Judicial Review of Strict Liability Local Ordinances

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The criminal code reform movement brought about by the Model Penal Code had, among other goals, the aim of eliminating strict liability offenses.1 The success of the movement resulted in the enactment of the MPC’s scheme of element analysis and default culpability terms in almost half of American jurisdictions.2 Around the same time, though, a similar reform movement was occurring in local government law: the home rule movement, which advocated for greater political power for municipalities—including the power to criminalize conduct.3

When one looks at the state of much of local criminal law today, one might conclude that these two reform movements were ships that passed in the night. Many local offenses are not written in the manner of an MPC-type offense, and most significantly, many of these offenses contain no culpability element whatsoever.4 Consider the following offense from Los Angeles, California:

No person shall urinate or defecate in or upon any public street, sidewalk, alley, plaza, beach, park, public building or other publicly maintained facility or place, or in any place open to the public or exposed to public view, except when using a urinal, toilet or commode located in a restroom, or when using a portable or temporary toilet or other facility designed for the sanitary disposal of human waste and which is enclosed from public view.5

Read literally, such an offense would create liability for the spontaneous incontinence of a public beachgoer.

These strict liability local offenses proliferate even in the many states that attempted to reform their codes according to the MPC’s goals. Home rule has frustrated the purposes of the code reformers by facilitating the creation

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1 Brown, Strict Liability at 287–88 (the “two ambitions” of the project were “to bring analytical clarity to the definition and interpretation of criminal statutes” and to “reject[] strict liability for any element of a crime.”).
2 Id. at 294 (counting 24 jurisdictions with an “identifiable variation” of MPC 2.02(3) and 2.02(4)).
4 See Fissell, Local Offenses, Fordham LR (listing examples).
5 LOS ANGELES, CA CODE § 41.47.2.
of a vast subterranean body of misdemeanors that exist below the core state code. If one agrees with the drafters that strict liability should be reduced (if not eliminated), then this asymmetry between modern state offense drafting and archaic local offense drafting should be viewed as harmful. But as all criminal lawyers know, the text of the offense is not the last word on its meaning: judges interpret the offenses. Can judges ameliorate the harmful asymmetry just described?

Many jurisdictions have doctrines that judges deploy when confronted with an offense that contains no mental element, and if the offense meets certain criteria, a culpability requirement can be simply read into the statute. The hornbook example of this is the Morissette case, where the Supreme Court wrote, “[M]ere omission from [the offense] of any mention of intent will not be construed as eliminating that element from the crimes denounced.”

This judicial practice has been adopted by many states as well. These doctrines, as we will see, allow for the judiciary to impose the MPC culpability scheme on an ordinance written by a local board that might perhaps be unaware of the term “mens rea” altogether.

Moreover, local offenses exist in the context of a superior body of state criminal law. This means that a second doctrine is implicated when a local criminal case comes before the judiciary: preemption. When reviewing claims of intrastate preemption, most states utilize the major analytical categories created by the U.S. Supreme Court in the federal-state context: express preemption, and implied preemption (due to “conflict” or “occupation of the field”). Preemption’s effect on a strict liability local offense will be different depending on the type of preemption a state has adopted; field preemption would of course invalidate the offense, while, as we will see, a prevalent form of conflict preemption would not invalidate the offense (because it is broader).

I. INFERRING MENS REA

We can begin by considering the doctrine of the inference of mens rea. A review of cases assessing strict liability local criminal laws indicates wide

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8 See generally Diller, Intrastate Preemption at 1141-42 (citing state law) (“Despite some superficial distinctions, most states’ preemption analyses are similar in form to the federal model”). See Viet Dinh, Reassessing the Law of Preemption, 88 Geo. L.J. 2085, 2104 (2000) (discussing federal categories).
variation in approaches across jurisdictions—some hewing closely to the analysis laid out in Morissette, where a factor-test is used to determine whether strict liability is permissible, and with one applying a form of a rational basis test. It is worth discussing these in order of prevalence.

A. Implied Intent By Application of Factors

What appears to be the dominant approach to the judicial review of strict liability ordinances is the application of a factor test. The application of the factors is used to determine if the legislature actually intended to dispense with mens rea when it decided not to include a culpability element in the offense definition. We might call this an assessment of “implied” legislative intent for strict liability.

First, consider a 1999 case from the Texas Court of Criminal Appeals: Aguirre v. State. The City of El Paso promulgated an ordinance in 1987 making it a misdemeanor offense to “own, operate or conduct any business in an adult bookstore, adult motion picture theater or nude live entertainment club” within 1,000 feet of certain types of establishments (churches, schools, parks, etc.). The defendant was an employee of a nude strip club (one of the performers) that did business within 1,000 feet of a parochial school; she was cited for violation of the ordinance and fined $500. The issue on appeal was

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9 Our research into these state doctrines was limited to caselaw involving a preemption claim regarding a local criminal offense. It is possible, therefore, that some states apply different doctrines outside of the criminal context.


12 Id. at 464.

13 Id. The light punishment in this case did not cause the Court to avoid the deeper implications of strict liability. “Texas penal law has not decriminalized strict liability
whether the conviction could be sustained even absent a finding of a culpable mental state—presumably with respect to whether the club was physically within the prohibited zone. 14 Texas state law, applicable to municipalities, required that an offense be interpreted to include a mental element “unless the definition plainly dispenses” with it. 15 Given that offense drafters rarely include clear statements regarding the intent to create strict liability, though, the court looked to “whether such an intent is manifested by other features of the statute.”

Relying heavily on the Supreme Court’s analytical framework in Morissette, as well the LaFave Treatise and other scholarly writings, this boils down to a factor test. 17 These are considered: plain language, legislative history, severity of punishment, ability of citizens to learn facts that would assist them in avoiding liability, difficulty of proving mental state, number of expected prosecutions, subject matter of prohibited conduct (whether it is “associated with the protection of public health, safety, or welfare”), and “the relationship of the offense to public mores and resentment” (whether it is malum in se). 18 Finding that the factors overall weigh against permitting strict liability—most importantly because the ordinance does not seek to protect “public safety” by punishing “dangerous activities”—the Court affirmed the lower court’s dismissal of the complaint. 19

The Iowa Supreme Court employed a similar analysis, but with a different result, in the 1976 case Iowa City v. Nolan. 20 In Nolan, the defendant was convicted of violating various criminal parking ordinances promulgated by Iowa City, and fined $20. 21 The offense that was most extensively analyzed by the court was a provision that created strict vicarious liability for the registered owner of a vehicle if that vehicle was found to be parked past the given time limit: “It shall be unlawful and a violation of the provisions of this chapter for Any person to cause, allow, permit or suffer any vehicle

offenses. Many are Class C misdemeanors, a conviction for which does not impose any legal disability or disadvantage. But the offenses are still crimes, and “the fact is that the person charged can be arrested on warrant like any ordinary criminal, forced to travel a long distance to attend the court, remanded in custody and imprisoned in default of payment of the fine.”


14 Id.
15 Id. 470.
16 Id. 472
17 472-74.
18 See id at 475. Citing 1 LAFAVE & SCOTT. While the court lists a number of factors in its discussion of persuasive authorities, I list above only those that the court clearly applied and considered.
19 Id. at 476.
20 Iowa City v. Nolan, 239 N.W.2d 102 (Iowa 1976)
21 Id.
registered in the name of or operated by such person to be parked overtime …”22 Quoting from Morissette and applying its factors (discussed above), the court held that parking offenses are “clearly within a permissible area of regulation in the interest of people’s lives and property,” and therefore fall within Morissette’s “public welfare” exception to the mens rea presumption.23 Even parking can implicate public danger, the court reasoned, because “an illegally parked vehicle on a downtown street during rush hour can seriously endanger pedestrian and vehicular traffic.”24 Moreover, just as the public welfare doctrine permits dispensing with the mens rea requirement, so too does it permit vicarious liability.25

Next, consider the approach of the one federal circuit court that has addressed this issue. In the 1982 case Levas & Levas v. Village of Antioch, the Seventh Circuit confronted a constitutional due process challenge to a strict liability drug paraphernalia ordinance.26 The larger ordinance was mostly identical to a Model Drug Paraphernalia Act written by the Drug Enforcement Agency, but with a significant innovation: it added two express examples of paraphernalia, cocaine spoons and hashish pipes, but eliminated the mens rea element that was part of the DEA’s general paraphernalia definition.27 The DEA’s definition stated, “‘Drug Paraphernalia’ means all equipment, products and materials of any kind which are used, intended for use, or designed for use, … [with] a controlled substance…”28 The Village prohibited sale or display of cocaine spoons and marijuana or hashish pipes, but defined them purely in reference to their physical properties—items “so small that the primary use for which it is reasonably adapted or designed” is drug use.29 Whether the intended use by the actual possessor was for the ingestion of cocaine or hashish was irrelevant. The court accepted this strict liability reading, reasoning that “the drafters thought these items were basically single-purpose implements….”30 Citing to the LaFave treatise factors used by the Texas court above (but with modification), the Seventh

22 Id. at 103.
23 Id. 105.
24 Id. This rationale does not apply, of course, to the offense of parking past the allotted time in an otherwise designated spot. The court ignored this or failed to appreciate it.
25 “Not only may public welfare legislation dispense with a mens rea or scienter requirement, it may, and frequently does, impose a vicarious ‘criminal’ liability for the acts of another.” Iowa City v. Nolan, 239 N.W.2d 102, 104 (Iowa 1976)
26 Levas & Levas v. Vill. of Antioch, Ill., 684 F.2d 446, 447 (7th Cir. 1982)
27 Id. 455
28 Id. 456-57
29 Id. at 456. The ordinance was not read by the village or by the court to create some sort of negligence mental requirement by the use of the word “reasonable.”
30 Levas & Levas v. Vill. of Antioch, Ill., 684 F.2d 446, 455 (7th Cir. 1982).
Circuit found that strict liability was constitutionally permissible. The small penalty also appeared highly significant, and the court appealed to the Model Penal Code’s approval of strict liability for “violations” punishable only by fine (and not incarceration). In general, the Seventh Circuit’s review of this ordinance was more deferential than that of the two courts above—almost certainly because this was a federal court assessing an alleged constitutional violation by a state-government entity, and not a state court interpreting legislative intent of such an entity.

While the use of the Morissette-type factors is the most common factor test employed, some jurisdictions apply a dual-factor test that ascertains implied intent when: (1) the offense is aimed at punishing “dangerous” activity or (2) it punishes activity that raises evidentiary problems with respect to proving mens rea. For example, in City of Englewood v. Hammes, the Supreme Court of Colorado reviewed what read plainly as a strict liability ordinance punishing “interfer[ing] with or hinder[ing] [a police officer] in the discharge of his duty.” The defendant was convicted of this offense after observing a physical altercation between his roommate and police officers, while yelling at the officers not to hurt the roommate. He claimed he had no intent to interfere or obstruct, but the trial court held that the only relevant issue was the officers’ claim that interference

31 “In the absence of such a doctrine, it is generally assumed that criminal legislation can dispense with mens rea if (a) the conduct at which the prohibition is aimed lies squarely within the state's traditional police powers; (b) there is a legislative determination that the conduct must be drastically curbed; (c) the relevant intent is hard to prove; and (d) the sanctions imposed are, as here, relatively mild. W. LaFave and A. Scott, Handbook on the Criminal Law s 31 at 218-222 (1972).” Id. at 455.
32 Id.
34 “The defendant, according to the testimony of the police officer, was advised by one of the officers to step back although the officer said the defendant had done nothing except be involved in the conversation, siding with the roommate. Both the defendant and the officer testified that the defendant did step back, and according to the defendant he went to the other side of his pickup truck while the officers and his roommate were wrestling on the curb-side of the truck. As other officers arrived, the two officers pushed the roommate to the ground, and the defendant came back around his truck to see what was happening. While the officers were trying to handcuff the roommate, the defendant approached close enough, according to the testimony of one officer, that the officer felt threatened. Because the defendant was yelling at the officers not to hurt the roommate the officer feared that the defendant was going to become involved in the altercation. The substance of the defendant's remarks was that “he [the roommate] had both hands behind his back already.” The officer testified that the defendant was four to six inches away from him when he told him to get back or he would be arrested. The defendant testified that he did not approach the officer; instead, the officer approached him, and that he was not closer than eight feet to the fight. When the defendant ignored the officer's order to get back, the defendant was arrested.” Id. at 949.
did in fact occur. Although accepting that the ordinance had no express mental state, the Court noted that there was a presumption of mens rea except when offenses are “created to ‘more effectively regulate activity in areas where an individual's act may have grave consequences upon the public at large or where the government may have particular problems of proof with respect to the intent element.’” Because this ordinance did not implicate either, but instead originated in “common law,” the court inferred a mental state of “knowingly.” The same factors have been applied by a Minnesota court to read in an intent requirement in an ordinance punishing the creation of driveways with materials other than concrete (conduct neither “inherently dangerous” or raising “burden of proof concerns”).

B. Expressed Intent Through Plain Language or Legislative History

A less prevalent approach, followed by some states, is to permit strict liability only when there is clear legislative intent for this reading. Put another way, intent will not be implied under this approach after consideration of the conduct punished—it must be manifest. Thus, an Arizona appellate court read in a textually absent mental state in a Phoenix ordinance punishing “solicit[ing] or hire[ing] another person to commit an act of prostitution,” reasoning that there was “no evidence of clear intent that suggests the city council intended to create a strict liability offense.” An Ohio appellate court applied the same method to reach an opposite result when an offense punishing “suffer[ing] or permit[ting] [a] dog to…bite…any other person…” provided in the ordinance’s operative text that “lack of intent or knowledge is not a defense to a violation of this section.”

35 Id. 949.
36 Id. at 952.
37 Id.
38 State v. Betz, No. A09-793, 2010 WL 1190524, at *2 (Minn. Ct. App. Mar. 30, 2010) (“driveways shall be surfaced with concrete, bituminous pavers, or pervious paving/paver systems provided appropriate soils and site conditions exist for the pervious systems to function.... Other materials such as decorative rock, gravel, sand, or bare soil are prohibited.”).
39 State v. Crisp, 855 P.2d 795, 797 (Ariz. Ct. App. 1993) (citing State v. Jennings, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986) (“Strict liability offenses are the exception rather than the rule and will only be found where there is a clear legislative intent not to require any degree of mens rea.”)).
40 State v. Thaler, 2008-Ohio-5525, ¶ 27-30 (citing State v. Collins, 2000-Ohio-231, 89 Ohio St. 3d 524, 530, 733 N.E.2d 1118, 1123–24 (“It is not enough that the General Assembly in fact intended imposition of liability without proof of mental culpability. Rather the General Assembly must plainly indicate that intention in the language of the statute. There are no words in R.C. 2919.21(B) that do so.”)). The concurrence in the state high court case, Collins, urged the majority to apply a Morissette-type factor analysis (even citing to the opinion), but this was not accepted. Id. See also City of Parma v. Mackay, 2010-Ohio-2881,
C. Rational Basis

Finally, at least one jurisdiction flips the presumption of mens rea on its head—presumptively permitting strict liability offenses that pass a quasi-rational basis test. Consider a 1976 opinion by the New York Court of Appeals, *People v. Judiz.*\(^{41}\) In *Judiz*, New York City had created an offense punishing the sale, use, or possession of “any toy or imitation pistol or revolver which substantially duplicates an actual pistol or revolver…” with up to one year imprisonment.\(^{42}\) No culpability was required with respect to the nature of the item, or with its use—this was a strict liability offense, and the Court decided to enforce it as such. Eschewing any reference to *Morissette* or LaFave, the Court of Appeals stated (without further analysis), “A[n] [ordinance] which creates a crime is a valid exercise of the [delegated] police power of the State so long as there is a reasonable relationship between the public welfare and the act proscribed.”\(^{43}\) In New York, then, strict liability offenses are upheld so long as there is a rational basis, and here the rational basis seemed too obvious to even warrant discussion.

II. PREEMPTION

There is a second doctrine often at play when a court reviews a local offense: preemption by state law. In general, most states adopt the major analytical categories of preemption created by the U.S. Supreme Court in analyzing federal preemption: express preemption and implied preemption (due to “conflict” or “occupation of the field”).\(^{44}\) The Court’s own description of these doctrines is worth quoting in full:

It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms. Absent explicit preemptive language, Congress’ intent to supercede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no

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\(^{41}\) *People v. Judiz*, 38 N.Y.2d 529, 344 N.E.2d 399 (1976)

\(^{42}\) Id. at 530.

\(^{43}\) Id. 531.

room to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.45

From these analytic baselines, State courts have added substantial variation. In what follows, we shall discuss how these courts interpret implied preemption; express preemption, after all, is easy to recognize and hard to ignore, and therefore reveals less about the role of expert judges in the application of local offenses to real cases.

A. Conflict Preemption: “Prohibit/Permit” and “More Stringent”

The doctrine which appears to be a pure innovation by state courts is that which fleshes out the meaning of “conflict” preemption. Many states interpret this to mean that a conflict arises when a local ordinance prohibits that which state law permits, or if the ordinance permits that which state law prohibits. Local government law scholar Paul Diller calls this the “prohibit/permit” test.46

Since criminal law almost always speaks in the form of a prohibition, though, a local offense could only be preempted under generic prohibit/permit test if the absence of a state offense on point were somehow interpreted to constitute “permission” by the legislature to engage in the non-criminalized conduct. In other words, anything not made a crime is viewed as permissible. While some states have taken this “extreme” position, this does not appear to be widely held, and for good reason—it is incompatible

46 Diller at 1142. Diller is highly critical of the test. (“a fundamentally flawed approach that creates tremendous confusion for courts and litigants. "Prohibit/permit," in its most extreme form, is an argument almost shocking in its sophistic simplicity; nonetheless, litigants challenging local ordinances frequently rely upon it.”)
with home rule powers that include criminalization.\textsuperscript{47} As the Oregon Supreme Court observed:

Statutes defining crimes normally are not written in terms of permitted conduct; they normally are written to prohibit conduct. If the criminal statutes of Oregon are interpreted to permit all conduct not prohibited... it would bar all local governments from legislation in the area of criminal law unless the local legislation was identical to its state counterpart.\textsuperscript{48}

Thus, Oregon’s approach (shared by some other states) finds “permission” only when it is expressed or when “legislative intent to permit that conduct is otherwise apparent.”\textsuperscript{49}

But many states have created a further elaboration of the “prohibit/permit” test in order to “escape the anti-local conclusions” the “extreme” position would lead to—an interpretation of the test that Diller calls the “more stringent” test.\textsuperscript{50} This version holds that there will be no “prohibit/permit” conflict preemption if the local ordinance is “more stringent” in its regulation than is state law.\textsuperscript{51} For criminal offenses, this means that the local offense must punish more conduct than does the


\textsuperscript{49} City of Portland v. Jackson, 316 Or. 143, 149, 850 P.2d 1093, 1096 (1993) (upholding local ordinance that imposed strict liability for public exposure, while analogous state statute required “intent of arousing the sexual desire of the person or another person,” because no legislative history indicated permission for non-sexually motivated exposure). See also State v. Tyler, 168 Or. App. 600, 603, 7 P.3d 624, 626 (2000) (“The state's policy decision to decriminalize all minor traffic infractions, including pedestrian violations, forecloses the city's decision to impose criminal penalties for comparable, even if not identical, offenses.”). State v. Crawley, 90 N.J. 241, 245, 447 A.2d 565, 567 (1982) (doctrine of “preemption by exclusion” from state criminal code applied if there was “legislative intent from the overall structure of the penal code and its legislative history” to “decriminalize that conduct” – note—also used field preemption here). Thomas v. State, 614 So. 2d 468, 470 (Fla. 1993) (“A city may not enact an ordinance imposing criminal penalties for conduct essentially identical to that which has been decriminalized by the state.”).

\textsuperscript{50} Diller at 1145.

\textsuperscript{51} Diller at 1145.
analogous state offense—not less. This is true if new offenses are invented which no state offense seems to cover, or if a mens rea element is lowered from a more culpable mental state to a less culpable one (thus covering more instances of the given conduct). Two examples are worth discussing.

In *Junction City v. Lee*, the Kansas Supreme Court upheld a local ordinance that punished possession of handguns and firearms in a broader set of circumstances than did an analogous state law. The ordinance prohibited “knowingly…carrying on one’s person…[a] dangerous knife…or…any pistol, revolver, or other firearm.” The state statute prohibited “knowingly…carrying concealed on one’s person, or possessing with intent to use the same unlawfully against another…[a] dangerous knife…or…any pistol, revolver or other firearm concealed on the person…” Thus, the local ordinance eliminated the statute’s requirement that the knife be concealed and possessed for an unlawful purpose, and the requirement that the firearm be concealed. The defendant in the case was found in a used car lot with a revolver and a knife both strapped visibly to his belt, and stated at trial that he possessed the weapon in the lot for the purpose of “plinking.” Were either the concealment or the unlawful intent elements imposed, as required by state law, the defendant would not have committed an offense. Because the ordinance was broader, though, the court held that it was not preempted. “The ordinance eliminates the[] [state law] elements and is thus more restrictive, more stringent,” the court observed, and when “the ordinance goes further in its prohibition but not counter to the prohibition in the statute…there is no conflict.”

Another example is *Kansas City v. LaRose*, a decision by the Missouri Supreme Court upholding a local ordinance punishing interference with a

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52 *Junction City v. Lee*, 216 Kan. 495, 496, 532 P.2d 1292, 1294 (1975)
53 Id. at 499.
54 Id.
55 Id.
56 Id. at 1297-98
57 Id. The court also seemed to find that there was a rational basis for broadening liability here based on unique local circumstances. “Evaluation of the wisdom or necessity of the Junction City enactment of a weapons control ordinance more rigid than statutory law is not within our province, although the city fathers undoubtedly were aware of the fact that in situations where passions or tempers suddenly flare easy accessibility of weapons, whether carried openly or concealed, may contribute to an increased number of fatalities, and further that their own problem is rendered more acute by the presence of an adjoining military reservation from whence combat troops trained in the use of handguns and knives sometimes repair to the city during off-duty hours. In an earlier era the cowboy entering the Kansas cowtown was frequently required to deposit his gunbelt with the marshal. We conclude conflict in terms or language between the parts of the ordinance and the state statute does not exist.” *Junction City v. Lee*, 216 Kan. 495, 501–02, 532 P.2d 1292, 1298 (1975)
The ordinance prohibited “hinder[ing], obstruct[ing], molest[ing], resist[ing], or otherwise interfer[ing]” a police officer acting pursuant to his or her official duties. The closest state law offense on point prohibited that the same conduct be “knowingly and willfully” committed. The defendant, a mother, prevented officers from entering her home without a warrant to arrest her teenage son for alleged disorderly conduct after he randomly shouted obscenities at a police officer who drove by. While the court later held that the officers were permitted to enter a home without a warrant when in hot pursuit of a suspect that committed an offense in their presence, the defendant of course did not appear to have “knowledge” with respect to her hindrance of a lawful police action. But her claim that she “had no actual knowledge that she had a duty to admit the officers” was rebuffed. While the court reasoned that ignorance of criminal procedure law was no excuse, the irrelevance of her mental state was a foregone conclusion given that the mens rea elements of “knowingly and willfully” in the state statute were expressly omitted from the local ordinance. This was permissible, according to the court, under the “more stringent” preemption test:

While, as stated, the statute requires that the act be knowingly and willfully done and the ordinance does not contain those words, we have concluded that no conflict exists which would invalidate the ordinance. It is clear that any violation of the statute would also be a violation of the ordinance. In that regard they are entirely consistent. The ordinance has simply gone further and prohibited interference in cases where willfullness is not shown.

Reducing the culpable mental state required for liability, or eliminating it altogether, saves the local offense from being invalidated by conflict preemption.

B. Field Preemption

A second version of preemption that is also frequently implicated by local criminal laws is field preemption—when a substantive area of

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58 Kansas City v. LaRose, 524 S.W.2d 112 (Mo. 1975)
59 Id.
60 Id.
61 Id. at 115.
62 Id.
63 Id. at 119.
64 Kansas City v. LaRose, 524 S.W.2d 112, 117 (Mo. 1975)
regulation is intended to be completely taken over or “occupied” by the state offenses regarding that area. Recall the Supreme Court’s description of this in the federal context: “a scheme of federal regulation so pervasive as to make the reasonable inference that Congress left no room to supplement it.”

Given that all states have codes of criminal law, one might think of this subject matter as a “field” that could be “occupied” entirely. The New Jersey Supreme Court came close to taking this position in the 1982 case State v. Crawley. In Crawley, Newark had enacted a local offense punishing loitering defined as “remaining idle in essentially one place.” While relying in part on legislative history indicating an intent to decriminalize loitering-type conduct (and rejected the more-stringent test), the court went further and applied field preemption principles, asking “Was the state law intended expressly or impliedly to be exclusive in the field?” Noting that the state criminal code contained numerous provisions relating to disorderly conduct and breaches of peace, the court concluded that this category of conduct was occupied by state regulation. The justification for field preemption here was the comprehensive aspiration of the state’s criminal code reform efforts:

The Code of Criminal Justice itself manifests both a ‘clear design for uniform statewide treatment’ and a ‘complete system of law’.... The Legislature's central purpose in enacting the Penal Code was to create a consistent, comprehensive system of criminal law. The Legislature stated these goals in...the statute that established the New Jersey Criminal Law Revision Commission: ‘It shall be the purpose of [the Code of Criminal Justice] to modernize the criminal law of this State so as to embody principles representing the best in modern statutory law, to eliminate inconsistencies, ambiguities, outmoded and conflicting, overlapping and redundant provisions and to revise and codify the law in a logical, clear and concise manner.’

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67 Id. 244
68 Id. at 568 (describing concerns with loitering following Papachristou case and reasoning that the legislature likely intended to decriminalize the conduct because of its questionable constitutionality) (Relying on such principles, the State argues that chapter 33 of the Code establishes only minimum statewide regulation of loitering-related activities, that N.R.O. 17:2–14 complements the state law, and therefore, that the Newark ordinance should be viewed as permissible local supplementation of state legislation. We disagree.”).
69 Id. at 569.
While this comprehensive aspiration would appear to preclude any criminal offense creation by localities, the court did not appear to mean “comprehensive” in the literal sense. Instead, it seems that the state code is “comprehensive” only with respect to categories of conduct that it addresses. Thus, the court wrote that legislature did not intend to “leave this area of criminal law to a patchwork of municipal criminal regulations,” and expressly stated that localities could create criminal offenses to prohibit loitering-type harms “by provisions of local ordinances dealing with property offenses, vandalism, pollution and public health.”

This limited version of comprehensiveness—comprehensive within a “field” of conduct subject to criminal regulation, and not all criminal regulation—appears to be the typical interpretation and application of field preemption. Consider a 1989 decision by the Supreme Court of Kentucky, *Pierce v. Commonwealth*.

A locality in Kentucky created a criminal offense punishing solicitation of sodomy: “It shall be a criminal offense for a person to solicit, invite, influence or encourage another person by speech, gesture, or any other form of communication, to engage in or attempt to engage in [sodomy]…with the intent to promote or facilitate such conduct.”

This contrasted with the state-law offense of solicitation in general: “A person is guilty of criminal solicitation when, with the intent of promoting or facilitating the commission of a crime, he commands or encourages another person to engage in specific conduct which would constitute that crime…” By adding the possibility of liability for “gesture[s]” and “other form[s] of communication,” the ordinance defined the sodomy solicitation offense “more broadly” than the state offense. Without explicitly using the term “field preemption,” the court struck down the local ordinance using this form of reasoning (and in the process, rejecting a “more stringent” test). Because the ordinance “directly addresses criminal conduct which is comprehensively addressed by state statutes,” it is preempted.

The general criminal solicitation offense in state law, then, was “comprehensive” with respect to

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71 Id. at 571 (1982). This seems strange, though, because presumably there are state offenses regarding this conduct as well. The supreme court of New Jersey thus uses “comprehensive” here in a confusing manner; *Lambert v. City of Atlanta*, 242 Ga. 645, 646, 250 S.E.2d 456, 458 (1978) (local offense of loitering “under circumstances manifesting the purpose of inducing…prostitution or sodomy” field-preempted by state sodomy offenses).
72 *Pierce v. Com.*, 777 S.W.2d 926, 927 (Ky. 1989).
73 927-28.
74 Id.
75 927
76 “As the General Assembly chose the language used in the statute, we must conclude it did so intentionally and we cannot approve an ordinance which amounts to an enlargement of the conduct proscribed by the act of the General Assembly.” Id. at 928. The court was also very concerned with the excessive penalty.
77 Id. at 928.
all solicitation-type offenses, regardless of subject matter. The court did note that it thought the breadth with which the ordinance was drafted had the potential to include within its applicability some innocent conduct: “We are also concerned that under the expansive language of the ordinance there is a possibility that an inadvertent act would appear to be a violation when in fact it is but an innocent behavioral idiosyncrasy.”

III. JUDICIAL RESPONSES TO ASYMMETRY

Now that we better understand the doctrinal tools available to judges when confronted with a strict liability local offense, we can assess which of these tools can help to fix the mistakes made by the locality. Certain doctrines can be seen as ameliorative, in that they work to reinforce the benefits of modern offense drafting when a local legislature fails to draft in a modern way itself.

A. Inferring Mens Rea

First, consider how the doctrine of mens rea imputation interacts with harmful asymmetry. The most prevalent form of the test asks, after applying a factor test, whether the legislature actually “intended” for the offense to create strict liability even absent an express mental element. Most significant is whether the offense is a traditional malum in se offense (in which case mens rea is required) or a newer offense aimed at regulating conduct harmful to “public welfare.” This doctrine, when it applies, is somewhat ameliorative of harmful asymmetry: it results in a judicial re-writing of an archaic local offense to look more like a modern offense by the grafting on of a mens rea requirement. Recall the Supreme Court of Colorado’s opinion in Hammes, discussed earlier, in which the court re-wrote a local strict liability offense punishing “interfer[ing] with or hinder[ing] [a police officer] in the discharge of his duty.” Because the conduct covered by the ordinance originated in

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78 “Thus the ordinance enacted by the City of Florence directly addresses criminal conduct which is comprehensively addressed by state statutes.” Id. at 928.
79 Pierce v. Com., 777 S.W.2d 926, 928 (Ky. 1989)
80 Only implied preemption will be discussed. This is because when a state legislature expressly preempts a local criminal offense, the application of the doctrine is simple, and also reveals little about the role of the judiciary. State judges are merely vehicles of the implementation of legislative will in these cases. In analyzing implied preemption, the “more stringent” and “field” versions of implied preemption are discussed because they appear to be the most prevalent.
“common law” it seemed like a core malum in se offense, and therefore the court imputed a mental state of “knowingly.”

At least in the category of offenses that trigger imputation of mens rea, then, this doctrine is ameliorative of harmful asymmetries in criminal offense drafting. The doctrine does nothing, though, to help the defendant who is prosecuted for a local “public welfare”-type offense—and this is likely a very large category of local offenses. Thus, the doctrine was powerless to counteract the creation of strict liability by the local drug paraphernalia ordinance in the Seventh Circuit case discussed earlier—Levas & Levas.

Departing from the DEA’s model ordinance (with required mens rea for paraphernalia possession), the Village created additional strict liability offenses for the possession of extremely small spoons and certain types of pipes. The court refused to impute mens rea to the locally-created offenses because this conduct failed to trigger the requirements of the factor-test. The locality effectively refused to constrain itself criminalization practices by the modern drafting principles reflected in the model ordinance, and the doctrine was unable to counteract this.

B. Preemption

Now, consider how preemption doctrine will apply in a harmful asymmetry scenario. In such a case, a state court will compare a local offense written in the archaic form and an analogous state offense written in the modern form, and ask whether the local offense is “more stringent” than the state offense, or whether the state legislature had “occupied the field” in that area of conduct.

When applying the “more stringent” implied conflict preemption doctrine in a harmful asymmetry scenario, the doctrine can do little work to ameliorate the problems created by the asymmetry. Because the local offense is written in the archaic form it is likely to have no mens rea, while the analogous state offense will be written and interpreted using the MPC method of element analysis. Since a strict liability offense is by definition “more stringent” than an offense with a required level of culpability (the strict liability offense is broader, and includes more conduct), conflict preemption is of no help to the jurist or court aiming to displace a poorly drafted local offense with a well drafted state offense. Recall the Missouri Supreme Court case of LaRose discussed above. Missouri, a modern-code state, punished

82 Id.
83 684 F.2d 446, 447 (7th Cir. 1982).
84 Id.
85 Id.
86 Kansas City v. LaRose, 524 S.W.2d 112 (Mo. 1975).
“knowingly and willfully” interfering with a police officer, while a local ordinance punished “hinder[ing], obstruct[ing], molest[ing], resist[ing], or otherwise interfer[ing]” a police officer without reference to a culpability requirement. Applying the “more stringent” test, the court upheld the ordinance because it had “simply gone further and prohibited interference” without willfulness. Implied conflict preemption was unable to ameliorate harmful asymmetry in offense drafting.

Application of the field preemption doctrine, though, would be ameliorative in this class of cases. Successful field preemption claims result in the entirety of criminal law, or at least entire categories of criminalized conduct, being walled off from local regulatory innovation. When a state has promulgated a modern criminal code, and a locality has promulgated an archaic offense, this is a good thing. An example of this judicial amelioration in action is the New Jersey Supreme Court case discussed earlier, Crawley. The City of Newark enacted an archaic-type loitering ordinance punishing “loitering,” defined as “remaining idle in essentially one place ... spending time idly, loafing or walking about aimlessly, [or] ... hanging around.” New Jersey, a modern-code state, punished similar conduct but defined it with precision and with a mental state. Applying field preemption, the New Jersey Supreme Court invalidated the local offense, noting the goal of a “comprehensive system of criminal law” in the state. The Court also quoted the state code revision commission’s mission to “embody principles representing the best in modern statutory law, to eliminate inconsistencies, ambiguities, outmoded and conflicting, overlapping and redundant provisions and to revise and codify the law in a logical, clear and concise manner...” In other words, a robust use of field preemption can ameliorate the problems of harmful asymmetry, displacing archaic local offenses with modern state offenses.

CONCLUSION

87 Id.
88 Id. 117
90 Id. at 249 n.4
91 See id. at 249, citing multiple New Jersey statutes (for example: “A person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof he
(1) Engages in fighting or threatening, or in violent or tumultuous behavior; or
(2) Creates a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor. NJSA 2C:33-2”).
92 Id.
93 Id. at 250.
Judicial doctrines are *partly ameliorative* of harmful asymmetry, especially when field preemption is applied, but they have limited effect. They cannot preempt an archaic local offense with a modern state offense if the test for implied conflict preemption is whether the local offense is “more stringent.” Moreover, mens rea imputation will usually be limited to core malum in se offenses, and many local offenses fall outside of this category.