conviction, the Massachusetts Supreme Court noted that the "schools required by the statute [were] to be maintained for the benefit of the whole town." *Id.* at 146.

46. Some early cases held that, although corporations could be indicted for nonfeasance, they could not be indicted for misfeasance. *See, e.g.*, State v. Great Works Milling & Mfg. Co., 20 Me. 41, 44 (1841). However, courts subsequently overruled most of these cases. *See, e.g.*, State v. City of Portland, 74 Me. 268, 273 (1883) (overruling *Great Works*). By the turn of the century, the distinction had been "almost universally repudiated." LAZELL, *supra* note 30, § 111; *see also* BRICKEY, *supra* note 15, § 2:08 (describing development and decline of distinction between misfeasance and nonfeasance); GRIGSBY, *supra* note 41, § 142; JOHN W. MAY, THE LAW OF CRIMES § 38 (3d ed. 1905) (explaining that because both misfeasance and nonfeasance exist "irrespective of criminal intent," there was no reason to limit the criminal liability of corporations in this manner).

47. JOHN ADAMS, THE DOCTRINE OF EQUITY: A COMMENTARY ON THE LAW AS ADMINISTERED BY THE COURT OF CHANCERY 427 (1873) ("The remedy at law for nuisance is by indictment in respect of public nuisances, and by action in respect of private nuisances or of the private injuries resulting from public ones."); MELVILLE M. BIGELOW, ELEMENTS OF EQUITY FOR THE USE OF STUDENTS 300 (1879) ("In cases of public nuisance, or nuisance to the injury of the general public alike, an indictment may be maintained to abate them and to prosecute the offender . . . .") (footnote omitted); GEORGE T. BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY 395 (1874) ("The remedy for public nuisance is by information by the attorney general. But if the individual has also sustained special damage over and above the public injury, he may also proceed by bill."); H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES § 863 (3d ed. 1893) ("In the case of public nuisances, . . . the remedy is by indictment in respect of the public injury, and by action in respect of any particular or special damage sustained by individuals.") (footnotes omitted).

The particular significance of this rule in the context of municipal defendants is considered further *infra* notes 60-68 and accompanying text.

equity.[48] Sophisticated commentators like Joel Bishop, author of a leading nineteenth-century criminal law treatise, acknowledged doubts about the extent to which "crimes" involving acts such as creating a nuisance could be distinguished from torts.[49]

Nevertheless, the weight of the historical evidence suggests that state-brought prosecutions against local municipalities were viewed as criminal proceedings. Such prosecutions were initiated either by information[50] or indictment.[51] A municipality named as a criminal defendant enjoyed procedural rights similar to those enjoyed by natural persons.[52] Upon conviction, the municipality was usually subject to a criminal fine, ranging from ten dollars in 1844 for a failure to repair a city street[53] to one thousand dollars in 1856 for a failure to repair a bridge.[54] The prosecution of municipalities

48. *Compare* Attorney Gen. v. Utica Ins. Co., 2 Johns. Ch. 371, 391 (N.Y. 1817) (Kent, Ch.) (holding that the chancery court has no jurisdiction over information filed against public nuisance); JOHN WILLARD, A TREATISE ON EQUITY JURISPRUDENCE 390 (2d ed. 1880) ("In many of the cases which are indictable, as common nuisances, courts of equity have no cognizance. The remedy at the suit of the people by a public prosecution, will, in general, accomplish the object of suppressing the injury, and render unnecessary the prosecution by individuals.") *with* 3 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1349 (1887) ("A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of . . . the state, or the people, or municipality, or some proper officer representing the commonwealth . . . .") *and* 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 923 (12th ed. 1877) ("In cases of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievances by way of injunction.").

49. 1 BISHOP, *supra* note 30, §§ 1074-77.

50. *E.g.*, People v. City of Chicago, 100 N.E. 194, 195 (Ill. 1912); Commonwealth v. Ephrata Borough's Town Council, 2 Pa. D. 349, 349 (1893).

51. *E.g.*, Commonwealth v. City of Boston, 33 Mass. (16 Pick.) 442, 443 (1835); State v. Canterbury, 28 N.H. 195, 195-96 (1854).

52. The issue of the municipality's procedural rights is rarely discussed in the cases. What little discussion there is indicates that, when named as a criminal defendant, municipal corporations enjoyed rights that were similar to those enjoyed by natural persons. *See* City of Ludlow v. Commonwealth, 56 S.W.2d 958, 959 (Ky. 1933) (reversing conviction of city where fine violated state constitutional provision prohibiting excessive fines); State v. Canterbury, 28 N.H. 195, 228 (1854) (noting, with respect to defendant Towns of Canterbury and Boscawen, that under the New Hampshire Constitution, "no citizen shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally described to him"); *see also* 64 C.J.S. *Municipal Corporations* § 2216 (1950) ("General rules as to the trial and evidence in criminal proceedings have been applied in criminal prosecutions against a municipal corporation.") (footnotes omitted).

53. State v. Barksdale, 24 Tenn. (5 Hum.) 154, 154 (1844).

54. *See* State v. City of Bangor, 41 Me. 533, 534 (1856); *see also* People v. City of Chicago, 100 N.E. 194, 195 (Ill. 1912) (fining the city $25 for violation of law prohibiting city from employing women more than 10 hours per day); State v. Canterbury, 28 N.H. 195, 229 (1854) (imposing fine of unspecified amount for neglect to build or repair highways); Board of Chosen Freeholders v. State, 42 N.J.L. 263, 264 (1880) (upholding a $10 fine and ordering the city to improve a bridge or pay for expenses).

A corporation could also have its charter abrogated—a sort of corporate "capital punishment," *see* MAY, *supra* note 46, § 38—although there do not appear to be any instances in which courts ordered such a sanction against a municipality.

was, moreover, addressed in the criminal law treatises.[55] Most importantly, these prosecutions were not, according to Bishop, intended to be compensatory.[56] Rather, they were intended to further aims that were, and are, considered particularly appropriate for the criminal law: to "punish,"[57] to "correct public wrongs,"[58] and to "prevent their repetition."[59]

B. *Criminal Liability, the "Single Plaintiff" Principle, and the Development of Municipal Immunity from Tort*

As noted above,[60] the general rule in the nineteenth century was that a defendant responsible for causing a public nuisance was immune from private tort suit but liable to state-initiated prosecution. There was an economically sound justification for this tradeoff: If a defendant that created a nuisance affecting everyone in the community were subject to private tort suits, it was likely to be "overwhelm[ed] . . . with litigation."[61] On the other hand, if no one were allowed to sue, the result would be underdeterrence. By allowing the state alone to institute an action, the courts were able to achieve a practical, economically sound solution to this dilemma.[62]

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55. *See supra* note 30.

56. 1 BISHOP, *supra* note 30, § 249.

57. *See* City of Ludlow v. Commonwealth, 56 S.W.2d 958, 959 (Ky. 1933) (holding that criminal fine against a town was intended to "punish and deter"); Town of Paintsville v. Commonwealth, 55 S.W. 915, 915-16 (Ky. 1900) (standing for the proposition that town may be indicted and punished for willful refusal to repair bridge).

58. *See* 1 BISHOP, *supra* note 30, § 247.

59. *Id.* On the other hand, the cases fail to indicate whether non-mens rea crimes were accompanied by the stigma that usually accompanies criminal proceedings.

60. *See supra* note 47 and accompanying text.

61. *See* 1 BISHOP, *supra* note 30, § 235. In modern terminology, the defendant would be "overdeterred."

62. As Bishop explained:

> [I]f the injury is common to the whole community, affecting no one person specially, the law would be unreasonable to allow each to bring his separate suit, where all could alike complain, and overwhelm the transgressor with litigation. Therefore the rule of the law is, that, under such circumstances, no one can have his private action.
>
> . . . But if there were no public remedy, the wrong would go unredressed. When, therefore, a thing is done to the injury of the whole community, and sufficient in magnitude for the tribunals to notice, it is cognizable criminally.

Id. (footnotes omitted).

This "single plaintiff" principle was the converse of what modern commentators generally refer to as "enterprise liability," a principle that might, for the sake of symmetry, be called the "single defendant" principle.

Logically, of course, there was no need for the state to bring a *criminal* prosecution in order to achieve the intended effect. The same goal could have been achieved by vesting in the state the exclusive right to bring a *civil* suit. Indeed, in some states, such as Kansas, state-initiated, civil *quo warranto* suits seem to have served a similar purpose. *See, e.g.*, State *ex rel.* Pleasant v. City of Ottawa, 84 Kan. 100, 100 (1911) (bringing civil action to oust City of Ottawa from exercising power to require engineers and firemen at city water and light plant to work more than eight hours per day in contravention of state statute); State *ex rel.* Vance v. City of Topeka, 31 Kan. 452, 453

This "single plaintiff" principle had a notable influence on the developing law of municipal tort immunity. The first American case to establish such immunity was *Mower v. Inhabitants of Leicester*.[63] The *Mower* court's principal justification for granting immunity (i.e., the authority of what was probably an inapposite English case)[64] has been severely criticized.[65] But such criticism has overlooked another of *Mower*'s justifications for holding the defendant county immune—namely, that such immunity was in some sense *conditioned* on the county's susceptibility to criminal indictment.[66]

Numerous cases involving municipal tort immunity—many of which went beyond the public nuisance context—subsequently cited *Mower*.[67] Only a few of those cases actually mentioned what has been referred to here

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(1884) (county attorney bringing *quo warranto* suit in name of state to oust City of Topeka from licensing persons to sell intoxicating liquors and taxing them for doing so); *see also* 17 MCQUILLIN, *supra* note 15, § 50 (summarizing *quo warranto* law); 4 C. DALLAS STONE ET AL., LOCAL GOVERNMENT LAW §§ 29.01-.06 (summarizing law concerning non-criminal, state-brought "public actions" against municipalities).

An alternative solution to the problem of inefficient multiple lawsuits involving related claims was to allow a "bill of peace," a precursor to the modern class action. *See* ZACHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 200-01 (1950) (describing procedural device for aggregation of claims used in English courts of equity in 17th century).

63. 9 Mass. 247, 247-50 (1812) (holding defendant county immune from tort suit brought by owner of public stagecoach whose horse was injured while crossing bridge allegedly kept in poor repair).

64. In ruling that the defendant county was immune from suit in tort, the court relied on a distinction between "quasi-corporations" (*i.e.*, municipal entities "created by the legislature for purposes of public policy") and corporations "created for their own benefit." *Id.* at 249. Following the authority of an earlier English case, Russell v. Men of Devon, 2 T.R. 667, 673, 100 Eng. Rep. 359, 362 (K.B. 1788), the court held that while "corporations created for their own benefit" could, under the common law, be sued "on the same ground . . . as individuals," quasi-corporations could not be sued without a legislative enactment. *Id.* Since it found that the county was a quasi-corporation and the legislature had made no provision for liability, the *Mower* court held that the county was immune from suit in tort. *Id.*

65. It appears that *Mower* was wrong to rely on *Russell*, because the defendant in *Mower* in fact was incorporated. *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 206, 254 (1983); James D. Barnett, *Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250, 264 (1936); Edwin M. Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 41-42 (1924); John St. Francis Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROBS. 214, 215 (1942).

66. *See Mower*, 9 Mass. at 249 (stating that quasi corporations "*are subject, by the common law, to an indictment for the neglect of duties enjoined on them*; but are not liable to an action for such neglect, unless the action be given by some statute") (emphasis added).

Although several commentators have mentioned the fact that the defendant county was subject to indictment, none seems to have thought it very significant. *See* HARTOG, *supra* note 29, at 190; SCHUCK, *supra* note 65, at 254.

67. *See, e.g.*, Long v. City of Weirton, 214 S.E.2d 832, 853 (W.V. 1975) (showing influence of *Mower*); Note, *Municipal Tort Immunity in Virginia*, 68 VA. L. REV. 639, 640-41 (1982) (same).

as the single plaintiff principle.[68] Nevertheless, given the role it played in the *Mower* case itself, the susceptibility of municipalities to criminal indictment should be recognized as having had a seminal, if indirect, influence on the development of municipal tort immunity.

C. *Immunity for Actions Performed in a "Governmental" or "Discretionary" Capacity*

By the middle of the nineteenth century, courts had begun to distinguish not just between different types of municipalities,[69] but also between the different capacities in which municipalities performed. For a combination of political and doctrinal reasons that other commentators have discussed extensively,[70] courts developed two sets of related distinctions: a distinction between municipal functions that were "governmental" as opposed to "proprietary" and a distinction between municipal functions that were "discretionary" rather than "ministerial."[71]

Both distinctions are now most familiar in the tort context. In some American jurisdictions, cities are still liable in tort only to the extent that they have exercised proprietary functions.[72] The usual rationale for this rule is that municipalities acting in their governmental capacity act as part of the state government and, therefore, share in the state's sovereign immunity.[73]

An analogous rule existed in the context of the criminal law: Municipalities acting in a governmental capacity were immune from criminal prosecution, but those acting in a proprietary capacity were not.[74] In some respects, this rule made even more sense in the criminal context than it did in the tort context. Unlike the right to sue in tort, the right to bring a criminal prosecution has traditionally been viewed as an exclusively governmental prerogative.[75] Therefore, unless a municipality acting in its

68. *See, e.g.*, Morey v. Town of Newfane, 8 Barb. 645, 652 (N.Y. 1850) (quoting *Mower* on this point).

69. *See supra* note 64; *see also* Barnes v. District of Columbia, 91 U.S. 540, 552 (1875) (noting distinction between liability of municipal and quasi-corporations).

70. *See, e.g.*, HARTOG, *supra* note 29, at 1-60; Frug, *supra* note 2, at 1099; Carol F. Lee, *The Federal Courts and the Status of Municipalities: A Conceptual Challenge*, 62 B.U. L. REV. 1, 8-11 (1980).

71. *See supra* note 70.

72. 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 29:6, at 620-39 (2d ed. 1986); 2 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 6:9, at 48-57 (1985).

73. 5 HARPER, *supra* note 72, § 29:6, at 624.

74. *See, e.g.*, City of Georgetown v. Commonwealth, 73 S.W. 1011, 1014 (Ky. 1903) (reversing conviction of municipality for failure to prosecute nuisance occurring on private property because failure to act was done in governmental capacity).

75. *See* Stuart P. Green, Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488, 494-95 & n.39 (1988).

governmental capacity (*i.e.*, acting "as the state") was immune from prosecution, the state would face the uncomfortable possibility of having to prosecute itself.[76]

This ban on "self-prosecution"—and the difficulty of applying it in a consistent manner—is well illustrated by a comparison of two cases with very similar facts, but directly opposed holdings. In the first, *People v. City of Chicago*,[77] the defendant was convicted of violating Illinois' Woman's Ten-Hour Law, which prohibited any "mechanical or mercantile establishment" from employing any "female" for more than ten hours during any one day.[78] Two women—Julia Klein, a cook, and Edna Kuhnan, a nurse—had each worked more than ten hours on a certain day at a city-managed hospital.[79] The city contended that it could not be guilty of a criminal offense because, as a political subdivision of the state, a criminal prosecution against the municipality would indirectly constitute an action by the state against itself.[80] The Illinois Supreme Court rejected this argument, reasoning that a municipality may act in two different capacities—one governmental, the other private. In the former capacity, the municipality is the "agent of the state, and assists in the government of the territory."[81] In the latter capacity, it

> represents those proprietary interests that appertain to it in common with other corporations. It makes contracts, employs men, owns property, and transacts business in the same way as individuals and private corporations. In this capacity it may sue and be sued, and is governed by the same laws and rules and subject to the same regulations and limitations that natural persons are, except so far as it may be exempt by express enactment.[82]

The court found no problem of self-prosecution, since the municipality was acting in its "private, proprietary" capacity.[83]

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76. A version of this argument also appears in the Australian High Court case of Cain v. Doyle, 72 C.L.R. 409 (1946). Under an Australian statute, employers were criminally liable for unreasonably terminating employees who had completed a certain period of war service. *Id.* at 411. The defendant, manager of a Commonwealth munitions factory, was prosecuted for unlawfully terminating members of a returned soldiers' organization. *Id.* at 410. Under the statute, the defendant's conviction depended on a finding that he was an accessory to an offense committed by the employees' former employer, the Crown. *Id.* at 411-12. Although a majority of the High Court decided to affirm the order of the lower court dismissing the information, the reasoning of the judges varied. Chief Justice Latham's principal concern was with preventing a construction of the statute that would require the Crown, as a criminal defendant, to prosecute, or pay a fine to, itself. *Id.* at 418 (Latham, C.J.).

77. 100 N.E. 194 (Ill. 1912).

78. *Id.* at 196.

79. *Id.* at 195.

80. *Id.* at 196.

81. *Id.*

82. *Id.*

83. *Id.* at 197.

In the second case, *State v. Metropolitan Park District of Tacoma*,[84] the Washington Supreme Court reversed the conviction of the Tacoma Metropolitan Park District, a special municipal corporation, for violating a statute that forbade the employment of females for more than eight hours per day in any "mechanical or mercantile establishment."[85] The court distinguished *City of Chicago* on the dubious ground that, unlike the maintenance of a hospital, the "regulation and maintenance of public parks" was not a "private or proprietary act of a municipal corporation, but rests purely within the governmental function of such corporations."[86]

There was, moreover, another wrinkle in this doctrine. Even when a city was acting in its proprietary capacity, it was still immune from criminal prosecution if it was performing a "discretionary" or "legislative," as opposed to "ministerial," function.[87] This distinction, however, like the governmental/proprietary distinction itself, was notoriously difficult to apply. In *Board of Chosen Freeholders of the County of Bergen v. State*,[88] for example, a New Jersey court discussed whether a city's refusal to build or repair a bridge fell within the proper limits of its discretion: "[W]here the public would be deprived of the beneficial use of the highway without the bridge, a refusal to provide it would constitute a breach of official duty."[89] In contrast, "where a road not much used crosses a stream of water which can be safely forded, the [town] may in [its] discretion decline to interfere, without subjecting [itself] to restraint from any other tribunal."[90] As these

84. 171 P. 254 (Wash. 1918).

85. *Id.* at 254.

86. *Id.* at 255.

87. *See* State v. Town of Burlington, 36 Vt. 521, 524 (1864) (stating that the duty to remove a nuisance was not "absolute" but "dependent upon the exercise of [the selectmen's] judgment and discretion"); Town of Saukville v. State, 33 N.W. 88, 89 (Wis. 1887) (upholding the conviction of Town for failing to repair a common bridge on a public highway; stating, in *dicta*, that had there been evidence that the "electors of the town had voted that it was not necessary to repair the bridge in question, that the interests and convenience of the public did not demand it, or that the town had no money which could be appropriated for that purpose, it would be manifestly unjust to impose a fine upon the town for the alleged omission of duty"); *see also* People v. Adsit, 2 Hill 619, 619 (N.Y. 1842) (dismissing indictment that failed to allege that there were sufficient funds available to pay for repair of bridge).

The discretionary/ministerial function distinction relied on in these cases was presumably based on the same concern for separation of powers that justified reliance on this distinction in the tort context. *See* Owen v. City of Independence, 445 U.S. 622, 648 (1980) ("For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on [issues of public policy] would be an infringement upon the powers properly vested in a coordinate and coequal branch of government."); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803) (using discretionary/ministerial distinction to define boundaries of judicial power to compel executive action).

88. 42 N.J.L. 263, 272-73 (1880).

89. *Id.* at 273-74.

90. *Id.* at 274.

passages suggest, distinguishing between what was discretionary and what was ministerial was no easy task.

D. *Reasons for the State Prosecution of Municipalities in the Nineteenth Century and for Its Decline*

As noted earlier,[91] cases involving the state criminal prosecution of local governments occurred too infrequently and were too widely dispersed to allow for any definitive conclusions about how they fit into the development of local government law during the nineteenth and early twentieth centuries. Nevertheless, one can offer several observations about why such prosecutions occurred, and why they ultimately disappeared.

It is clear that the state-initiated criminal prosecution of local governments was never a preferred remedy. The paucity of cases suggests that states utilized such prosecutions only when less intrusive methods were either unavailable or ineffective. Nevertheless, such cases remained a fixture. Even as states began exercising increasingly direct political control over local governments, occasions still arose when it was impossible for a state government simply to order, or "bribe," a municipality to build a road, repair a bridge, abate a nuisance, or otherwise comply with state policy. Many local municipalities continued to maintain an independent revenue base and the autonomy to run their own day-to-day affairs.[92] In such circumstances, it became necessary for the state or, more accurately, a prosecutor acting on behalf of the state to seek relief in court.[93] And, because of various and frequently formalistic doctrines of tort immunity, the division of law and equity, and the appropriate remedies for public and private harms (each of which has been described above), the means by which the state acted was sometimes a criminal prosecution.

Nevertheless, the use of such prosecutions eventually abated. In 1933, the Commonwealth of Kentucky brought an unsuccessful criminal prosecution against the City of Ludlow.[94] In 1975, the Commonwealth of Penn-

91. *See supra* note 30 and accompanying text.

92. HARTOG, *supra* note 29, at 188.

93. In the influential theories advanced by John Dillon, the leading 19th-century commentator on the law of municipalities, the abuses of local governments were to be restrained through enhanced state control. *See* 2 DILLON, *supra* note 30, § 745. As Professor Gerald Frug has noted, Dillon's conception of such state control included a "major role for the courts." *See* Frug, *supra* note 2, at 1111-12.

94. City of Ludlow v. Commonwealth, 56 S.W.2d 958 (Ky. 1933). The city built an allegedly defective sewer that, when it rained, caused backups in the basements of several residences, "producing an odor so noisome, offensive, and sickening that the occupants of the houses could not eat or sleep." *Id.* at 958. The state prosecuted and the city was convicted of maintaining a common nuisance and fined $1500. *Id.* It appealed. The court of appeals cited three earlier Kentucky cases in which cities had been held criminally liable for maintaining a public nuisance. *Id.* at 959 (citing City of Paris v. Commonwealth, 93 S.W. 907 (Ky. 1906); City of Newport v.

sylvania was more successful in its prosecution of the Fleetwood Borough Authority.[95] These appear to be the last reported cases in which a state brought a criminal prosecution against a government or governmental agency, except for one curious 1984 case in which the State of California, acting through the City Attorney of Los Angeles, brought criminal charges against the Veterans Administration, a federal government agency.[96]

The reasons for the demise of such prosecutions are varied and elusive. Certainly, nothing in the *City of Ludlow* or *Fleetwood Borough* cases themselves foreclosed the possibility of their being brought. To be sure, a few states adopted a Model Penal Code provision that might have been intended to have such an effect.[97] Much more significant, however, has been the increasingly clear identification of the municipal corporation as a creature of state government—an identification that made the problem of "self-prosecution" more prominent and the state criminal prosecution of such entities increasingly awkward. In addition, the public nuisances and breached public duties once dealt with by state-initiated criminal prosecutions increasingly were addressed through the expanded use of federal, state, and privately-initiated civil suits.[98] This development was facilitated by the tre-

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Commonwealth, 55 S.W. 914 (Ky. 1900); Commonwealth v. City of Somerset, 14 Ky. L. Rptr. 238 (1892)). Nevertheless, the court reversed and remanded for a new trial on the grounds that the $1500 fine imposed on the City violated Kentucky's constitutional prohibition of excessive fines. *Id.* at 968-69.

95. Commonwealth v. Fleetwood Borough Auth., 346 A.2d 867, 868-69 (Pa. Commw. Ct. 1975) (upholding conviction and $300 fine of Borough authority for violations of sewage permit issued by Sanitary Water Board.)

96. *See* People v. Walters, 751 F.2d 977, 978 (9th Cir. 1984) (affirming dismissal of criminal prosecution brought by City of Los Angeles against Veterans Administration in connection with the alleged disposal of hazardous medical wastes, on the grounds that there was no clear and unambiguous evidence that the federal government had waived its sovereign immunity to criminal sanctions).

97. As Part II of this Article explains, determining whether a municipality is subject to a particular criminal statute is, in the first instance, a question of whether the defendant is a "person" or "corporation" within the meaning of the statute. Section 2.07(4)(a) of the Model Penal Code excludes from the definition of "corporations" that may be convicted of a criminal offense entities "organized as or by a governmental agency for the execution of a governmental program." The Commentary to § 2.07(4)(a) states that "[l]iability in such cases would seem entirely pointless." MODEL PENAL CODE § 2.07, commentary at 3455 (1985). At least five states have adopted a version of § 2.07(4)(a). HAW. REV. STAT. § 702-229(1) (1985); N.J. STAT. ANN. § 2C:2-7(b)(1) (West 1982); N.D. CENT. CODE § 12.1-0304(1)(b) (Supp. 1993); OHIO REV. CODE ANN. § 2901.23(D) (Anderson 1993); 18 PA. CONS. STAT. § 307(F) (1983). The model provision is at best ambiguous, however, since it is unclear whether it is intended to immunize entities organized as governmental agencies only when they are executing governmental programs or whether it is also intended to immunize such agencies when they are acting in a proprietary capacity.

98. For examples of federal- and state-brought civil suits involving alleged "public nuisances," see Michigan v. City of Allen Park, 501 F. Supp. 1007, 1011-12 (E.D. Mich. 1980) (suit by state to compel city to use a specific type of water pollution control), *aff'd mem.*, 667 F.2d 1028 (6th Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); United States v. County Bd. of Arlington County, 487 F. Supp. 137, 139 (E.D. Va. 1979) (suit to prevent construction of high-rise office

mendous growth of the administrative state (which supplanted many of the regulatory functions previously overseen by the common-law courts[99]), as well as by the almost universal merger of law and equity[100] (which relieved plaintiffs of their former inability to seek injunctive relief from public nuisances).

II. Federal Law Governing the Criminal Prosecution of Local Governments

The apparent obsolescence of state criminal prosecution of local governments need not preclude the possibility of federally initiated prosecutions of such entities. The types of crimes that municipalities are now most likely to commit—violations of the environmental, civil rights, and antitrust laws, to name three of the most prominent—have in large part been federalized. Should there remain a need for the criminal prosecution of local governments,[101] it is therefore likely to be at the federal level. Accordingly, the focus of this Article now shifts from the history of criminal prosecution of municipalities under state law to a focus on the legal apparatus and policies surrounding such prosecutions under federal law. In the course of this discussion, three themes first raised in the nineteenth century state cases remain central: whether municipalities can form mens rea, whether there are economic or practical justifications for limiting the scope of liability to a single plaintiff or defendant rather than multiple plaintiffs or defendants, and whether municipalities should enjoy immunity from prosecution when acting in a "governmental" or "discretionary" capacity.

This Part also addresses two basic issues concerning the framework for the criminal prosecution of local governments under federal law. First, are there federal criminal statutes[102] involving environmental law, antitrust, and civil rights that can reasonably be construed to apply to municipalities?

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buildings and hotel because such construction would increase traffic and congestion and create visual intrusion on national parks and monuments); People v. City of Los Angeles, 325 P.2d 639, 641 (Cal. App. 1958) (action to enforce injunction restraining Los Angeles from discharging sewage into Santa Monica Bay); People v. City of Reedley, 226 P. 408, 408 (Cal. App. 1924) (nuisance suit by state concerning passage of sewage effluent between two counties); State *ex rel.* Lamm v. City of Sedalia, 241 S.W. 656, 656 (Mo. App. 1922) (nuisance suit by state concerning city's disposal of dead animals).

99. *See* Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 17, 20-21 (1990).

100. *See* Fleming James, Jr. & Geoffrey C. Hazard, Jr., Civil Procedure § 1.6, at 18 (3d ed. 1985).

101. Part III argues that there is such a need. *See infra* notes 215-73 and accompanying text.

102. It has long been settled that federal criminal prosecutions must be brought under federal statutory, as opposed to common, law. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812); *see also* Dowling v. United States, 473 U.S. 207, 213 (1985) (stating that federal crimes are created solely by statute). Thus, the determination whether a particular defendant is subject to federal criminal law is, in the first instance, an exercise in statutory construction.

Second, even assuming that one can construe various federal criminal statutes in this manner, would such entities nevertheless be immune from prosecution, either through some generalizable judicial doctrine of immunity or through some more specific statutory grant of immunity?

A. *Statutory Construction*

1. The Municipality as a "Person"

Federal criminal statutes typically provide that every "person," or "whoever," commits some crime shall be subject to a specified penalty.[103] To determine whether a given criminal statute applies to municipalities, then, one must thus decide whether the terms "person" and "whoever" refer to such entities.[104]

Federal environmental law provides the most straightforward example. Of ten major environmental statutes imposing both criminal and civil sanctions,[105] at least eight[106] include in the definition of "person" municipalities; government corporations; or political subdivisions, instrumentalities, and agencies of a state.[107]

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103. *E.g.*, 18 U.S.C. § 201(b) (1988) (stating that "whoever" corruptly gives or promises anything of value to public official with intent to influence official act shall be fined not more than $10,000 or imprisoned for not more than two years, or both); 18 U.S.C. § 842(a)(1) (1988) (making it unlawful for any "person" to import, manufacture, or deal in explosives without license); *see also infra* notes 133, 135.

104. Another possibility is that a criminal statute might apply to "corporations," in which case one would need to determine whether the statute applies to both business corporations and municipal corporations.

105. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(b) (1988); Toxic Substances Control Act, 15 U.S.C. § 2615(b) (Supp. IV 1992); Endangered Species Act, 16 U.S.C. § 1540(b) (1988); Clean Water Act, 33 U.S.C. § 1319(c)(2) (1988 & Supp. IV 1992); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(b) (1988 & Supp. IV 1992); Safe Drinking Water Act, 42 U.S.C. § 300h-2(b) (1988); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(d) (1988); Clean Air Act, 42 U.S.C. § 7413(c) (Supp. III 1991); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9603(b), (c) (1988); Emergency Planning Community Right to Know Act, 42 U.S.C. § 11045(b)(4) (1988). *See generally* Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781 *passim* (1991) (discussing the criminal aspects of environmental statutes).

106. Endangered Species Act, 16 U.S.C. § 1532(13) (1988); Clean Water Act, 33 U.S.C. § 1362(5) (1988); Marine, Protection, Research and Sanctuaries Act, 33 U.S.C. § 1402(e) (1988); Safe Drinking Water Act, 42 U.S.C. § 300f(12) (1988); RCRA, 42 U.S.C. § 6903(15) (1988); CERCLA, 42 U.S.C. § 7602(e) (1988); Clean Air Act, 42 U.S.C. § 9601(21) (1988); Emergency Planning Community Right to Know Act, 42 U.S.C. § 11049(7) (1988).

107. Many of these statutes also define "person" to include states, "interstate bodies," federal agencies, and the federal government itself. *See, e.g.*, 33 U.S.C. § 1362(5) (1988) (definition of "person" includes states); 42 U.S.C. § 300f(12) (1988) ("person" includes states and federal agencies); 42 U.S.C. § 6903(15) (1988) ("person" includes states and interstate bodies); 42 U.S.C. § 7602(e) (1988) ("person" includes states and departments or instrumentalities of the United States); 42 U.S.C. 9601(21) (1988) ("person" includes United States government); 42 U.S.C. § 11049(7) (1988) ("person" includes states and interstate bodies).

In light of its plain meaning, the definition of "person" in these environmental statutes almost certainly applies to municipal defendants—whether in the civil context[108] or in the criminal context, as a 1978 Clean Water Act prosecution of the Little Rock Sewer Committee suggests.[109] Indeed, starting in the late 1970s, Congress amended the definition of "person" in many of these environmental statutes precisely because it wanted to ensure that the environmental laws would apply to local governmental defendants.[110]

The possibility that the criminal provisions of these and other statutes could be applied to the federal government and to the states raises interesting issues that are mostly beyond the scope of this Article. For example, given the serious environmental problems created by the United States military, *see* sources *supra* note 17, one can imagine the Department of Justice bringing a criminal case against another executive branch agency, such as the Department of the Army or one of its entities. Although such a prosecution might arguably be justified as a matter of policy, it would raise the objection that the government was bringing criminal charges against itself. For a discussion of the problems inherent in "self-prosecution," see *supra* text accompanying notes 76-83. *See also supra* note 96 (discussing case in which a federal agency was prosecuted by a state prosecutor).

The possibility of a federal criminal prosecution of a *state* agency was, for a time, raised by the recent case of *In re* Antitrust Grand Jury Investigation (Hospital Services), Misc. No. 92-M-58 W (D. Utah). The case involved a grand jury investigation into charges that the University of Utah and other public and private defendants had violated the antitrust laws. The University argued that under the state actor doctrine of Parker v. Brown, 317 U.S. 341, 350-51 (1943), it should be immune from both criminal and civil antitrust charges. In October 1993, the Department of Justice announced that it had dropped its criminal investigation of the University and various other defendants, and had decided to pursue the civil antitrust claims alone. *See* Cherrill Crosby, *Two Utah Hospitals Off the Hook in Criminal Probe*, SALT LAKE TRIB., Oct. 22, 1993, at A1. The author of this Article served as counsel to the University in that case.

Such a prosecution would raise federalism concerns that might well be more significant than the federalism concerns raised by the federal criminal prosecution of municipalities. *See infra* notes 182-84 and accompanying text; *cf.* Briffault, *supra* note 29, at 93 n.385:

> The states enjoy textual protection under the Constitution and function as fundamental components of the structure of the national government. American federalism has consistently been framed in the context of nation-state and state-state relations. Local governments lack the political status and historic role of the states, and have no claim to the states' special relationship with the national government. In the absence of a specific congressional grant of immunity, the most local governments can aspire to is autonomy, not sovereignty.

108. *See* United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1634 (1992) (holding in civil case that the term "person" in CWA and RCRA applies to states, subdivisions of states, municipalities, and interstate bodies); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992) (stating that the term "person" in CERCLA applies to municipal defendants); Westfarm Assoc. v. International Fabricare Inst., Civ. No. HM-92-9, 1993 U.S. Dist. LEXIS 15921, *11-*12 (D. Md. July 16, 1993) (applying term "facility" in remedial provisions of CERCLA to a municipal sewage system).

109. United States v. Little Rock Sewer Comm., 460 F. Supp. 6 (E.D. Ark. 1978). The case is discussed further *infra* notes 243-44 and accompanying text.

110. *See, e.g.*, Safe Drinking Water Amendments of 1977, H. Rep. No. 95-338, 95th Cong., 1st Sess. 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3648, 3659 (expanding the definition of "person" under the Safe Drinking Water Act, 42 U.S.C. § 1362(5) (1988)).

A particularly apt example is the Endangered Species Act.[111] Prior to a 1988 amendment, the Act's definition of "person" included no explicit reference to municipalities, referring only to "departments and instrumentalities" of states and "instrumentalities of political subdivisions" of states.[112] In *United States v. City of Rancho Palos Verdes*,[113] this omission proved decisive. In affirming the district court's dismissal of a criminal information brought against the City of Rancho Palos Verdes,[114] the Ninth Circuit held that the defendant was not a "person" as defined in the Act. As a political subdivision of the State of California, the city could be neither an instrumentality of the state nor an instrumentality of a political subdivision of the state.[115] Shortly after the Ninth Circuit handed down this decision, Congress amended the Endangered Species Act's definition of "person" to refer expressly to "municipalities."[116] In so doing, Congress seems to have removed any doubt that the federal government can criminally prosecute municipalities for violations of the Endangered Species Act. Naturally, this decision could have implications in cases involving other federal environmental statutes with parallel language.

When viewed in the context of federal law generally, however, the environmental statutes seem somewhat anomalous. Under most federal criminal statutes—including the criminal antitrust and civil rights statutes—the definitions of "person" and "whoever" contain no explicit reference to municipalities or governmental corporations.[117] Here, the task of statutory construction is more complex.

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111. 16 U.S.C. § 1531-1544 (1988 & Supp. III 1991).

112. *Id.* § 1532(13) (1982) (amended 1988).

113. 841 F.2d 329 (9th Cir. 1988).

114. *Id.* at 330-31.

115. *Id.* at 330. The court's reading of the statute seems correct, even if somewhat cramped; it may reflect an unspoken concern over the danger of imposing criminal liability on a municipal corporation.

116. Pub. L. No. 100-478, tit. I, § 1001(a)(12), 102 Stat. 2306, 2306 (codified as amended at 16 U.S.C. § 1532(13) (1988)). Although the legislative history does not expressly mention the *City of Rancho Palos Verdes* case, it could hardly have been a coincidence that, so soon after the Ninth Circuit had issued its opinion, Congress amended the Act to remedy the precise defect that the court had identified.

117. *See infra* notes 124, 133. One exception was the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (1942) (terminated 1947), which made it "unlawful" for "any person" to violate maximum price regulations promulgated by the Federal Price Administrator. *Id.* § 4(a), 56 Stat. at 28. Included in the Act's definition of "person" were the "United States and any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing." *Id.* § 302(h), 56 Stat. at 37. Courts repeatedly held that the Act applied to state and local governments. Hulbert v. Twin Falls County, 327 U.S. 103, 104-05 (1946) ("person" includes counties); Case v. Bowles, 327 U.S. 92, 99-100 (1946) ("person" includes states and their subdivisions); City of Dallas v. Bowles, 152 F.2d 464, 465 (Emerg. Ct. App. 1945) ("person" includes cities). What makes the Emergency Price Control Act apparently unique, however, is that while governmental entities were expressly included within the definition of "person," they were at the same time also expressly exempted from the Act's criminal sanctions (although not from the Act's

Traditional canons of construction provide that courts should construe statutes narrowly when, among other things, they involve punitive sanctions[118] or threaten sovereignty.[119] One must therefore be particularly certain before applying a criminal statute to a local government. Nevertheless, there are persuasive reasons for construing the terms "person" and "whoever" in this manner.

This question has an interesting history with regard to the Sherman Act,[120] which functions as both a civil and criminal antitrust statute.[121] In *City of Lafayette v. Louisiana Power & Light Co.*,[122] the defendant cities were sued for civil damages.[123] In seeking to escape such liability, the cities argued that, under the Act, the term "person"[124] could not refer to municipalities, because it would be "anomalous" to subject such entities to criminal liability.[125] In a plurality opinion, the United States Supreme Court rejected this argument, holding that the term "person" does indeed include municipalities.[126] The Court cited three cases in which it had "require[d] compliance by municipalities with the substantive standards of other federal laws which impose such sanctions upon 'persons.'"[127] At the

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punitive damages provisions). *See* Title III, § 302(h), ch. 26, 56 Stat. 23, 37 (1942) (terminated 1947); *see also Hulbert*, 327 U.S. at 105 (Douglas, J., dissenting) (noting that states are exempted from the Act's criminal sanctions, but not from its punitive damages provisions).

118. *See* 3 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION §§ 59.01-.09 (5th ed. 1992).

119. *Id.* §§ 62.01-.04.

120. 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988 & Supp. IV 1992)). Section 1 provides in part: "Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . ." 15 U.S.C. § 1 (Supp. IV 1992). Section 2 provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *Id.* § 2.

121. *See* PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 66 (4th ed. 1988) ("Sherman Act § 1 and § 2 and the relevant procedural provisions make no express distinction with respect to the civil-criminal, the legal-equitable, or the public-private nature of the lawsuit that brings an antitrust question to the courts.").

122. 435 U.S. 389 (1978).

123. *Id.* at 392.

124. Section 8 of the Sherman Act provides that "the word 'person' or 'persons,' whenever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State or the laws of any foreign country." 15 U.S.C. § 8 (1988 & Supp. IV 1992).

125. *Lafayette*, 435 U.S. at 400.

126. *Id.* at 394-97. Chief Justice Burger, the fifth member of the majority, agreed that the municipalities in this case were subject to liability, but only because they were acting in a "proprietary" rather than "governmental" capacity. *Id.* at 422 (Burger, C.J., concurring). For more on this distinction, see *supra* notes 71-83 and accompanying text.

127. *Id.* at 400-02. The three cases were: California v. United States, 320 U.S. 577 (1944) (holding that cities and states are subject to §§ 16 and 17 of the Shipping Act, 46 U.S.C. §§ 815, 816 (1940), making unlawful certain practices of "persons"); Union Pacific R.R. v. United States,

same time, the Court avoided a question it did not need to answer—namely, whether a municipality could be criminally prosecuted under the Sherman Act.[128] Nevertheless, it seems reasonable to conclude that, purely as a question of statutory construction—and putting aside for now the possibility that municipalities are immune from criminal antitrust prosecution by virtue of the state actor doctrine of *Parker v. Brown*[129] or the Local Government Antitrust Act[130]—a court should hold that, following the reasoning of *Lafayette*, municipalities can be criminally prosecuted under the Sherman Act.[131]

The question of statutory construction also has an interesting history under the civil rights laws. The Supreme Court's decision in *Monell v. Department of Social Services*[132] made it clear that the term "person" in 42 U.S.C. § 1983[133]—which provides *civil* relief for deprivation of constitutional rights—refers to municipalities and other local governmental units.[134] The criminal corollary to § 1983 is 18 U.S.C. § 242.[135] Section

313 U.S. 450, 463 (1941) (applying to city § 1 of Elkins Act, 49 U.S.C. § 41(1) (1940), making it unlawful for any "person" to "offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any [covered] common carrier"); Ohio v. Helvering, 292 U.S. 360, 370 (1934) (applying to state a statute that imposed federal tax liability on every "person" who "sells or offers for sale" alcoholic beverages).

128. *Lafayette*, 435 U.S. at 401-02 ("[T]hose cases do not necessarily require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities; nor need we decide any question of remedy in this case.").

129. 317 U.S. 341, 350-52 (1943). As interpreted in City of Hallie v. City of Eau Claire, 471 U.S. 34, 42-47 (1985), the *Parker* doctrine immunizes from all antitrust liability municipalities acting pursuant to clearly articulated state policy, even when the anticompetitive effects of such a policy have not been expressly acknowledged.

130. Even when not immune under the "clear articulation" standard of the *Parker* doctrine, *see supra* note 129, a municipality might nevertheless be immune under the Local Government Act, the subject of which is considered *infra* notes 206-14 and accompanying text.

131. It should be acknowledged, however, that doubts have been raised as to whether local governments should, even in the civil context, be subject to per se antitrust liability. *See* Community Communications Co. v. City of Boulder, 455 U.S. 40, 65 (Rehnquist, J., dissenting) (questioning whether "'per se' rules of illegality apply to municipal defendants in the same manner as they are applied to private defendants"); *see also* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 417 n.48 (1978) ("It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."). Perhaps the best approach would be to apply per se liability to local governments only when they are participating in truly proprietary activity in direct competition with private corporations. *See* Edward W. Barnett, *Suggestions from Outside Counsel, in* ANTITRUST AND LOCAL GOVERNMENT, *supra* note 18, at 43, 46. Whether *criminal* liability should be imposed, even in these circumstances, is, of course, a separate question.

132. 436 U.S. 658 (1978).

133. "[E]very person" who, under color of state law, deprives a citizen of federal rights "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1988).

134. 436 U.S. at 690.

242 has frequently been used to prosecute local government officials.[136] There appears to be only one instance, however, in which the federal government sought to use § 242 against a local governmental entity.

In *United States v. City of Philadelphia*,[137] the Department of Justice brought suit against the City of Philadelphia, seeking to remedy widespread and systematic civil rights violations. Although the Government sued under § 242, the remedies it sought (a declaratory judgment and an injunction) were civil.[138] The court rejected the notion that § 242 could be used in this manner, but it did so on the theory that the Government was an improper *plaintiff* to seek such relief.[139] Neither the parties nor the court considered whether the city was a proper *defendant* under § 242.

While there is little, if any, case law to resolve this issue, two principles of statutory construction suggest that the term "whoever" in § 242 should be construed to refer to local governments. First, the terms "person" and "whoever" are, for jurisdictional purposes, typically viewed as equivalents.[140] Second, courts have interpreted §§ 1983 and 242 *in pari materia*.[141] Thus, it seems reasonable to conclude, at least as a preliminary matter, that, just as § 1983 applies to municipalities, so should § 242.

2. The Problem of Inapplicable Criminal Sanctions

In determining whether a particular criminal statute applies to municipalities, one must consider the penalties that the statute imposes. Like pri-

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135. "[W]hoever, under color of any law . . . willfully subjects any inhabitant of any State . . . to the deprivation of any rights . . . secured or protected by the Constitution . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both." 18 U.S.C. § 242 (1988).

136. *E.g.*, Screws v. United States, 325 U.S. 91, 93 (1945); United States v. Langer, 958 F.2d 522, 522 (2d Cir. 1992); United States v. Currie, 609 F.2d 1193, 1193 (6th Cir.), *cert. denied*, 445 U.S. 928 (1980); United States v. Fleming, 526 F.2d 191, 192 (8th Cir. 1975), *cert. dismissed*, 423 U.S. 1082 (1976); United States v. Senak, 477 F.2d 304, 305 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973).

137. 644 F.2d 187 (3d Cir. 1980).

138. *Id.* at 190. Although § 242 offered no such civil relief on its face, the Government argued (unsuccessfully) that such relief could be inferred. *Id.* at 190-92.

139. *Id.* at 197. In dismissing the suit, the court held that the federal government had no standing under § 242 to seek injunctive relief. 644 F.2d at 194-99. Even assuming that the court was correct in holding that the federal government had no statutory authority to seek broadsweeping injunctive relief against the city, its use of standing analysis was flawed. The federal government always has standing to prosecute under § 242, or any other criminal statute. The real question was whether § 242, a criminal statute, afforded the civil remedy that the Government sought to impose.

140. *See* Dictionary Act, 1 U.S.C. § 1 (1988) (stating that "unless the context indicates otherwise . . . the terms 'person' and 'whoever' shall include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

141. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 184-85 (1961) (defining "under color of law" requirement of § 1983 in the same manner as § 242), *overruled on other grounds by* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 663, 695-96 (1978).

vate corporations,[142] towns and cities are not susceptible to prosecution for crimes punishable only by imprisonment or death.[143] As noted above,[144] this was one of the principal reasons nineteenth-century courts and commentators cited for the proposition that corporations could not commit a felony.

The problem of the inapplicable criminal sanction does not arise in the context of the environmental[145] and antitrust[146] laws; in both cases, the court is free to choose between a fine and imprisonment. With the civil rights laws, however, the problem of the inapplicable sanction does arise, albeit in limited form.

When a defendant is convicted of assault, § 242 provides for fines of not more than $1,000, imprisonment of not more than one year, or both.[147] In providing such a choice, § 242 is analogous to the Sherman Act and various environmental statutes[148] and would apply unproblematically to municipal corporations. However, § 242 also includes an additional feature. When a civil rights violation results in the victim's death, the statute provides that the defendant "*shall* be subject to imprisonment for any term of years or for life"[149]—an enhancement that clearly would not apply to municipalities. This fact should not preclude the possibility of prosecuting a municipality under § 242 whenever the victim is killed, however. When a § 242 prosecution is brought against a municipal corporation, the penalty enhancement provision simply should not apply.[150]

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142. Joplin Mercantile Co. v. United States, 213 F. 926, 933 (8th Cir. 1914), *aff'd*, 236 U.S. 531, 549 (1915); Herbert R. Chermside, Annotation, *Corporation's Liability to Criminal Prosecution as Affected by Punishment or Penalty Imposed*, 80 A.L.R.3D 1220, 1223-25 (1977).

143. *See* COOLEY, *supra* note 30, § 162, at 491 ("A municipality is not indictable for a felony, since it is incapable of felonious intent, and can neither be hanged nor imprisoned.").

144. *See supra* note 41 and accompanying text.

145. *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540(b)(1) (1988) (stating that "any person who knowingly violates" certain provisions of the Act "shall, upon conviction, be fined not more than $5,000 *or* imprisoned for not more than one year, or both" (emphasis added)); Clean Air Act, 42 U.S.C. § 7413 (c)(1) (1988) (punishing violations of various provisions "by a fine of not more than $25,000 per day of violation, *or* by imprisonment for not more than one year, or by both" (emphasis added)).

146. Sherman Act § 1, 15 U.S.C. § 1 (Supp. 1992) (stating that upon conviction, defendant "shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, *or* by imprisonment not exceeding three years, or by both said punishments, *in the discretion of the court*" (emphasis added)).

147. 18 U.S.C. § 242 (1988).

148. *See supra* notes 145-46.

149. 18 U.S.C. § 242 (emphasis added).

150. The Supreme Court, per Justice Holmes, accepted a precisely analogous argument in United States v. Union Supply Co., 215 U.S. 50, 55 (1909) ("[T]he natural inference, when a statute prescribes two independent penalties [one of which is applicable to corporations and one of which is not], is that it means to inflict them so far as it can, and that if one of them is impossible, it does not mean on that account to let the defendant escape"); *accord* People v.

B. *Local Governmental Immunity*

Assuming that the language of various federal statutes theoretically allows for the criminal prosecution of local governments, the next question is whether such entities nevertheless enjoy governmental immunity from prosecution. The analysis here consists of two steps. First, do local governments enjoy general immunity from all federal criminal prosecution? Second, even if local governments are not generally immune, do they enjoy immunity from prosecutions brought under certain statutes or when acting in certain capacities?

1. General Immunity from Criminal Prosecution

Neither *Little Rock Sewer Committee*[151] nor *City of Rancho Palos Verdes*[152]—the two reported cases involving the federal criminal prosecution of a local government—deals with the question of immunity. As explained in Part I, it was widely held in the nineteenth and early twentieth centuries that cities were immune from state prosecution for all crimes involving either criminal intent[153] or a governmental or discretionary function.[154] Assuming that such doctrines of governmental immunity did make sense in the nineteenth-century state context, one must ask whether municipalities should today be immune from *federal* criminal prosecution according to an analogous scheme.[155]

a. Municipalities and the Formation of Criminal Intent

If municipalities were incapable of forming criminal intent as a matter of law, they would be effectively immunized from prosecution under any criminal statute requiring a showing of mens rea.[156] At first glance, the

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Charter Thrift & Loan, 106 Cal. Rptr. 364, 365 (Cal. Ct. App. 1973) (following the holding in *Union Supply*).

151. United States v. Little Rock Sewer Comm., 460 F. Supp. 6 (E.D. Ark. 1978); *see also infra* notes 243-44 and accompanying text.

152. United States v. City of Rancho Palos Verdes, 841 F.2d 329 (9th Cir. 1988); *see also supra* text accompanying notes 113-16.

153. *See supra* note 38 and accompanying text.

154. *See supra* notes 74, 87 and accompanying text.

155. Technically, "[m]unicipal defenses—including an assertion of sovereign immunity—to a federal right of action are . . . controlled by federal law." Owen v. City of Independence, 445 U.S. 622, 647 n.30 (1980).

156. Of course, many criminal statutory provisions do not require a showing of mens rea. *See, e.g.*, Clean Water Act, § 309(c)(1), 33 U.S.C. § 1319(c)(1) (1988 & Supp. IV 1992); Oil Pollution Act of 1990, § 4301(c) (amending § 309(c) of the Clean Water Act, 33 U.S.C. § 1319 (1988 & Supp. IV 1992)); Act of Nov. 15, 1990, § 701 (amending § 113(c)(4) of the Clean Air Act, 42 U.S.C. § 7401-642 (1988 & Supp. IV 1992)). To the extent that mens rea is not a requirement of such crimes, a defendant's supposed inability to form criminal intent would obviously not be an issue, just as it was not issue in those 19th- and early 20th-century cases in which municipalities

Supreme Court's opinion in *City of Newport v. Fact Concerts, Inc.*[157] and a line of lower court cases involving the Racketeer Influenced and Corrupt Organizations ("RICO") statute[158] suggest that municipalities are indeed incapable of forming mens rea. Upon closer examination, however, none of these cases compels the conclusion that municipalities are per se immune from prosecution for such crimes.

In *City of Newport*, the Court held that municipalities are immune from punitive damage actions brought by private plaintiffs under § 1983.[159] In reaching this conclusion, the Court did what it frequently does in such cases—it examined the meaning of the applicable statute at the time it was enacted.[160] The Court found that, in 1871, when Congress passed the forerunner of § 1983, municipalities (like other "corporate" entities) were considered incapable of forming the mental intent that is a necessary element of punitive damages actions[161]—a mental intent similar to the intent that is an element of most crimes.[162]

Despite the Court's primarily historical approach, many lower courts[163] have read *City of Newport* more broadly to suggest that municipal-

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were prosecuted for non-mens rea, "regulatory" crimes. *See supra* notes 39-46 and accompanying text.

157. 453 U.S. 247 (1981).

158. 18 U.S.C. §§ 1961-68 (1988 & Supp. IV 1992); *see also* cases cited *infra* note 163.

159. *City of Newport*, 453 U.S. at 271.

160. *Id.* at 258-66.

161. *Id.* at 267 ("If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. A municipality, however, can have no malice independent of the malice of its officials.").

162. For a discussion of what criminal intent means in the antitrust, environmental, and civil rights contexts, respectively, see George E. Garvey, *The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions*, 29 CATH. U. L. REV. 389, 423-25 (1980); Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirements of Section 6928(d) of RCRA After* United States v. Dee, 59 GEO. WASH. L. REV. 862, 871-74 (1991); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2200-24 (1993).

163. *See, e.g.*, Lancaster Community Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 404 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1168 (1992); County of Oakland v. City of Detroit, 784 F. Supp. 1275, 1283 (E.D. Mich. 1992); Nu-Life Const. Corp. v. Board of Educ., 779 F. Supp. 248, 252 (E.D.N.Y. 1991); O & K Trojan, Inc. v. Municipal Contractors Equip. Corp., 751 F. Supp. 431, 434 (S.D.N.Y. 1990); Smallwood v. Jefferson County Gov't, 743 F. Supp. 502, 504 (W.D. Ky. 1990); Bonsall Village, Inc. v. Patterson, No. Civ. A. 90-0457, 1990 WL 139383, at *6 (E.D. Pa. Sept. 19, 1990); Scott v. Township of Bristol, Civ. A. No. 90-1412, 1990 WL 178556, at *8 (E.D. Pa. Nov. 14, 1990); Bryant v. City of Philadelphia, Civ. A. No. 89-6005, 1990 WL 82099, at *6, *8 n.5 (E.D. Pa. June 11, 1990); North Star Contracting Corp. v. Long Island R.R., 723 F. Supp. 902, 907 (E.D.N.Y. 1989); Albanese v. City Fed. Sav. & Loan Assoc., 710 F. Supp. 563, 567-68 (D.N.J. 1989); Victor v. White, No. C-88-3350-DLJ, 1989 WL 108276, at *6 (N.D. Cal., July 26, 1989); *In re* Citisource, Inc. Sec. Litig., 694 F. Supp. 1069, 1080-81 (S.D.N.Y. 1988); Massey v. Oklahoma City, 643 F. Supp. 81, 85 (W.D. Okla. 1986).

A notable exception to this line of authority is the Third Circuit's thoughtful opinion in Genty v. Resolution Trust Corp., 937 F.2d 899, 903 n.1 (3d Cir. 1991). The court agreed that municipal-

ities are incapable of forming mens rea[164] even under more modern statutes, such as civil RICO.[165] For several reasons, however, it is incorrect to read *City of Newport* as establishing a per se barrier to the criminal prosecution of local governments under federal law.

First, simply because municipal corporations were considered incapable of forming malicious intent at the time the Reconstruction-era civil rights statutes were originally enacted does not necessarily mean that they should still be considered incapable of committing a malice crime. In 1871, by which time the distinction between governmental and business corporations had begun to erode,[166] both kinds of corporations were still considered incapable of forming mens rea.[167] In the years since, however, it has become well established that private business corporations—through the conduct of their agents and employees—can be guilty of crimes involving knowledge and willfulness.[168] As a result, for *City of Newport* to stand for the proposition that, unlike private corporations, governmental entities are incapable of forming mens rea—at least under more modern criminal stat-

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ities are immune from punitive damages actions under RICO, but it did so on legislative intent grounds and specifically declined to rely on the argument that municipalities are per se incapable of forming mens rea. *Id.* at 906-14.

164. The issue of mens rea-forming ability arises because one of the elements of a civil RICO claim is that the defendant have committed one of several predicate criminal offenses. *See* 18 U.S.C. § 1961(1) (1988 & Supp. IV 1992) (listing offenses that qualify as "racketeering activity"). To prove that a defendant has committed one of these predicate offenses, the defendant must have had the criminal intent required to commit the underlying offense. *See, e.g., Lancaster Community Hosp.*, 940 F.2d at 404. Thus, when the RICO defendant is a municipality, the plaintiff must show that the municipality has formed criminal intent.

165. In fairness to these lower courts, however, it should be noted that *City of Newport* seems to invite such a broad reading. The opinion includes a discussion of the policy reasons for immunizing municipalities from punitive damages actions, a discussion that extends beyond the narrow historical grounds that form the principal basis for the Court's holding. *See infra* notes 251, 255, 272 and accompanying text.

166. *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1101 (1983) ("As if to signal the clarity with which lawyers by the late nineteenth and early twentieth centuries had begun to see municipal corporations as a distinct legal form, a number of treatises devoted solely to municipal corporations appeared, beginning with John Dillon's *Municipal Corporations* in 1872.").

167. *See* CLARK, *supra* note 30, § 42; 2 DILLON, *supra* note 30, § 746.

168. *See, e.g.*, Egan v. United States, 137 F.2d 369, 378-80 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943); Mininsohn v. United States, 101 F.2d 477, 478 (3d Cir. 1939); *accord* People v. Charter Thrift & Loan, 106 Cal. Rptr. 364, 365 (Cal. Ct. App. 1973); Commonwealth v. Beneficial Fin. Co., 275 N.E.2d 33. 80, 86 (Mass. 1971), *cert. denied*, 407 U.S. 914 (1972); *see also* James J. Brosnahan et al., *Corporate Criminal Liability and Procedure*, *in* WHITE COLLAR CRIMES 187, 189 (Gary P. Naftalis ed., 1980) ("It is now well settled, however, that a corporation through the conduct of its agents and employees, may be guilty of crimes involving knowledge and willfulness.") (footnote omitted).

utes[169]—there needs to be some theory explaining the distinction between private corporations and governmental entities in this respect.

The Supreme Court's theory was that the malice of officials should not be imputed to the taxpaying citizens of the community. To do so would place the consequences of such attribution—namely, punitive damages—"upon the shoulders of blameless or unknowing taxpayers."[170] Yet this argument clearly places the conceptual cart before the horse. Regardless of whether legitimate policy reasons exist for relieving taxpayers of such a burden,[171] this concern is very different from saying that governmental entities are, as a matter of law, *incapable* of forming willful intent.

Outside the criminal law, intentions, motives, and other mental states are regularly attributed to governmental entities.[172] Courts have had little difficulty finding, for example, that the State of California *intended* to

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169. Under the Court's historical approach, courts should construe criminal statutes enacted in the mid-19th century or earlier (unlike more modern statutes) to preclude criminal liability against municipalities (as well as against business corporations). This is clearly not an issue in the case of the major environmental statutes, which were enacted in the 1970s and 1980s. Nor is it an issue in the case of the Sherman Act, which was passed in 1890 and which made explicit reference to "corporations." *See* 15 U.S.C. § 7 (1988); *see also* United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972) ("Despite the fact that 'the doctrine of corporate criminal responsibility for the acts of the officers was not well established in 1890,' the [Sherman] Act expressly applies to corporate entities.") (citation omitted), *cert. denied*, 409 U.S. 1125 (1973). It is somewhat less obvious why it is not an issue in the case of 18 U.S.C. § 242, the criminal analogue of § 1983, the first version of which was enacted during Reconstruction. For an explanation of why this historical approach would not preclude § 242 from being applied to municipalities, see *infra* notes 199-205 and accompanying text.

170. *See City of Newport*, 453 U.S. at 267; *see also* Albanese v. City Fed. Sav. & Loan Assoc., 710 F. Supp. 563, 567 (D.N.J. 1989) (declining to attribute criminal intent to municipal corporation for this reason) (quoting *Newport*).

171. Although municipalities are immune from punitive damage actions in most states as well, *see City of Newport*, 453 U.S. at 260-62 & n.21; 18 McQUILLIN, *supra* note 15, § 53.18a; Joel E. Smith, Annotation, *Recovery of Exemplary or Punitive Damages From Municipal Corporation*, 1 A.L.R.4TH 448, 454-61 (1980), such immunity is usually based on public policy concerns about imposing such damages on municipalities, rather than on any theory about the capacity of municipalities to form mens rea. *See, e.g.*, Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965) (maintaining that because the purpose of punitive damages is punishment, the people who would bear the burden of the award, the citizens, were the same group of people who were expected to benefit from the public example which the punishment made of the wrongdoer); City of Hammond v. Conley, 498 N.E.2d 48, 53 (Ind. App. 1986); City of Gary v. Falcone, 348 N.E.2d 41, 42 (Ind. App. 1976); Ranells v. Cleveland, 321 N.E.2d 885, 889 (Ohio 1975); Nixon v. Oklahoma, 555 P.2d 1283, 1285-86 (Okla. 1976).

172. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 865 (1992) ("[A]scribing purposes to groups and institutions is a complex business, and one that is often difficult to describe abstractly. But that fact does not make such ascriptions improper. In practice, we ascribe purposes to group activities all the time without many practical difficulties."); *see also* Seth F. Kreimer, Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317, 332-43 (1976) (describing intent of school board in school desegregation case as metaphor in which institution is viewed as single actor, not reduced to individual states of mind).

maintain resale prices through its wholesale wine pricing system,[173] or that the City of Centralia, Illinois, was *negligent* in failing to maintain the cover on a sewer manhole into which a person fell and was injured.[174]

Under traditional criminal-law doctrines, criminal intent and liability can be imputed to a corporation either directly, when high-level employees of the defendant entity have adopted policies that authorize or recklessly tolerate the criminal conduct,[175] or vicariously, through an employee's actions within the scope of her office.[176] In *United States v. Little Rock Sewer Committee*,[177] for example, a federal district court had no difficulty finding that the defendant municipal Sewer Committee manifested criminal intent when it failed to file the proper discharge monitoring reports required under CERCLA.[178] Nor should there be any theoretical barrier to applying these criminal law principles in other cases involving municipal defendants.[179]

A second, and perhaps more important, reason to find no per se barrier is that *City of Newport* and the RICO cases all involved immunity from damage actions brought by *private* plaintiffs. Such cases say little about immunity from criminal prosecutions brought by the federal government. Although local governments have always enjoyed a considerable degree of immunity from private actions, there are only a few instances in which such entities have enjoyed immunity from government-initiated actions.[180] And

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173. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

174. Marshall v. City of Centralia, 570 N.E.2d 315, 319-20 (Ill. 1991).

175. *See* MODEL PENAL CODE § 2.07(1)(c) (1985) ("A corporation may be convicted of the commission of an offense if: the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."); 2 CHARLES E. TOREIN, WHARTON'S CRIMINAL LAW § 111 (14th ed. 1979).

176. *See* MODEL PENAL CODE, § 2.07(1)(a) (1985) ("A corporation may be convicted of the commission of an offense if: the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment."); 2 TOREIN, *supra* note 175, § 111.

177. 460 F. Supp. 6 (E.D. Ark. 1978).

178. Although the court relied on a vicarious liability theory, *id.* at 9, it could just as easily have found criminal intent directly, given that the plant manager responsible for the city's failure to file was considered a "high-level" employee. *Id.* at 7.

179. As Part III argues, however, criminal liability for municipalities probably should, for policy reasons, be limited to cases of direct, non-vicarious intent. *See infra* note 242.

180. The three instances of municipal immunity from federal suit identified herein are: (1) certain narrow exemptions from municipal liability under CERCLA, discussed *infra* note 195; (2) immunity from federally brought damages suits under the Local Government Antitrust Act, discussed *infra* note 207 and accompanying text; and (3) the Emergency Price Control Act of 1942, discussed *supra* note 117. *Cf.* Welch v. Tex. Highways & Pub. Transp. Dep't, 483 U.S. 468, 487 (1987) ("The contours of state sovereign immunity are determined by the structure and requirements of the federal system. . . . [T]he United States may sue a State, because that is 'inherent in the Constitutional plan.' . . . Absent such a provision, ' "the permanence of the Union might be endangered." ' ") (plurality opinion) (citations omitted).

in each of these instances, immunity was based on specific statutory authority.[181]

Moreover, municipal immunity is likely to be particularly disfavored in the criminal context. The Supreme Court has frequently noted that even when immune from civil damages actions, local officials are nonetheless subject to federal criminal prosecution.[182] Indeed, such liability occurs even with regard to "legislative acts" that, in the civil context, almost certainly would be immunized.[183]

In addition, the prosecution of local governmental entities would pose no greater threat to principles of federalism than would the prosecution of local governmental officials.[184] Indeed, the opposite may be true. As the Supreme Court recognized in *Spallone v. United States*,[185] fines aimed at individual public officials are likely to work a greater intrusion into the

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181. *See supra* note 180.

182. *See, e.g.*, Dennis v. Sparks, 449 U.S. 24, 28 n.5 (1980) (explaining that state judge may be found criminally liable under 18 U.S.C. § 242 for violating a person's civil rights even though he may be immune from damages action under 42 U.S.C. § 1983); United States v. Gillock, 445 U.S. 360, 372 (1980) ("[T]he cases in this Court which have recognized an immunity from civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials."); Imbler v. Pachtman, 424 U.S. 409, 429 (1976) ("Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of § 1983.") (footnote omitted); O'Shea v. Littleton, 414 U.S. 488, 503 (1974) ("[T]he judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress . . . .'") (quoting Gravel v. United States, 408 U.S. 606, 627 (1972)). *But see* United States v. Margiotta, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part) (arguing, on federalism grounds, against expansive use of federal mail fraud statute in case involving chairman of local Republican Committee and suggesting that local corruption is more appropriately dealt with through the political process), *cert. denied*, 461 U.S. 913 (1983); Ralph E. Loomis, Comment, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U. L. REV. 63, 74-77 (1978) (arguing that federal criminal prosecution of local officials for essentially local offenses poses threat to federalism).

183. *See Gillock*, 445 U.S. at 373 (holding in federal criminal prosecution against state legislator that there is no legislative privilege barring the introduction of evidence of the legislative acts of the legislator because "recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interests of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process").

184. This assumes, of course, that the federal criminal prosecution of local officials itself does not pose a substantial federalism problem. *See supra* note 182; *cf.* sources cited *infra* note 216.

185. 493 U.S. 265 (1990). A consent decree between the City of Yonkers and the Department of Justice provided that the city, through its elected council, would adopt an ordinance implementing a plan to build low-income housing in predominantly white sections of Yonkers. *Id.* at 270. Confronted with public opposition to the decree, a majority of the members of the city council balked at promulgating the promised legislation. *Id.* at 271-72. As a result of the council's failure to honor the consent decree, the district court imposed fines on both the city and each recalcitrant city council member. *Id.* at 272. The Court held that the district court had abused its discretion in fining the individual council members, though not the city itself. *Id.* at 276-80. The Court found that it was reasonably probable that the process of fining the city would effectuate compliance with the consent decree. *See id.* at 277-78.

political process than fines applicable to governmental entities.[186] Imposing sanctions on individual officials creates a conflict of interest for those officials, because they are forced to act in their own self-interest, rather than in the best interests of the entity they represent. When a fine is aimed at an entity instead, legislators who vote to comply with the court order may be voting against their personal desires, but they do so for the city's financial good, not their own. Thus, according to the Court, sanctions aimed at individual officials are more politically intrusive than sanctions aimed at the governmental entity and should be used only as a last resort.[187]

b. The Governmental/Proprietary and Discretionary/Ministerial Distinctions as a Basis for Immunity

As Part I explains, under nineteenth-century law, local governments were immune from state criminal prosecution to the extent that they were acting in a "governmental" or "discretionary" capacity.[188] In some states, municipalities continue to be immune from tort liability when acting in these capacities.[189] As this section suggests, however, little reason exists for adopting such distinctions in the context of federal criminal prosecution.

First, when a prosecution against a local government is brought by the federal government rather than by a state, there is no danger of "self-prosecution," because the federal and local governments have vastly different constituencies.[190] Hence, one of the original reasons for distinguishing between governmental and proprietary functions in the context of state criminal prosecution of local municipalities[191] does not apply in the federal context.

Second, in light of the serious difficulties it poses in application, the governmental/proprietary distinction has come under almost overwhelming attack in the tort context.[192] The distinction seems particularly difficult to sustain now that governmental corporations have taken on an increasing

186. *Id.* at 280.

187. *Id.*

188. *See supra* note 74 and accompanying text.

189. *See supra* notes 72-73.

190. *Cf.* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1166-67 n.217 (1981) (asserting that criminal sanctions are most likely to be applied against local officials when there is "a great difference in the constituencies of a prosecutor and defendant-official," as there is in the case of a federal prosecution).

191. *See supra* note 76 and accompanying text.

192. *See, e.g.*, Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955) (on reh'g) (criticizing the governmental/nongovernmental distinction as a "quagmire that has long plagued the law of municipal corporations"); Austin v. City of Baltimore, 405 A.2d 255, 259 (Md. 1979) (observing that the governmental/proprietary distinction is "'sometimes illusory in practice'") (quoting E. Eyring Co. v. City of Baltimore, 252 A.2d 824, 825 (Md. 1969)); Repko, *supra* note 65, at 219-22 (discussing the governmental/proprietary distinction); Murray Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910, 938 (1936) (not-

number of historically private functions[193] and private corporations have taken on many traditionally governmental functions.[194] The usual solution abandons the distinction altogether and makes local governments uniformly subject to liability, regardless of the capacity in which they have acted.[195]

A third reason argues for the abandonment of immunity that is based on the distinction between discretionary and ministerial functions. In the days when municipalities were prosecuted for non-mens rea "crimes," such as failing to build a road or repair a bridge,[196] it was appropriate to allow a defendant to argue that its conduct resulted from a legitimate discretionary decision about how to allocate limited funds. Such a distinction may well make sense in the context of the Federal Tort Claims Act.[197] In the context of crimes involving an element of intent, however, such arguments seem out of place. Municipalities, like private corporations, may face difficult decisions about how to allocate their financial resources so as to maximize the benefit to their constituents. For example, a municipality might have to choose between spending tax dollars on the implementation of environmental controls and funding teacher training programs that would benefit its high school students. Either expenditure would be a worthwhile one. But in cases where federal criminal law dictates one of the municipality's choices—for example, if federal criminal law prohibited the municipality from willfully failing to maintain certain environmental standards—it seems implausible that the municipality should be permitted to argue in

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ing that the "rules sought to be established are as logical as those governing French irregular verbs.").

193. *See, e.g.*, HARPER ET AL., *supra* note 72, § 29.6, at 629; Gar Alperovitz, *How Cities Make Money*, N.Y. TIMES, Feb. 10, 1994, at A23.

194. *See, e.g.*, William Celis 3d, *Private Groups to Run 15 Schools in Experiment by Massachusetts*, N.Y. TIMES, March 19, 1994, at A1; Mary Jordan, *Minneapolis Votes to Hire Firm to Run City Schools*, WASH. POST, Nov. 5, 1993, at A1; Robert O'Harrow, Jr., *More and More, the Business of Government Is Run by Business*, WASH. POST, Apr. 24, 1994, at B1; Steve Stecklow, *Private Groups Compete for the Chance to Create New Schools With Public Funds*, WALL ST. J., Jan. 24, 1994, at B1; Martin Tolchin, *Localities Shift to Private Firefighters*, N.Y. TIMES, July 28, 1985, at 22.

195. *See, e.g.*, Note, *supra* note 67, at 639 n.2 (detailing instances in which states have abolished, or virtually abolished, doctrine of municipal tort immunity for governmental functions).

This does not, however, deny the possibility that Congress might wisely choose to carve out certain narrow "governmental function" immunities that would apply to municipalities in the criminal context. *Cf.* CERCLA, 42 U.S.C. § 9601(20)(D) (1988) (excepting from certain civil liability provisions of the Act a state or local government that acquires ownership or control of a facility involuntarily "by virtue of its function as a sovereign"); *id.* § 9607(d)(2) (excepting state or local governments from certain civil liability provisions of Act for "actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person").

196. *See supra* note 87 and accompanying text.

197. *See* 28 U.S.C. § 2680(a) (1988) (stating that the Act does not apply to claims based on "exercise or performance or the failure to exercise or perform a discretionary function or duty").

favor of its discretionary power to engage in an intentional violation of the law.

2. Municipal Immunity From Criminal Prosecution Under Certain Statutes

To say that local governments enjoy no broad-sweeping immunity from all prosecutions involving either mens rea crimes or governmental or discretionary functions does not foreclose the possibility that such entities might be immune from criminal prosecution in more limited contexts. It is necessary to examine the various criminal statutes individually to determine if some more specific basis for immunity exists. In this context, two issues warrant consideration. The first concerns the possibility that, even if the Supreme Court's opinion in *City of Newport* does not make municipalities generally immune from criminal prosecution, it might nevertheless create immunity under 18 U.S.C. § 242. The second concerns the possibility that municipalities might be immune from Sherman Act criminal prosecution by virtue of the Local Government Antitrust Act.[198]

As noted above, the Supreme Court's approach to the question of liability under the civil rights statutes has generally been historical.[199] In *City of Newport*, it reasoned that § 1983 should be interpreted to preclude punitive damage liability against municipalities because, during Reconstruction, when the predecessor to § 1983 was enacted, municipalities and other kinds of corporate entities were considered incapable of forming the mental intent required in punitive damage actions.[200] The first precursor to § 242—the criminal analogue to § 1983—was also enacted during Reconstruction.[201] Thus, following the Court's historical approach to such questions, it might be assumed that municipalities would also be immune from criminal prosecution under § 242.

This assumption would be mistaken, however. The original 1866 version of § 242 contained no mens rea or criminal intent requirement;[202] nor did the 1870 version of the law.[203] Congress did not add the requirement of

198. 15 U.S.C. §§ 34-36 (1988). As explained *supra* note 129, it is clear that, under the *Parker* doctrine, municipalities *are* immune from antitrust liability—whether criminal or civil—when acting pursuant to "clearly articulated" state policy. The question considered here is whether, under the Local Government Act, municipalities are immune from criminal liability even when *Parker* immunity does not apply.

199. *See supra* note 160 and accompanying text; *see also* Smith v. Wade, 461 U.S. 30, 38-51 (1983) (employing historical approach to reach the conclusion that punitive damages are available against individual defendants).

200. *See supra* note 161.

201. *See* § 2 of the Civil Rights Act of 1866, Ch. 31, 14 Stat. 27.

202. *See id.*

203. *See* § 17 of the Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870).

"willfulness" to the statute until 1909.[204] By then, corporations were much more likely to be held capable of forming criminal intent than they were at the time of Reconstruction.[205] Therefore, no inconsistency exists between this historical approach to interpreting the civil rights statutes and subjecting municipalities to criminal prosecution under § 242.

The second question concerns the possibility that, even if the criminal provisions of the Sherman Act apply to municipalities,[206] such entities would nonetheless be immune from criminal prosecution by virtue of the Local Government Antitrust Act ("the Act").[207] The Act immunizes cities, counties, villages, school districts, and other local governments from treble damages suits brought by private plaintiffs, actual damages suits brought by states, and actual damages suits brought by the federal government.[208] The Act does not immunize such entities from civil injunctive and declaratory suits brought by the federal government.[209]

However, the Act says nothing about whether local governments are immune from federal *criminal* prosecution. The legislative history indicates that the Act was not intended to immunize from criminal prosecution municipal officials acting outside their authority.[210] But it does not consider the possibility that a prosecution might be brought against a municipality acting according to some express or implied policy.

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204. *See* 35 Stat. 1092 (1909). For a discussion of the legislative history of what is now § 242, see United States v. Screws, 325 U.S. 91, 98-107 (1945) (plurality opinion); Lawrence, *supra* note 162, at 2180-81.

205. In 1909, the Supreme Court decided the landmark case of New York Central & Hudson River R.R. v. United States, 212 U.S. 481, 494-95 (1909), which upheld the constitutionality of ascribing to a corporation the criminal intent of its agents. Although courts continued, for some time, to say that corporations were incapable of committing what the *New York Central* Court rather vaguely called "some crimes," *id.* at 494, it is unlikely that criminal violations of the civil rights laws were among these. *See, e.g.*, United States v. John Kelso Co., 86 F. 304, 306 (N.D. Cal. 1898) (excluding bigamy, perjury, rape, and murder, but not civil rights violations, from the list of crimes of which corporations could be found guilty).

206. *See* discussion *supra* notes 120-31 and accompanying text.

207. 15 U.S.C. §§ 34-36 (1988).

208. *Id.*; Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301, 320 (1988). Congress enacted the Local Government Antitrust Act following the Supreme Court's opinion in Community Communications Co. v. City of Boulder, 455 U.S. 40, 49-50 (1982), which held that the general authority provided under a state's home rule statute did not immunize a city from the possibility of enormous treble damages liability.

209. *See* 15 U.S.C. §§ 34-36 (1988); *see also* Lee, *supra* note 208, at 320 ("[The Act] restored the power of federal antitrust authorities to seek injunctive relief . . . .").

210. *See* H.R. REP. No. 965, 98th Cong., 2d Sess., 20 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4602, 4621 ("[P]articipation in criminal acts, or other behavior clearly falling outside a local government's authority, would fall outside the definition of official conduct."); CONG. REC. H12,182 (daily ed. Oct. 11, 1984) (statement of Rep. Rodino) ("Actions of officials that fall outside a local government's authority, such as participation in criminal acts, would fall outside the protection of this section.").

Congress passed the Local Government Act with the express purpose of protecting municipalities from potentially bankrupting treble damages actions brought by private plaintiffs.[211] At the time the Act was passed, a municipality was more likely to be bankrupted by treble damages (which are awarded only in civil suits[212]) than by the criminal fines then available under the Sherman Act. Since passage of the Act, however, Congress has amended the Sherman Act to allow criminal fines ten times larger than previously permitted.[213] Thus, there is a reasonable, if inconclusive, argument, based on the "spirit" of the Local Government Act, that municipalities should be immune from federal antitrust criminal prosecution.[214]

III. Policy Arguments Supporting the Criminal Prosecution of Local Governments

The last thirty years have seen significant growth in the use of the federal criminal laws against both private corporations and their employees[215] and against local governmental officials.[216] For the purposes of this Article, it is accepted that certain serious cases of environmental, civil

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211. *See* Lee, *supra* note 208, at 311-33 (reviewing legislative history of Act).

212. *See* 2 Phillip Areeda & Donald F. Turner, Antitrust Law §§ 308, 313, 311a, 331 (1978) (asserting that treble damages may be awarded only in private actions).

213. The Sherman Act Amendments increased the maximum fine available against a corporate defendant from one million to ten million dollars. Antitrust Amendments Act of 1990, Pub. L. 101-588, § 4(a), 104 Stat. 2879, 2880 (codified as amended at 15 U.S.C. § 1 (Supp. IV 1992)).

214. For a further discussion of how criminal fines compare to civil damage awards in terms of their respective potential to "bankrupt" a municipal defendant, see *infra* note 254 and accompanying text.

215. *See* John C. Coffee, Jr., *"No Soul to Damn; No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386, 444-48 (1981); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 Yale L.J. 793, 857, 897 (1984); Victor H. Kramer, Comment, *Criminal Prosecutions for Violations of the Sherman Act: In Search of a Policy*, 48 Geo. L.J. 530, 539 (1960); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1229-30 (1979); Note, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 Yale L.J. 280, 305 (1961).

216. *See* Michael W. Carey et al., *Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part I*, 94 W. Va. L. Rev. 301, 318-24 (1991-92); Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecution of State and Local Officials*, 62 S. Cal. L. Rev. 367, 381-406 (1989); Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171, 1193-96 (1977); Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 Va. L. Rev. 1617, 1617 (1992).

As these sources indicate, the focus of most scholarly attention in this area has been on the prosecution of local officials for crimes such as bribery and fraud. However, local officials have been prosecuted for other crimes as well, such as for violations of the civil rights laws, *see supra* note 136, and the environmental laws, *see* United States v. Hoflin, 880 F.2d 1033, 1034-35 (9th Cir. 1989) (affirming conviction of director of city public works department for violating laws concerning disposal of hazardous wastes and burial of sludge), *cert. denied*, 493 U.S. 1083 (1990).

rights, and antitrust illegality should be addressed by means of criminal sanctions.[217]

Considerable evidence suggests that local governments engage in behavior that may be viewed as criminal. For example, it is now widely recognized that local governments and their agencies are among the nation's worst polluters,[218] that they engage in serious antitrust violations,[219] and that they adopt or condone policies which result in pernicious civil rights violations.[220] Such acts go beyond what was considered criminal for municipalities in the nineteenth century.[221] In some cases, these acts involve willful and knowing violations of the law, dictated or tolerated by official policy.[222]

Recognizing that municipalities violate the law, however, does not necessarily entail that they should be criminally prosecuted. Under the current system, local governments are subject to damage remedies in tort[223] as

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However, there do not appear to be any cases in which local officials have been prosecuted under antitrust laws.

When towns dump sewage or fix prices, they may well do so as a result of a collective decisionmaking process. When a city mayor or police chief takes a bribe, however, she is more likely to act on her own. *But see* Cindy Loose, *5 D.C. Housing Employees Charged*, WASH. POST, Apr. 13, 1994, at A1 (reporting on federal criminal charges brought against head of District of Columbia subsidized housing program and four of her deputies for corruption so rampant that nearly everyone who benefited from the program during the last four years did so by bribing city officials). *Cf.* Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1 (summarizing mayoral commission draft report finding that New York city police often make false arrests, tamper with evidence, and commit perjury, and that such practices are condoned by superior officers). Thus, in general, the prosecution of local governments would seem to make more sense in the environmental, antitrust, and civil rights context than in the corruption context. *Cf.* Carey et al., *supra*, at 312-13 (suggesting that federal criminal prosecution of local governmental officials is more appropriate in cases involving bribery and corruption than in cases involving other crimes because such crimes pose a greater threat to democratic principles, which itself is of federal concern); Kurland, *supra*, at 415-70 (asserting that the federal government's power to prosecute local officials in corruption cases is based on its constitutional interest in preserving republican form of government at local level).

217. As described *supra* note 20, however, the Article is not intended to suggest either that acts not already regarded as criminal should be criminalized or that the criminal prosecution of local governments should be anything other than a last resort.

218. *See supra* note 17 and accompanying text.

219. *See supra* note 18 and accompanying text.

220. *See supra* note 16 and accompanying text.

221. *See supra* notes 42-46 and accompanying text.

222. *See, e.g.*, Webster v. City of Houston, 735 F.2d 838, 842 (5th Cir.) (per curiam) (en banc), *aff'd in part and rev'd in part*, 739 F.2d 993) (5th Cir. 1984) (per curiam) (en banc), discussed *supra* notes 3-10 and accompanying text.

223. *See* SCHUCK, *supra* note 65, at 46 (1983); William F. Baxter, *Enterprise Liability, Public and Private*, 42 LAW & CONTEMP. PROBS. 45, 48 (1978); Cass, *supra* note 190, at 1180; Kenneth C. Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 717-22 (1974); Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514-15 (1955); Louis F. Jaffe, *Suits Against Government and Officers: Damage Actions*, 77 HARV. L. REV. 209, 229-30 (1963); Jerry L. Mashaw, *Civil Liability of Government Officers: Property*

well as civil fines.[224] Because municipalities cannot be imprisoned, the only kinds of penalties that courts can apply to them are monetary—civil damages, civil fines and criminal fines—and probationary.[225] Unless criminal fines and probation further some policy goal that civil fines do not, there would be no logical explanation for their being applied to municipalities.

Moreover, even if one accepts the view that criminal penalties are appropriate when governmental entities engage in criminal acts, one need not agree that such sanctions should be imposed on the entity itself. After all, municipalities can act only through the agency of individual officials. Because local governmental officials are regularly subject to criminal sanctions, it might be argued that the desirable effects of criminal sanctions are achieved more sensibly through criminal prosecution of the responsible official.

Indeed, one might think that a municipality would make a particularly poor candidate for treatment as a criminal. The criminal law intends, after all, to protect the public interest. Municipalities represent the public; therefore, it might be argued that prosecution of the municipality would be counterproductive. Moreover, many people who live within the boundaries of the lawbreaking municipality might not approve of its policies. To brand the municipality a "criminal" would be tantamount to branding all of the people who live within the municipality "criminal." Accordingly, criminal prosecution of the municipality might also be perceived as unjust.

In an attempt to sort out these issues, this section offers three basic arguments. First, local governments can be the appropriate object of the stigma and moral condemnation that usually accompany criminal prosecution.[226] Second, in certain cases—such as when a local government has systematically adopted or condoned a policy that leads to a violation, and individual officials are merely the immediate agents of the violation—prosecution of the responsible entity may well be fairer than prosecution of the individual officials.[227] Third, imposing criminal liability on local governments may be more efficient than imposing such liability on officials, be-

Rights and Official Accountability, 42 LAW & CONTEMP. PROBS. 8, 22 (1978); Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 450-51 (1978).

224. *E.g.*, Atchison v. Barry, No. 11976-CA-88 (D.C. Super. Ct.) (Order of Dec. 21, 1989, ¶¶ 10-13) (described in WASHINGTON LEGAL CLINIC FOR THE HOMELESS, *supra* note 16, at 53); Nancy Lewis, *Judge, Tired of Waiting, May Sock D.C. With Fine*, WASH. POST, July 28, 1993, at B6 (addressing the imposition of fines in Jerry M. v. District of Columbia, 571 A.2d 178 (D.C. 1990)).

225. As discussed *infra* note 244, the penalty imposed by the court in *Little Rock Sewer Committee* was probation.

226. *See infra* notes 229-50 and accompanying text.

227. *See infra* notes 252-53, 257-63 and accompanying text.

cause it would encourage local governments to adopt internal controls on illegal conduct and would provide a more easily identifiable, and perhaps more readily convictable, defendant.[228]

A. *Local Governments as Appropriate Objects of Criminal Sanctions*

As Professor Wolfgang Friedmann observed, "the main purpose of a [criminal] fine is not primarily to hurt the defendant financially . . . . It is to attach a stigma—pronounced by independent law courts—on the breach of legal obligations which have been imposed in the interest of the community."[229] The creation of stigma is a crucial factor in accomplishing two important objectives of the criminal law. The first is general deterrence—the idea that the punishment criminals suffer serves to deter others from committing similar crimes.[230] The second is retribution—the idea that criminals should receive their "just deserts" and that punishment is necessary to restore order and maintain society's respect for the law.[231] Indeed,

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228. *See infra* notes 264-73 and accompanying text. The Article contemplates a scheme under which prosecutions would be brought against local governments *rather than, or in addition to*, the officials who work for them. The determination of which of these two options should be pursued would be determined on a case-by-case basis. For example, if a municipality adopted policies that led to criminal activity and there were no individual officials who bore particular responsibility for such policies or acts, then the municipality alone should be prosecuted. Conversely, if an entity adopted crime-encouraging or -tolerating policies and there were individuals who were especially culpable, then the prosecution should be brought against both the entity and the officials.

It is acknowledged, however, that some of the policy arguments offered in the text below may be more relevant to those circumstances in which only the municipality (and not any individuals) would be prosecuted. *See, e.g., infra* notes 267-69 and accompanying text.

229. FRIEDMANN, *supra* note 15, at 211.

230. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 24 (2d ed. 1986). The extent to which a punishment acts as a deterrent is often expressed as a function of the type and magnitude of the punishment and the probability that the crime will be discovered and punished. *Id.* at 25.

231. *Id.* at 25-26. The retribution theory of punishment has enjoyed a significant revival in recent years. *See, e.g.*, Jean Hampton, *Correcting Wrongs Versus Righting Wrongs*, 39 UCLA L. REV. 1659, 1685-98 (1992). In the case of corporate defendants, however, the majority view among scholars continues to be that deterrence is the more important policy goal. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *Mischief Afoot: The Need for Incentives to Control Corporate Criminal Conduct*, 71 B.U. L. REV. 447, 449-50 & n. 20 (1991) (citing literature). *But see* KIP SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS 53-74 (1990) (emphasizing the importance of retributive principles in corporate punishment); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1167-85 (same).

Other criminal law rationales that are often mentioned include prevention or specific deterrence (deterring the individual defendant from committing further crimes), incapacitation (isolating criminals that are dangerous to society), and rehabilitation. *See* LAFAVE & SCOTT, *supra* note 230, at 23-24; *see also* 18 U.S.C. § 3553 (1988) (listing purposes of federal criminal sentencing). Although some of these additional rationales may or may not apply when the defendant is a local government, the focus here is on what appear to be the most significant rationales underlying criminal punishment—general deterrence and retribution.

stigma is arguably what distinguishes criminal from civil remedies.[232] Although tort remedies deter, they do so without imposing the stigma that is unique to criminal sanctions. And although tort remedies obviously carry some moral weight, they nonetheless lack the retributive force of criminal sanctions. Thus, if a local government is to be an appropriate object of criminal sanctions, it must also be an appropriate object of the stigma and moral condemnation that accompanies such sanctions.[233]

Professor Brent Fisse has described the ways in which stigma and moral condemnation play a crucial role when the defendant is a business corporation.[234] In his words, "[w]hen people blame corporations, they are not merely channeling aggression against a deodand or some other symbolic object, they are condemning the fact that the people within the organization collectively failed to avoid the offense to which corporate blame attaches."[235]

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232. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404-05 (1958); *see also In re* Gault, 387 U.S. 1, 23-24 (1967) (noting that "[i]t is disconcerting . . . that [the term 'delinquent'] has come to involve only slightly less stigma than the term 'criminal' applied to adults").

Judge Newman has long viewed criminal civil rights prosecutions of local officials as unwieldy and would replace them with Department of Justice-initiated civil actions against the entity. *See* Newman, *supra* note 223, at 449-50, 455-58; Jon O. Newman, *How to Protect Other Rodney Kings*, N.Y. TIMES, May 1, 1992, at A35; Miranda S. Spivack, *Hartford Judge Offers Police Brutality Bill*, HARTFORD COURANT, May 6, 1992, at A1. However, even if Judge Newman is correct in his description of the practical problems involved in criminal civil rights prosecutions, he fails to take account of the unique stigmatizing effects that criminal prosecutions offer. Moreover, at least one of the major problems with the criminal prosecution of governmental officials that he identifies—namely, reluctance on the part of juries to convict individual police officers—would likely be eliminated by the prosecution of the entity instead. *See infra* notes 268-69 and accompanying text.

233. In Professor Friedmann's view, the answer was obvious:

> At a time when government departments and many independent corporations, directly or indirectly controlled by the government, assume an increasing variety of functions and responsibilities in the social and economic life of nations, the exemption of either government or governmental corporations from criminal liability generally is neither morally nor technically justified.

FRIEDMANN, *supra* note 15, at 26.

234. Fisse, *supra* note 231, at 1147-54.

235. *Id.* at 1149; *see also* Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889, 889 (1991) (arguing that the criminal law has a "unique capacity" to "shame those who violate society's increasingly strict norms of environmental protection); Stephen A. Saltzburg, *The Control of Criminal Conduct in Organizations*, 71 B.U. L. REV. 421, 431-32 (1991) (noting that "[t]he threat of a stigma resulting from a criminal conviction may encourage an organization to take steps to prevent criminal behavior within the organization"). *But see* Andres Cowan, Note, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387, 2389 n.11 (1992) ("Retributive justice . . . has generally been rejected as inappropriate in the context of corporations. . . . because it is grounded in concepts of individual blameworthiness and responsibility that make little sense when applied to organizations that lack mind and conscience.").

A similar phenomenon would occur in the case of municipalities. When individual municipal officials violate the law, they frequently do so within a system of rules and norms established by the governmental entity for which they work. To the extent that such wrongdoing is the result of official policy, custom and usage, or collective and deliberate decision-making, the appropriate object of moral condemnation should be the enterprise, rather than, or at least as much as, the individual official.[236]

A dramatic example of how government policy can lead to criminality and justify moral condemnation of the governmental entity itself is provided by the facts of *Webster v. City of Houston*.[237] As described at the beginning of this article,[238] *Webster* involved the Houston Police Department's alleged policy of condoning the use of throw-down guns. In such circumstances, condemnation of the governmental entity is likely to be at least as strong as it is in the case of the individual defendants. As in the case of "state-sponsored" terrorism[239] and war crimes,[240] the fact that a

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236. There exists a substantial body of law regarding the determination of when a deprivation of federally protected rights is caused by action taken "pursuant to official municipal policy." Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690-95 (1978). This Article does not intend to offer a description of exactly when a criminal act would properly be considered the result of municipal policy (rather than simply the act of an individual official who works for the municipality). Such determinations would likely be consistent with those cases that have addressed similar issues in the area of civil rights tort law. *See, e.g.*, Pembaur v. Cincinnati, 475 U.S. 469, 479-80 (1986):

> The conclusion that tortious conduct, to be the basis for municipal liability under § 1983, must be pursuant to a municipality's "official policy" . . . was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality"—that is, acts which the municipality has officially sanctioned or ordered.

See also Owen v. City of Independence, 445 U.S. 622, 652 (1980) (imposing liability against municipality in case involving " 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials"); Colleen R. Courtade, Annotation, *What Constitutes Policy or Custom for Purposes of Determining Liability of Local Government Unit Under 42 U.S.C. § 1983—Modern Cases*, 81 A.L.R. FED. 549 (1987).

237. 689 F.2d 1220 (5th Cir. 1982), *vacated and remanded*, 735 F.2d 838 (5th Cir.) (per curiam) (en banc), *aff'd in part and rev'd in part*, 739 F.2d 993 (5th Cir. 1984) (per curiam) (en banc).

238. *See supra* notes 3-10 and accompanying text.

239. *See* UNITED STATES DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM 21-24 (1993) (detailing United Nations resolutions and other efforts to deal with state-sponsored international terrorism).

240. *See* INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON STATE RESPONSIBILITY, Art. 19, *reprinted in* UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 329 (Marina Spinedi & Bruno Simma eds., 1987) ("An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of a fundamental interest of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime."). *But see* 1 MARJORIE M. WHITEMAN, DIGEST OF INTERNA-

governmental entity is the moving force behind the criminality makes it, in the eyes of many, that much more threatening.[241] As Justice Brandeis wrote, "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[242]

Such condemnation of the government entity would not be reserved solely for dramatic and violent crimes. In *United States v. Little Rock Sewer Committee*,[243] for example, the defendant Sewer Committee was charged with criminal violations of the Clean Water Act based on the fact that the city's sewer plant manager, a "high level" government employee, "knowingly" made material false statements in monthly discharge monitoring reports.[244] It would, of course, be disturbing if the plant manager had failed to file the report simply because he was personally lazy or indolent. It would be even more troubling, however, if his failure to file was the result of city policy—if, for example, the Little Rock City Council had, in an effort to save money, deprived its city sewer plant managers of the support staff necessary to prepare the required reports.

Indeed, municipalities are particularly susceptible to the effects of the condemnation and stigma associated with criminal conviction. Local governments mount major public relations efforts to promote civic pride and ensure that their towns are perceived as clean, safe, productive, and stimulating places to visit, live, work, and raise a family.[245] Although it is difficult to predict exactly how a criminal conviction would affect the reputation

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TIONAL LAW 52 (1963) (attributing to Nuremberg Tribunal the statement: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.").

241. Consider, for example, how much we are appalled by the fact that the Iranian Government was behind the *fatwah* ordering the death of author Salman Rushdie.

242. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (involving admissibility of evidence gained through illegal wiretap).

Because the appropriateness of such condemnation is considerably less clear when the defendant entity is vicariously liable, municipalities should be held criminally liable only when high-level officials have adopted policies that authorize or recklessly tolerate criminal conduct. Such a policy also would be consistent with the doctrine that municipalities may not be held vicariously liable in tort under § 1983. *See* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 691-92 (1978).

243. 460 F. Supp. 6 (E.D. Ark. 1978).

244. *Id.* at 9. An earlier information had named the City of Little Rock itself as a defendant, but the court dismissed the charge on the grounds that the duty to submit the required reports belonged to the Sewer Committee rather than the City. *See id.* at 7. After a one-day jury trial, the Sewer Committee was found guilty and was placed on probation for a period of two years. *See* Judgment and Probation/Commitment Order, United States v. Little Rock Sewer Comm., 460 F. Supp. 6 (E.D. Ark. 1978) (No. LR-CR-77-138) (on file with the *North Carolina Law Review*).

245. *See, e.g.*, Stuart Elliott, *Advertising: New York's Subway Puts its Problems on the Line in a Campaign*, N.Y. TIMES, May 13, 1993, at D19; *see also* Kirk Johnson, *"I Love Tourism": Three States Try to Resume Luring Visitors*, N.Y. TIMES, May 13, 1993, at B1 (discussing efforts by New York, New Jersey, and Connecticut to boost tourism).

of a city, effects could include a loss of confidence in local officials, a decline in business and tax revenues, and falling real estate values and bond ratings.[246] Criminal conviction might also make it easier for civil plaintiffs to sue.

On the other hand, it is important to note that the stigma attending criminal prosecution need not—and probably would not—attach to the individual citizens who live in the city that is convicted of a crime. To say that the Cities of Houston or Little Rock committed a crime no more entails that every citizen, or even every government official, in Houston or Little Rock is a "criminal" than to say that every stockholder or official of a convicted corporation is a criminal.[247] Enterprise criminality is not, and need not be, so reducible.

Of course, in at least some cases, the citizens of a given community can be said to share in the guilt of their municipal government.[248] Public choice theorists have long emphasized that the smaller the community, the more control its citizens have over its governance—be it through the ballot box, town meetings, referenda, or voting "with their feet."[249] This is not to say that every citizen will agree with every policy that her town adopts. But if a small town adopts policies that encourage environmental violations or police brutality, it is probably fair to assume that the individual citizens of the town have as much control over, and bear as much blame for, such policies as a small shareholder or mid-level manager has in her company's decision to violate the law.[250]

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246. The "fairness" aspects of this issue are discussed *infra* text accompanying notes 251-63.

247. *See, e.g.*, United States v. Cincotta, 689 F.2d 238, 242 (1st Cir.) (upholding conviction of Mystic Fuel Corporation for fraud and stating that the company itself—"not the individual defendant[ ] [employees]—was making money by selling oil that it had not paid for"), *cert. denied*, 459 U.S. 991 (1982).

248. *Cf.* Webster v. City of Houston, 689 F.2d 1220, 1237 (5th Cir. 1982) (Goldberg, J., concurring) ("It is necessary that the threatened [punitive] damages cause some deprivation for the populace so that they will be nudged out of their blissful ignorance . . . . "), *vacated and remanded*, 735 F.2d 838 (5th Cir.) (per curiam) (en banc), *aff'd in part and rev'd in part*, 739 F.2d 993 (5th Cir. 1984) (per curiam) (en banc).

249. *See* VINCENT OSTROM ET AL., LOCAL GOVERNMENT IN THE UNITED STATES 206 (1988); Briffault, *supra* note 2, at 400-01 (citing Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956)); *see also* Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 944-45 (1988) (discussing local citizens' ability to "vote with their feet").

250. The ascription of such "collective guilt" would also be consistent with a more general trend in the law toward notions of group responsibility. *See* Robert A.B. Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1501-02 nn.96 & 97 (1986) (describing shift from individual to group responsibility in tort law, contract law, and civil procedure).

B. *Criminal Enterprise Liability and Fairness*

Determining whether it is fair to make local governments the object of criminal sanctions requires consideration of the following issues: (1) whether such sanctions would unjustly impose an economic burden on "blameless" or "innocent" taxpayers; (2) whether such fines would risk bankrupting municipal governments; and (3) whether imposing criminal sanctions on entities that are meant to benefit the public would be counterproductive, because it would harm precisely those people who are meant to be helped.[251] This section considers these "fairness" issues and suggests that, contrary to first impressions, imposing criminal sanctions on local governments would actually lead to greater fairness than imposing such sanctions solely on governmental officials.

1. The Supposed Problem of "Blameless" Taxpayers, Potentially Bankrupting Liability, and Harm to the People Whose Interests Are Meant to Be Protected

Modern tort law provides that when a municipality acts negligently, and such negligence causes injury, the municipality is obligated to pay compensation to a plaintiff.[252] Obviously, the burden of paying damages in such cases is borne by the town's taxpayers and by those who would have benefitted from programs that could have been paid for with funds that must instead be used to pay such damages. This occurs regardless of whether these citizens approve of the governmental policy that leads or contributes to liability.

From this perspective, then, there is nothing anomalous about making "blameless"[253] taxpayers pay for the wrongs of their government. To the extent that some citizens suffer a small injustice when their municipality is

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251. The Supreme Court offered similar arguments for immunizing municipalities from punitive damage liability in City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981). Several lower courts have also cited such arguments in cases involving the possibility of subjecting municipalities to civil RICO damages. *See, e.g.*, Lancaster Community Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 404 (9th Cir. 1991) ("The 'body politic,' that is, the taxpayers, will pay if [plaintiff's] RICO claim is successful. Yet the 'body politic' was the target of the deception perpetrated."), *cert. denied*, 112 S. Ct. 1168 (1992).

252. *See supra* notes 72-73 and accompanying text; *see also* Grason Elec. Co. v. Sacramento Municipal Util. Dist., 526 F. Supp. 276, 281 (E.D. Cal. 1981) (stating that "[t]he day is long past when it was thought that mere status as a public entity was a sufficient basis upon which to require a tort victim to bear his own damages" and thus maintaining that municipality may be held liable for antitrust treble damages).

253. The "blameless taxpayers and citizens" concept distinguishes municipalities from business corporations, whose managers and shareholders have, in a more obvious way, voluntarily undertaken the risk of criminal and civil liability. *Cf.* Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 836-40 (1927) (identifying parties that are hurt when a corporation is punished).

required to pay tort damages, it is an injustice that we are willing to accept in the pursuit of the overriding policy goal of compensation. Similarly, when the policy goal is that of deterring or obtaining retribution for criminal behavior, and such criminal behavior is the result of a municipal policy, it seems reasonable to conclude that society would tolerate the small injustice that comes from the possibility that some of those bearing the burden of the criminal fine might be blameless.

The potential fiscal impact of criminal fines also should not be overestimated. There is little evidence that such fines are any more likely to bankrupt a town than civil fines or compensatory civil damages.[254] There is even less indication that criminal fines would hurt a municipality as much as the imposition of punitive damages, a burden that the Supreme Court has called "unmanageable."[255]

Finally, the argument that federal criminal prosecution of local governments would hurt precisely the people whose interests are meant to be vindicated is, at best, overstated. The federal criminal laws are intended to protect the interests of a far broader constituency than that which is penalized when a local government is prosecuted. The crimes that local governments commit frequently hurt people who live and work outside the local polity as well.[256]

Moreover, a citizen who must bear some fraction of the costs of the criminal sanction imposed on his municipality might be quite willing to do so if it means the opportunity to live in a "crime-free" municipality. Indeed, it is possible that those most likely to benefit from the deterrent effect of criminal sanctions on municipalities—i.e., those most likely to be injured if the municipality engages in police brutality, environmental pollution, or price fixing—would shoulder a comparatively small share of the higher

254. For example, under the Clean Water Act, a municipality that knowingly fails to file a monthly discharge report is subject to a criminal fine of not less than $5,000 and not more than $50,000 per day of violation. 33 U.S.C. § 1319(c)(2) (1988). By contrast, municipalities found negligent in tort for causing serious bodily injury or death to a plaintiff are frequently assessed hundreds of thousands, or even millions, of dollars in damages. *See infra* note 269. On the other hand, one should consider that, while defendants generally can insure against civil damages, they are usually prevented by public policy from insuring against criminal fines and punitive damages. *See, e.g.*, Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 441-42 (5th Cir. 1962) (holding that public policy prohibits construction of insurance policy as covering liability for both punitive damages and criminal fines). A full accounting of the impact of criminal sanctions would also have to include the financial effects of lost confidence in a city government. *See supra* notes 245-46 and accompanying text.

255. *City of Newport*, 453 U.S. at 265. In at least four different places in that opinion, the Court expressed concern that punitive damages would pose a serious risk to the financial integrity of local governmental entities. *Id.* at 265, 266, 270, 271.

256. *Cf.* Briffault, *supra* note 2, at 429 (pointing out that decisions by local governments often impose costs on people outside the local polity).

taxes, reduced public services, and depressed business climate that result from criminal conviction.

2. Fairness and Retribution

Those who favor the retribution theory of punishment contend that it " 'provides an important check against tyranny, for a person is punished only when he deserves it; and the opposite is also true—that he is not punished if he does not deserve it.' "[257] Crucial to this view of punishment is the idea that the criminal laws must be applied consistently and fairly. If wealthy and well-connected defendants receive lighter criminal sanctions than poor and politically powerless defendants, the integrity of the criminal justice system suffers.[258] Similarly, the system suffers if an individual defendant becomes a scapegoat for the wrongs of a larger criminal enterprise of which he is only a small part.[259] At its most basic level, the retribution principle says that the person or entity that is truly to blame for a crime should be the one to suffer the punishment, and that such punishment should be proportional to the degree of the harm the crime has caused and the degree of the defendant's guilt.[260] Thus, in those cases such as *Webster,*[261] in which the crimes of individual officials are committed within the context of broader-based governmental policies that either authorize or tolerate such illegality, it seems fairer to address the criminal sanction to the governmental entity rather than, or in addition to, the responsible official.

Such consistency in enforcement benefits the defendant entity as well. Criminal defendants are guaranteed certain rights that defendants in civil proceedings are not.[262] Commentators have long criticized the practice of

257. LAFAVE & SCOTT, *supra* note 230, at 26 (quoting PHILIP BEAN, PUNISHMENT 19 (1981)).

258. *See, e.g.*, Jill Dut, *Milken Justice: Some Say It's Unusual But Not Cruel Enough*, N.Y. NEWSDAY, Mar. 1, 1992, at 69 (reporting reaction to news that convicted financier Michael Milken would retain hundreds of millions of dollars in assets after sentencing); Floyd Norris, *Market Watch: On Wall Street, Some Crooks Get off Easy*, N.Y. TIMES, Oct. 3, 1993, at 3-1 (arguing that it is unfair that those who violate criminal laws involving the securities industry receive much lighter sentences than others); *cf.* People v. City of Chicago, 100 N.E. 194, 196 (Ill. 1912) (involving the state criminal prosecution of a municipality):

> It would be a peculiar condition of affairs if a state could exact obedience from its citizens, fine and imprison them for violations of law, and at the same time be powerless to secure obedience to the same laws by the entity which derived its being from the state itself. To obtain this result there is no weapon so effective as criminal procedure by way of indictment.

259. *See, e.g.*, Ken Wells, *Lawyer for Exxon Valdez Captain Calls Him Scapegoat, Victim of Crew Mistakes*, WALL ST. J., Feb. 6, 1990, at A6 (describing trial of *Exxon Valdez* Captain Joseph Hazelwood).

260. *See supra* note 231.

261. *See supra* notes 3-10 and accompanying text.

262. These include the right to indictment, counsel, speedy trial, and proof beyond a reasonable doubt, as well as protection against unreasonable searches and seizures, self-incrimination, double jeopardy, and excessive fines. Some of these protections undoubtedly are less important in

denying defendants these rights by combatting what are essentially criminal violations through civil means.[263] Criminal prosecution of local governments in appropriate cases would thus ensure that such entities receive all of the rights to which criminal defendants are constitutionally guaranteed.

C. *Criminal Enterprise Liability and Efficiency*

A final set of justifications for imposing criminal sanctions on governmental entities rather than officials centers on efficiency. Analogous arguments have been developed extensively in the literature on criminal liability for business corporations[264] and in the literature on tort liability for municipalities.[265]

As in the case of business corporations, imposing liability on the governmental enterprise obviates the difficulty of determining which governmental employees are primarily responsible for the entity's wrongdoing. As Judge Goldberg asked in his concurrence in *Webster*:

> [A]t whom do we point the finger of guilt in the case of tragic collective apathy? At the individual police officers who knew of the policy but did nothing? The instructors at the police academy who allowed this horrible technique to be inculcated at the very time adherence to law and the Constitution and fundamental human morality should have been taught? The police chief? The city council? The citizens snug in their beds, oblivious to the fact that young men were being shot down by their "protectors"?[266]

In many cases involving municipal wrongdoing, deciding which individuals within an entity should be held responsible will present difficult problems of both proof and moral judgment. By naming a police department, sewer

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the case of non-corporeal defendants, such as business corporations and local governmental entities. *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HAST. L. REV. 577, 622 (1990).

263. *See, e.g.*, Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 480 (1974); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HAST. L.J. 1325, 1348-69 (1991); Coffee, *Paradigms*, *supra* note 20, at 1887-90; Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895, 1898-99 (1992); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1864-72 (1992); Franklin E. Zimring, *The Multiple Middlegrounds Between Civil and Criminal Law*, 101 YALE L.J. 1901 *passim* (1992); George Fletcher, Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at* Kennedy v. Mendoza-Martinez, 32 U. CHI. L. REV. 290 *passim* (1965); Note, *Civil RICO Is a Misnomer: The Need for Criminal Procedural Protections in Actions Under 18 U.S.C. § 1964*, 100 HARV. L. REV. 1288, 1301-05 (1987).

264. *See supra* note 215.

265. *See supra* note 223.

266. Webster v. City of Houston, 689 F.2d 1220, 1236 (Goldberg, J., concurring), *vacated and remanded*, 735 F.2d 838 (5th Cir.) (per curiam) (en banc), *aff'd in part and rev'd in part*, 739 F.2d 993 (5th 1984) (per curiam) (en banc).

committee, municipal hospital, or a city itself—rather than any individuals—as the defendant, these quandaries can be avoided and, as a practical matter, the costs of investigation and prosecution can be reduced.[267]

A second reason for prosecuting local governments rather than the officials who work for them is that the former may be more likely to be convicted. It has frequently been observed in the corporate crime context that juries are more willing to convict a corporate entity than the responsible individual officials.[268] A similar phenomenon might occur when the defendant is, say, an individual governmental official with no previous criminal record, a history of public service, and a family to support.[269]

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267. *Cf.* Stephen A. Saltzburg, *The Control of Criminal Conduct in Organizations*, 71 B.U. L. REV. 421, 425-28 (1991) (noting that the benefits of prosecuting organization alone include reducing the costs of investigating and convicting, increasing the likelihood of conviction, and avoiding procedural problems).

268. *See, e.g.*, United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941); United States v. Austin Bagley Corp., 31 F.2d 229, 233 (2d Cir.), *cert. denied*, 279 U.S. 863 (1929); *see also* Christopher Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 32-33 nn.127-28 (1980) (describing pattern of judicial leniency toward corporate executives convicted of antitrust violations).

269. In *City of Newport*, the Court noted that the jury's $200,000 award against the city was more than twice the total amount of punitive damages assessed against the individual defendant city officials collectively. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 n.32 (1981); *see also* Newman, *supra* note 232, at A35 ("[I]n all police misconduct trials, there is an inevitable reluctance on the part of ordinary citizens to brand a law enforcement officer as a criminal."). It is unclear which is the more significant cause of this reluctance, however: the fact that the defendant is an individual, or the fact that the defendant is a member of the police force.

One can also anticipate a contrary argument. Federal criminal defendants are constitutionally guaranteed the right to have their cases tried to a jury in the district in which the offense was allegedly committed. *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI. Therefore, a federal jury hearing a criminal case against a municipal defendant would probably include at least some jurors who were citizens of the municipality. (Federal judicial districts are frequently larger than municipalities, so in many cases some of the jurors would come from neighboring municipalities as well.) Federal prosecutors thus would be in the uncomfortable position of having to ask some jurors to convict the very municipality in which those jurors live and pay taxes. Although this certainly raises a troublesome issue, there is no indication that the problem is any more significant than it is when jurors are asked to impose *civil* damages on a municipality in which they are resident—something that juries in large cities recently have been quite willing to do. *See, e.g.*, Margaret Cronin Fisk, *1993's Largest Verdicts*, NAT'L L.J., Jan. 17, 1994, at S15 (citing Marmol v. City of New York, 7918-1991 (Sup. Ct., New York Co.) (June 2, 1993) (New York City jury awarding plaintiff $100.57 million verdict in suit against city of New York)); Hawkins v. District of Columbia, 91-15515 (Super. Ct. Washington, D.C.) (Nov. 15, 1993) (Washington, D.C. jury awarding plaintiff $6 million verdict in suit against District of Columbia); Ferber v. City of Philadelphia, July Term 1986, No. 4696 (Ct. C.P. Phila.) (Sept. 28, 1993) (Philadelphia jury awarding plaintiff $4.5 million in suit against city); McCummings v. New York City Transit Authority, 9494/85 (Sup. Ct. New York Co.) (March 8, 1990) (Manhattan jury awarding plaintiff $4.34 million in suit against New York City), *aff'd*, 580 N.Y.S.2d 931 (1st Dept. 1992), *cert. denied*, 114 S. Ct. 548 (1993)); John Murawski, *District Slumps Under Liability Strain*, LEGAL TIMES, Aug. 30, 1993, at 1 (reporting on $4.9 million verdict against District of Columbia awarded by jury made up of District residents). On the other hand, it is worth recalling that criminal conviction requires a unanimous verdict, whereas civil judgment requires only a majority.

A final policy reason for imposing criminal sanctions on municipal entities rather than individual employees is that such a policy would encourage the enterprise to adopt efficient internal policies and controls intended to deter malfeasance, without undue deterrence of socially beneficial conduct. Indeed, the efficiency-enhancing role of enterprise liability as applied to municipalities (in the civil context) has been embraced both by numerous commentators[270] and by the Supreme Court on several significant occasions,[271] despite its unwillingness to do so in *City of Newport*.[272] As with business corporations,[273] a municipality threatened with the stigma and monetary penalty associated with criminal conviction would likely seek to "rehabilitate" itself, so as to repair its image and regain public confidence.

IV. CONCLUSION

Federal prosecutors should consider bringing criminal charges against municipal entities that systematically encourage or tolerate criminal behavior. Such prosecutions would not be without precedent. In the nineteenth and early twentieth centuries, imposing criminal sanctions on local governments was widely viewed as a means of vindicating public rights. Today, in those cases in which criminal actions are the result of a concerted governmental policy, rather than simply the action of an individual official, federal criminal prosecution of local governments should be viewed as a more fair, efficient, and effective alternative to either criminal prosecution of local officials or civil suits against the entity.

Moreover, a basic federal statutory scheme for prosecuting municipalities is already in place. Most federal criminal environmental laws, for ex-

270. *See, e.g.*, SCHUCK, *supra* note 65, *passim*; Baxter, *supra* note 223, *passim*; Cass, *supra* note 190, at 1174-1184; Mashaw, *supra* note 223, *passim*.

271. *See* Owen v. City of Independence, 445 U.S. 622, 652 (1980) (stating that imposing liability on the governmental entity encourages it "to institute internal rules and programs" designed to prevent its employees from engaging in the conduct at issue); Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978).

272. In declining to uphold the imposition of punitive damages on the defendant municipality, the *City of Newport* Court stated, in a conclusory fashion, that: (1) imposing such damages probably would not deter individual officials from wrongdoing; (2) imposing such damages directly against officials would serve as a more effective deterrent; and (3) a deterrent effect was already present through existing sanctions, such as public reaction and reprimand from superiors. 453 U.S. at 269-70. Yet, the Court offered no argument for distinguishing this case from its earlier decisions in *Owen* and *Monell*, and, indeed, did not even acknowledge that there might be a conflict.

In his concurrence in the *Webster* case, Judge Goldberg offered a compelling argument that, contrary to what the Court in *Newport* stated, imposing punitive damages on the municipal entity is precisely the appropriate remedy when it is the entity's policies that are to blame for the wrongdoing. *See* Webster v. City of Houston, 689 F.2d 1220, 1236-38 (5th Cir. 1982) (Goldberg, J., concurring), *vacated and remanded*, 735 F.2d 838 (5th Cir.) (per curiam) (en banc), *aff'd in part and rev'd in part*, 739 F.2d 993 (5th Cir. 1984) (per curiam) (en banc).

273. *See* Fisse, *supra* note 231, at 1154.

ample, expressly include municipalities within the definition of "persons" subject to prosecution. Federal criminal antitrust and civil rights laws can also reasonably be construed to apply to municipalities. Certainly, where gaps in the statutory scheme exist, Congress should consider enacting laws that would bridge them. Finally, although municipal immunity from prosecution might exist in certain limited circumstances, there appears to be no broader-based immunity that would protect municipalities from federal criminal prosecution more generally.