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# Judicial Application of Strict Liability Local Ordinances

Guyora Binder & Brenner Fissell

The criminal code reform movement inspired by the Model Penal Code had, among other goals, the aim of eliminating strict liability offenses.<sup>1</sup> The success of the movement resulted in the enactment of the Model Penal Code's scheme of element analysis and default culpability terms in about half of American jurisdictions.<sup>2</sup> 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.<sup>3</sup>

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 ordinances dispense with the Model Penal Code's analytic terminology, and most significantly, many of their offense definitions identify no culpability element whatsoever.<sup>4</sup> 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

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1. Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 287–88 (2012) (explaining that 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” (footnote omitted)).

2. *Id.* at 294 (counting twenty-four jurisdictions with an “identifiable variation” of MPC section 2.02(3), which requires recklessness for any objective element assigned no mental state, and section 2.02(4), which distributes any mental state in the offense definition to all elements). Because of our focus on local ordinances dispensing with culpability terms altogether, our analysis focuses on jurisdictions with a provision analogous to MPC section 2.02(1), the requirement that every objective element be assigned a culpable mental state, or section 2.02(3). MODEL PENAL CODE § 2.02(1) (AM. L. INST. 1985). Some state codes, notably California's, preceded and may have influenced the MPC in adopting such a requirement of culpability. *See* CAL. PENAL CODE § 20 (West 2021) (enacted 1872).

3. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2326 (2003) (describing a “second wave” of home rule reforms spurred by American Municipal Association's 1953 model home rule provision). The ten-year process of drafting the Model Penal Code began in 1951. *See generally* Jerome Hall, *The Proposal To Prepare a Model Penal Code*, 4 J. LEGAL EDUC. 91 (1951) (discussing the theory and research needed for the proposed Model Penal Code).

4. *See* Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837, 841–42, 866–67 (2020) (listing examples).

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.<sup>5</sup>

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 reformed their codes according to the Model Penal Code's goals. Home rule has frustrated the purposes of the code reformers by facilitating the creation of a vast subterranean body of misdemeanors that exists below the core state code. In so far as strict liability should be minimized, this asymmetry between modern state offense drafting and archaic local offense drafting is problematic. But as all criminal lawyers know, the text of the statute is not the last word on its meaning or application: judges interpret and apply the statute. Can judges use these powers to ameliorate asymmetry between state and local criminal law? This article will explore two judicial strategies for doing so: construction of a mental element and preemption by state law.

Judges often can and sometimes must read a mental element into a statutory offense definition silent as to culpability. Two classic Supreme Court interpretations of federal law illustrate this possibility. In *Baender v. Barnett*, the Court denied a due process challenge to a statute seemingly punishing inadvertent possession of counterfeiting tools by reading a mental element into the offense.<sup>6</sup> In *Morissette v. United States*, the Court overturned a theft conviction where knowledge of the ownership of the property taken was neither alleged nor required at trial, explaining that "mere omission from [the offense] of any mention of intent will not be construed as eliminating that element from the crimes denounced."<sup>7</sup> Many state judges similarly read mental elements into statutory offense definitions otherwise silent as to culpability.<sup>8</sup> We will see that many state codes invite judges to do so, even when applying local criminal statutes.<sup>9</sup> As *Baender* indicates, this maneuver

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5. L.A., CAL., MUNICIPAL CODE § 41.47.2 (2021).

6. 255 U.S. 224, 224–25 (1921).

7. 342 U.S. 246, 263 (1952); see *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("The fact that the statute does not specify any required mental state, however, does not mean that none exists.").

8. See generally Dannye Holley, *Culpability Evaluations in the State Supreme Courts from 1977 to 1999: A "Model" Assessment*, 34 AKRON L. REV. 401, 401 (2001) (assessing "the performance of state supreme courts . . . with regard to culpability evaluations"); Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 769 (2012) (discussing "courts' interpretations of criminal statutes, particularly where the subject of mens rea is concerned").

9. See discussion *infra* Part I.A.

does not always favor the defense: judges may require culpability in *avoiding* a due process challenge to strict liability.<sup>10</sup>

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.<sup>11</sup> 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 “occupation of the field” or a specific “conflict”).<sup>12</sup> 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 invalidate the offense, regardless of its mental element; while, as we will see, the more prevalent form of preemption, conflict preemption, would not invalidate an offense requiring less culpability than a parallel state offense.<sup>13</sup>

## I. CONSTRUCTING MENS REA

We can begin by considering the jurisprudence of constructing mens rea. After examining the state statutory frameworks governing interpretation of local criminal ordinances, we will review cases assessing local criminal laws silent as to culpability. We will see that regardless of whether codes encourage such construction of culpability, courts generally adhere to the analysis laid out in *Morissette*, where a multi-factor test is used to decide whether a statutory offense imposes strict liability.<sup>14</sup> In so doing, courts

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10. For due process limits on strict liability, see, for example, *Lambert v. California*, 355 U.S. 225, 229–30 (1957) (requiring notice of criminally enforced duties); *Smith v. California*, 361 U.S. 147, 152 (1959) (requiring culpability with respect to circumstance rendering speech unprotected); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) (identifying *Morissette* as an application of the doctrine of lenity possibly required by due process); *Holdridge v. United States*, 282 F.2d 302, 309–10 (8th Cir. 1960) (reading *Morissette*’s holding as required by due process); *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985) (finding due process precludes substantial penalty for one acting with an “innocent state of mind”); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (1999) (synthesizing due process restrictions on strict liability); GUYORA BINDER, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW* 155–66 (Dennis Patterson ed., 2016) (same). On the doctrine of constitutional avoidance, see *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 324–25 (1936); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

11. Paul Diller, *Intrastate Preemption*, 87 B.U.L. REV. 1113, 1114 (2007).

12. See Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2103–07 (2000) (discussing federal categories); see also Diller, *supra* note 11, at 1140–42 (citing state law and noting that “[d]espite some superficial distinctions, most states’ preemption analyses are similar in form to the federal model”).

13. See discussion *infra* Part III.B.

14. See discussion *infra* Part I.B.

frequently present this interpretive decision as a determination of legislative intent. Finally, we will briefly turn to another doctrine that we might expect to see invoked in constructing mental element in local offenses: the doctrine of lenity.<sup>15</sup> We will see why lenity is rarely invoked in interpreting state criminal codes. But we will also see that these considerations are less pertinent in interpreting local ordinances, particularly in states lacking applicable culpability default rules

### A. Statutory Law of Interpretation

The Model Penal Code classifies offenses punishable by incarceration or death as "crimes," and all other offenses as noncriminal "violations."<sup>16</sup> The Code's section 2.02(1) requires a culpable mental state of at least negligence corresponding to each objective offense element for every offense defined in the Code, apart from certain exceptions set forth in Section 2.05.<sup>17</sup> Section 2.05 in turn identifies two such exceptions: (1) violations defined in the Code, and (2) any offense defined in another statute, clearly expressing a legislative intent to impose strict liability with respect to an objective element, and punished only as a violation.<sup>18</sup> In short, the Code bars strict liability *crimes*, but permits strict liability *violations*. The official commentary on section 2.05 observes that "most strict liability offenses involve special regulatory legislation, normally found in titles of a code other than the criminal title."<sup>19</sup> The comment expresses ambivalence regarding the interpretation of such regulatory offenses.<sup>20</sup> To be sure, it cites *Morrisette* for the proposition that silence regarding culpability should not be equated with strict liability.<sup>21</sup> Yet *Morrisette* grudgingly acquiesces in attributing a legislative intent to impose strict liability to regulatory offenses, particularly with lower penalties.<sup>22</sup> And, while condemning incarceration on the basis of strict liability, the MPC comment similarly anticipates that courts will continue to treat regulatory

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15. See generally Shon Hopwood, *Two Sides of the Same Interpretive Coin: The Presumption of Mens Rea and the Historical Rule of Lenity*, 53 ARIZ. ST. L.J. (forthcoming 2021) (discussing in part how the rule of lenity could be used to assist courts engaged in statutory interpretation).

16. MODEL PENAL CODE §§ 1.04(1), 1.04(5) (AM. L. INST. 1985).

17. *Id.* §2.02(1).

18. *Id.* §§ 2.05(1), 2.05(2)(a).

19. *Id.* § 2.05 cmt. 1, at 282–83.

20. See *id.* at 283.

21. *Id.* cmt. 3, at 293 & n.10.

22. See *Morrisette v. United States*, 342 U.S. 246, 252–60 (1952).

offenses as strict liability and permits them to do so on the basis of an attribution of legislative intent, as long as the penalty is civil.<sup>23</sup>

About half the state criminal codes have provisions analogous to Model Penal Code section 2.02(1), establishing that at least some offenses silent as to culpability nevertheless require culpable mental states. Three codes provide that every crime requires intent or criminal negligence.<sup>24</sup> Another six adopt Model Penal Code section 2.02(1), with an exception for crimes in other codes manifesting a legislative intent to impose strict liability, or mildly punished offenses, or both.<sup>25</sup> Fifteen more adopt Model Penal Code section 2.02(1) with an exception for a clear statement or expression of legislative intent, even for crimes defined within the code.<sup>26</sup> Two more states provide that a statutory offense silent as to culpability will require culpability if the conduct “necessarily involves” such culpability, and distributes any mental state mentioned to all elements.<sup>27</sup> Michigan has recently adopted MPC section 2.02(1), but only for newly enacted offenses outside the criminal code.<sup>28</sup>

Can such provisions be applied to local ordinances? Model Penal Code section 1.05 provides that its general provisions “are applicable to offenses defined by other statutes.”<sup>29</sup> The commentary explains that these provisions reflect “norms that ought to govern any application of penal sanctions” and were “intended to simplify the problem of the courts” in applying any criminal offense.<sup>30</sup> Recall that the commentary’s discussion of strict liability focuses on regulatory offenses outside the criminal code. Moreover, much

23. § 2.05 cmt. 2, at 291–92. There is no discussion of local offenses in particular. *See id.*

24. CAL. PENAL CODE § 20 (West 2021); IDAHO CODE § 18-114 (2021); NEV. REV. STAT. § 193.190 (2021).

25. DEL. CODE ANN. tit. 11, § 251 (2021); HAW. REV. STAT. §§ 702-204, -207, -212 (2021); KY. REV. STAT. ANN. §§ 501.030, .040, .050 (West 2021); N.H. REV. STAT. ANN. § 626:2 (2021); OR. REV. STAT. §§ 161.095(2), .105, .115(2) (2021); 18 PA. CONS. STAT. §§ 302(a)–(c), 305 (2021).

26. ALA. CODE §§ 13A-2-3, -4(b) (2021); ALASKA STAT. §§ 11.81.600, .610(b) (2021); ARK. CODE ANN. §§ 5-2-203(b), -204(b)–(c) (2021); 720 ILL. COMP. STAT. 5/4-3(a)–(b), 5/4-9 (2021); KAN. STAT. ANN. §§ 21-5202(a), (d), (e), 21-5203 (2021); ME. STAT. tit. 17-A, § 34(1), (4) (2021); MO. REV. STAT. §§ 562.016, .021, .026 (2021); MONT. CODE ANN. §§ 45-2-103(1), -104 (2021); N.J. STAT. ANN. § 2C:2-2(a), (c) (2021); N.Y. PENAL LAW §§ 15.10, .15 (McKinney 2021); N.D. CENT. CODE § 12.1-02-02(2), (3) (2021); OHIO REV. CODE ANN. §§ 2901.20, .21 (West 2021) (applying section 2901.20 only to offenses enacted after March 23, 2015); TENN. CODE ANN. § 39-11-301 (2021); TEX. PENAL CODE ANN. § 6.02 (West 2021); UTAH CODE ANN. §§ 76-2-101, -102 (West 2021).

27. ARIZ. REV. STAT. ANN. § 13-202 (2021); COLO. REV. STAT. §§ 18-1-502, -503 (2021).

28. MICH. COMP. LAWS ANN. § 8.9(3) (West 2021).

29. MODEL PENAL CODE § 1.05(2) (AM. L. INST. 1985).

30. *Id.* § 1.05 cmt. 4, at 80–81.

regulation was originally enacted at the local level,<sup>31</sup> and at least one strict liability offense objected to in the Model Penal Code commentary was a local one.<sup>32</sup> Sixteen of the codes authorizing courts to construct the mental elements of offenses have provisions analogous to Model Penal Code section 1.05.<sup>33</sup> The culpability provisions in many of the remaining codes reference crimes defined under other statutes or are phrased broadly enough to apply to them.<sup>34</sup>

While a substantial minority of codes authorize courts to construct mental elements for local criminal offenses, courts need no statutory authorization to do so. As *Baender* and *Morissette* illustrate, courts can construct mental elements on the basis of constitutional or common law principles or by imputing legislative intent to require culpability. Even where codes invite courts to construct mental elements for local ordinances, courts may turn to caselaw in deciding whether to accept that invitation.

### *B. Factor Tests for Imputing Legislative Intent*

The most prevalent approach to the judicial application of strict liability ordinances is a multi-factor test drawn from *Morissette*.<sup>35</sup> That case was

31. See generally WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* 66–70, 95–105 (1996) (describing legal prohibitions on wooden buildings and gunpowder and the regulation of markets that developed in early American cities).

32. MODEL PENAL CODE § 2.05 cmt. 1, at 284 (referencing *People ex rel. Weisent v. Mishkin*, 11 N.Y.S.2d 77 (N.Y.C. Ct. Spec. Sess. 1939), *aff'd sub nom. People v. Mishkin*, 24 N.E.2d 22 (N.Y. 1939)).

33. ARIZ. REV. STAT. ANN. § 13-102(D) (2021); ARK. CODE ANN. § 5-1-103(b) (2021); COLO. REV. STAT. § 18-1-103(1) (2021); DEL. CODE ANN. tit. 11, § 103(b) (2021); HAW. REV. STAT. § 701-102(3) (2021); KAN. STAT. ANN. § 21-5103(b) (2021); MO. REV. STAT. § 556.031(2) (2021); MONT. CODE ANN. § 45-1-103(2) (2021); N.H. REV. STAT. ANN. § 625:9(I) (2021); N.J. STAT. ANN. § 2C:1-5(b) (West 2021); N.Y. PENAL LAW § 5.05(2) (McKinney 2021); OR. REV. STAT. § 161.035(2) (2021); 18 PA. CONS. STAT. § 107(a) (2021); TENN. CODE ANN. § 39-11-102(b) (2021); TEX. PENAL CODE ANN. § 1.03(b) (West 2021); UTAH CODE ANN. § 76-1-103(1) (West 2021).

34. ALA. CODE § 13A-2-4 (2021) (referring to “a statute defining an offense”); CAL. PENAL CODE § 20 (West 2021) (referring to “every crime or public offense”); IDAHO CODE § 18-114 (2021); 720 ILL. COMP. STAT. ANN. 5/4-3 (2021) (stating that “a person is not guilty of an offense”); KY. REV. STAT. ANN. § 501.040 (West 2021) (referring to “a statute defining an offense”); NEV. REV. STAT. § 193.190 (2021) (referring to “every crime or public offense”); N.D. CENT. CODE § 12.1-02-02(2) (2021) (referring to “a statute or regulation . . . defining a crime”).

35. Other than the cases discussed in the main text, the following cases also apply a similar analytic method: *State v. Elmwood Terrace, Inc.*, 204 A.2d 379, 382–83 (N.J. Super. Ct. App. Div. 1964) (determining that offense of failing to maintain apartment units at certain temperature was valid strict liability offense); *State v. Kiejdan*, 437 A.2d 324, 327 (N.J. Super. Ct. App. Div. 1981) (determining that offense of failure to provide heat to apartment units was valid strict

decided against the background of *United States v. Balint*. *Balint* is fairly read as holding that due process permits strict liability for any criminal offense, and as reasoning a public safety regulatory function provides evidence that strict liability was legislatively intended.<sup>36</sup> *Morissette* is fairly read as holding that a legislative intent to impose strict liability should not be presumed for “infamous common law crimes”<sup>37</sup> while suggesting that due process might forbid strict liability for such offenses.<sup>38</sup> In addition to emphasizing their legislative origins, the Court characterized offenses that could be presumed strict as regulatory in function. Such offenses were typically

not . . . positive aggressions or invasions . . . but . . . neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property, but merely create the danger or probability of it . . . . The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small.<sup>39</sup>

Although *Morissette*’s elusive multi-factor standard is controlling authority only for interpreting federal criminal statutes, it may be attractive to state courts for two reasons. First, it affords courts broad discretion. Second, its hints concerning due process make a citation to *Morissette* an attractive safe harbor for courts concerned about constitutional challenges.

These considerations may make *Morissette*’s multi-factor test particularly attractive in states without culpability default rules in their codes. In the Nebraska case of *State v. Ruisi*, the defendant was sentenced to six months’

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liability offense); *State v. Ruisi*, 616 N.W.2d 19, 26 (Neb. Ct. App. 2000) (determining that offense of harboring dangerous and unvaccinated dog, resulting in a conviction and sentence of six months incarceration and six months of probation, was valid strict liability offense); *Delfino v. Sloan*, 25 Cal. Rptr. 2d 265, 269 (Ct. App. 1993) (determining that offense of allowing dog to run loose was valid strict liability offense); *People v. Optimal Glob. Healing, Inc.*, 194 Cal. Rptr. 3d 913, 922–24 (App. Dep’t Super. Ct. 2015) (determining that offense of operating medical marijuana dispensary was valid strict liability offense); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 610–12 (6th Cir. 2005) (applying *Morissette* to hold that permit requirement for parade participation could not validly be punished using strict liability, mostly because of peculiar First Amendment implications).

36. See 258 U.S. 250, 252 (1922).

37. 342 U.S. 246, 252, 260–62 (1952).

38. See *id.* at 260 (“Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static. The conclusion reached in the *Balint* and *Behrman* cases has our approval and adherence for the circumstances to which it was there applied.”).

39. *Id.* at 255–56.



probation plus a six-month suspended sentence for the crime of harboring a dangerous dog, defined by Omaha's municipal code.<sup>40</sup> One of his three large guard dogs attacked and mauled a social guest when the defendant was out of the room.<sup>41</sup> The injuries were significant, requiring over 200 stitches and reconstructive facial surgery.<sup>42</sup> The trial court construed the offense as one of strict liability, thereby precluding the defendant from arguing that he had no notice of the dog's dangerousness.<sup>43</sup> Ruisi argued on appeal that such strict liability violated due process.<sup>44</sup> The Nebraska Court of Appeals rested its analysis on a Nebraska Supreme Court decision and an Eighth Circuit decision, both using the *Morissette* factors as a test of due process:

In *State v. Pettit*, the Nebraska Supreme Court stated: ““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.”” However, the court went on to state that the violation of some criminal statutes may occur without a defendant's criminal intent, if such law

“omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where the conviction does not gravely besmirch, where the statutory crime is not taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.”<sup>45</sup>

The *Ruisi* court noted that a state statute imposed civil strict liability on dog owners for injuries, reasoned that this reflected a state policy of protecting the public against such injuries, and concluded:

We find that the same public policy is carried through in Omaha's criminal “harboring” ordinance as there is no express provision for prior knowledge or criminal intent.

To find in the ordinance a mens rea requirement of criminal intent, or even a requirement of negligence on the part of the dog owner, would defeat the ordinance's public policy, which is to protect

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40. 616 N.W.2d at 23.

41. *Id.* at 22–23.

42. *Id.* at 23.

43. *Id.* at 26.

44. *Id.* at 23–24.

45. *Id.* at 24–25 (citations omitted) (quoting *State v. Pettit*, 445 N.W.2d 890, 897–98 (Neb. 1989), in turn quoting *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960)).

people from the great harm which can befall a victim of a dog attack.<sup>46</sup>

Thus, the imputed legislative intent does double duty, both supporting the strict liability interpretation of the statute and supplying one of the criteria satisfying due process under the test endorsed in *Pettit* and *Holdridge*.

A decision using a similar method to reach a different result is the Minnesota case of *State v. Betz*.<sup>47</sup> Betz was convicted of violating a city ordinance by maintaining an improperly paved parking area on his property and was sentenced to a year's probation.<sup>48</sup> Although affirming the conviction, the Minnesota Court of Appeals accepted his contention that this offense requires a culpable mental state.<sup>49</sup> Relying on a Minnesota Supreme Court case that in turn quoted *Morissette* and *Staples v. United States* (a leading case applying *Morissette*), the court reasoned that strict liability required a clear legislative intent because "strict liability statutes are generally disfavored."<sup>50</sup> The court continued that in *State v. Arkell*, the state supreme court had

held that public-welfare or regulatory offenses are not subject to the presumption that intent is required to establish liability because a "defendant knows that he is dealing with a dangerous device of a character that places him 'in responsible relation to public danger,' [and therefore] he should be alerted to the probability of strict regulation."<sup>51</sup>

The *Betz* court then added that *Arkell* had determined that violations of a building code did not pose sufficiently obvious danger to defeat the presumption of a mental element.<sup>52</sup> A fortiori, a law punishing the failure to pave a private parking space should be presumed to require proof of fault.<sup>53</sup>

While *Morissette*'s factor test fills an interpretive gap in state codes without culpability default rules, it seems that a presumption of culpability should obviate its use. An example is provided by the 2008 Ohio case of *City*

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46. *Id.* at 25–26.

47. *See* No. A09-793, 2010 WL 1190524, at \*2–3 (Minn. Ct. App. Mar. 30, 2010).

48. *Id.* at \*1.

49. *Id.* at \*3, \*6.

50. *Id.* at \*2 (quoting *In re Welfare of C.R.M.*, 611 N.W.2d 802, 805–06 (Minn. 2000)) (relying on *Staples v. United States*, 511 U.S. 600, 606 (1994) in turn relying on *Morissette v. United States*, 342 U.S. 246, 249–50 (1952)).

51. *Id.* at \*2 (alteration in original) (quoting *State v. Arkell*, 672 N.W.2d 564, 567 (Minn. 2003), in turn quoting *Staples*, 511 U.S. at 601).

52. *Id.* at \*3.

53. *Id.*

of *Dayton v. Becker*.<sup>54</sup> Becker successfully argued that an ordinance punishing failure to comply with a housing inspector's order required proof of his recklessness. The court relied on the penal code's presumption of culpability:

“When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.”<sup>55</sup>

The court then invoked a decision of the Ohio Supreme Court holding “[i]t 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.”<sup>56</sup> Finding no expression of such an intention in the language of the statute, the court assigned a mental state of recklessness.

Yet other courts have relied on *Morissette*'s factor test, even when their state codes gave clear guidance. California courts in particular have found *Morissette*'s balancing test more commodious than section 20 of California's 1850 Penal Code, which boldly proclaims that “in every crime . . . there *must* exist a union . . . of act and intent, or criminal negligence.”<sup>57</sup> It might be argued that strict liability criminal statutes can supersede section 20 as later in time, although one might then expect such statutes to explicitly announce an exception to section 20. California courts have instead interpreted section 20 as merely invoking a preexisting common law principle that courts are presumably free to modify. In *People v. Dillard*, an appellate court upheld the imposition of strict liability for carrying a loaded weapon in public, against arguments that doing so violated due process as well as section 20.<sup>58</sup> Interpreting section 20 as expressing a common law principle, the court quoted *Balint* and *Morissette* at length and thereby suggested that the common law principle had evolved, or perhaps had never applied to regulatory offenses. Applying *Morissette* to justify strict liability, the court

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54. *City of Dayton v. Becker*, No. 22107, 2008 WL 1921677 (Ohio Ct. App. May 2, 2008). The offense is a third-degree misdemeanor punishable by up to sixty days in jail. DAYTON, OHIO CODE OF ORDINANCES §§ 93.99, 130.99 (2021). The decision appears to have provoked the subsequent addition of language to section 93.99 expressly imposing strict liability.

55. *Becker*, 2008 WL 1921677, at \*5 (quoting OHIO REV. CODE ANN. § 2901.21(B) (West 2021)).

56. *Id.* (quoting *State v. Collins*, 733 N.E.2d 1118, 1122 (Ohio 2000)).

57. CAL. PENAL CODE § 20 (West 2021) (emphasis added).

58. 201 Cal. Rptr. 136, 136 (Ct. App. 1984).

invoked not only the danger of the conduct, but the legislature's characterization of the statute, the 1967 Mulford Act, as "necessary for the immediate preservation of the public peace" from "the increased incidence of organized groups . . . publicly arming themselves."<sup>59</sup>

In *People v. Optimal Global Healing, Inc.*, a California court applied similar reasoning to a local ordinance punishing the operation of medical marijuana dispensaries in certain areas with up to six months in jail.<sup>60</sup> The court drew on an earlier decision's multi-factor test for identifying a "public welfare offense," derived from the LaFave & Scott treatise.<sup>61</sup> This test treated any "general provision on mens rea or strict liability crimes" as just another factor.<sup>62</sup> The *Optimal Global Healing* court relied on such factors as a low punishment, the "severity of the . . . public harm," the ordinance's silence as to culpability, the difficulty and inconvenience to the prosecution of proving culpability, and the publicity of the regulations violated.<sup>63</sup>

California's reliance on *Morissette*'s flexible standard might be explained by the age and sweep of its statutory requirement of culpability, leaving no exception even for explicit impositions of strict liability. Thus, we might expect courts in Model Penal Code jurisdictions to follow the simpler approach of the Ohio courts, imposing strict liability only when explicitly required to. Yet recall that the Model Penal Code's requirement of culpability excepts offenses outside the code on the basis of "legislative purpose" (albeit "plainly" apparent).<sup>64</sup>

Courts in Model Penal Code jurisdictions have turned to the *Morissette* factors in constructing legislative intent. Consider a 1999 case from the Texas Court of Criminal Appeals: *Aguirre v. State*.<sup>65</sup> 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

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59. *Id.* at 138. On the Mulford Act as a response to the Black Panther Party, see generally Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/> [https://perma.cc/7QPB-FNLF]; David Caraccio, *From the Pages of the Bee, 1967: Armed Black Panthers Invade Capitol*, SACRAMENTO BEE, <https://www.sacbee.com/news/local/history/article148667224.html> [https://perma.cc/V7DQ-ERMY].

60. See *People v. Optimal Glob. Healing, Inc.*, 194 Cal. Rptr. 3d 913 (App. Dep't Super. Ct. 2015).

61. See *id.* at 922–23 (quoting *In re Jorge M.*, 4 P.3d 297, 301 (Cal. 2000)) (citing 1 LAFAVE & SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.8(a), at 342–44 (1986)).

62. *Optimal Glob. Healing*, 194 Cal. Rptr. at 922.

63. *Id.* at 923.

64. MODEL PENAL CODE § 2.05(1)(b) (AM. L. INST. 1985).

65. 22 S.W.3d 463 (Tex. Crim. App. 1999).

establishments (churches, schools, parks, etc.).<sup>66</sup> The defendant was employed as a performer at a nude strip club located within 1,000 feet of a parochial school; she was cited for violation of the ordinance and fined \$500.<sup>67</sup> The court upheld the dismissal below of the charge for failure to allege a culpable mental state with respect to the proximity of the school.<sup>68</sup> The court observed that section 6.02 of the Texas Penal Code provides “[i]f the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element” and imposes a default culpable mental state of recklessness.<sup>69</sup> While the statute’s silence as to culpability left in place the statutory presumption that culpability was required, the court nevertheless considered “whether such an intent is manifested by other features of the statute.”<sup>70</sup> The court considered the primary factor to be whether the statute protected “public health, safety or welfare.” It explained this criterion with lengthy quotes from *Morissette* and *LaFave & Scott*.<sup>71</sup> While conceding that the ordinance was a business regulation with a low penalty, the court emphasized its focus on morals rather than safety and its application to employees as factors militating against strict liability.<sup>72</sup>

A New Jersey court employed a similar analysis, but with a different result, in the 1981 case of *State v. Kiejdan*.<sup>73</sup> The defendant, a landlord, was fined seventy-five dollars for each failure to provide heat to a tenant on a given day under a town Board of Health ordinance.<sup>74</sup> The defendant professed that his violations had been unintentional, as his maintenance of the heating system had been subverted by vandalism.<sup>75</sup> The court classified the ordinance as a public welfare offense for which strict liability was appropriate, citing a

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66. *Id.* at 464.

67. *See 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 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.”

*Id.* at 472.

68. *See id.*

69. *Id.* at 470 (citing TEX. PENAL CODE ANN. § 6.02(b)–(c) (West 2021)).

70. *Id.* at 472.

71. *Id.* at 473–76.

72. *Id.* at 476–77.

73. 437 A.2d 324 (N.J. Super. Ct. App. Div. 1981).

74. *See id.* at 325.

75. *See id.*

1961 decision discussing *Morissette*.<sup>76</sup> The defendant, however, pointed to the 1979 adoption of the New Jersey Code of Criminal Justice, providing that “[a] statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime with mental culpability. This provision applies to offenses defined both within and outside of this code.”<sup>77</sup> The *Kiejdan* court, relying on the regulatory function of the ordinance and pre-Code judicial decisions imposing strict liability for similar laws, concluded that “[w]e have no doubt as to the clarity of the legislative intent” to impose strict liability.<sup>78</sup>

When confronted with a constitutional challenge to a strict liability ordinance, state courts tend to use the *Morissette* line of cases in one of two ways, finding that the ordinance raises no constitutional problem because either (1) it defines a public welfare offense, or (2) since it is not a public welfare offense, it can be interpreted as requiring culpability.

The first alternative is illustrated by a case from Iowa, a state with no statutory default rules. The defendant was convicted of violating various criminal parking ordinances promulgated by Iowa City and fined twenty dollars.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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 travel.”<sup>82</sup>

The second alternative is illustrated by the 1993 Arizona case of *State v. Crisp*, upholding the charge of “[s]olicit[ing] . . . an act of prostitution” under a Phoenix city ordinance.<sup>83</sup> The defendant had been convicted under this ordinance without an instruction requiring proof that he had intended to

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76. See *id.* at 325 (citing *State v. Chiarello*, 174 A.2d 506, 514 (N.J. Super. Ct. App. Div. 1961)).

77. *Id.* at 326 (quoting N.J. STAT. ANN. § 2C:2-2(c)(3) (West 1979) (amended 1981)).

78. *Id.* at 326.

79. *Iowa City v. Nolan*, 239 N.W.2d 102, 102–03 (Iowa 1976).

80. *Id.* at 103.

81. *Id.* at 105.

82. *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.

83. 855 P.2d 795, 796 (Ariz. Ct. App. 1993) (quoting PHX., ARIZ., CITY CODE § 23-52(a)(2) (1993)).

solicit prostitution.<sup>84</sup> The defense argued the ordinance imposed strict liability in violation of due process, and condemned it as overbroad and vague.<sup>85</sup>

Neither agreeing the statute imposed strict liability, nor approving strict liability, a lower appellate court had instead awarded defendant a new trial to consider his intent.<sup>86</sup> This ruling seemed consistent with the 1978 criminal code, which applied to offenses in other statutes, and provided that an offense definition mentioning no culpable mental state should be presumed to impose strict liability “unless the proscribed conduct necessarily involves a culpable mental state.”<sup>87</sup> The lower court reasoned that “solicitation” implied such an intent.<sup>88</sup> Rather than invoking the Code’s interpretive rules, however, the Court of Appeals cited a pre-Code case endorsing “the general rule that . . . mens rea is required” and stated that “this court may infer the scienter requirement from the words of the statute plus legislative intent.”<sup>89</sup> That decision in turn relied on a 1968 case, citing *Morissette*.<sup>90</sup> The Court of Appeals in *Crisp* concluded that the lower appellate court had properly given the statute a saving construction.<sup>91</sup>

Finally, consider the 1983 Colorado case of *City of Englewood v. Hammes*.<sup>92</sup> The defendant was convicted by a municipal court of “interfering with [a police] officer” after approaching officers to observe their arrest of his roommate and urging them not to hurt him.<sup>93</sup> A county court reversed on the ground that the ordinance unconstitutionally imposed liability without requiring proof of an intent to interfere.<sup>94</sup> However, the Colorado Supreme Court affirmed the reversal on a different ground: “We limit the ordinance to knowing conduct, and as limited, uphold it as constitutional. However, because there was no evidence that the defendant knowingly interfered with police officers, we affirm the result reached by the district court.”<sup>95</sup> Drawing on the *Morissette* progeny case of *United States v. U.S. Gypsum Co.*, the court observed that “a *mens rea* is the rule . . . of Anglo-American criminal jurisprudence.”<sup>96</sup> And while strict liability crimes could be used to regulate

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84. *See id.*

85. *Id.* at 797–98.

86. *See id.* at 796.

87. ARIZ. REV. STAT. ANN. § 13-202(b) (1978).

88. *Crisp*, 855 P.2d at 796.

89. *Id.* at 797 (quoting *State v. Mincey*, 566 P.2d 273, 279 (Ariz. 1977)).

90. *Mincey*, 566 P.2d at 279 (citing *State v. Cutshaw*, 437 P.2d 962, 973 (Ariz. Ct. App. 1968)).

91. *Crisp*, 855 P.2d at 797.

92. 671 P.2d 947 (Colo. 1983).

93. *Id.* at 948–49 (quoting ENGLEWOOD, COLO., MUNICIPAL CODE § 11-6-15 (1980)).

94. *Id.* at 950.

95. *Id.* at 948.

96. *Id.* at 952 (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978)).

dangerous activities, “[t]hose strict liability statutes which potentially abut upon constitutional freedoms must be narrowly drawn to avoid vagueness and overbreadth problems.”<sup>97</sup> Because obstructing an officer was a common law rather than a regulatory offense, implicated speech interests, and “necessarily contain[ed] an element of *mens rea* which may be read into the ordinance,” the court construed the ordinance “to require a mental state of ‘knowingly.’”<sup>98</sup> In using the term “necessarily” and citing the 1981 Colorado case of *Bollier v. People*, the court invoked the applicable state code provision permitting it to require culpability “necessarily involve[d]” in the act element.<sup>99</sup> But by also citing *U.S. Gypsum* and using the *Morissette* framework to reach a saving construction of *mens rea*, the court honored *mens rea* as a constitutional value, without insisting it is a constitutional requirement.

### C. Lenity?

One doctrine that plays perhaps surprisingly little role in the construction of strict liability local offenses is the rule of lenity, the canon requiring that criminal statutes be strictly construed against the state.<sup>100</sup> Indeed, lenity plays little role in the criminal law of most states.<sup>101</sup> Observers aware of the well-documented decline of lenity in federal criminal jurisprudence over the last half century might assume its small role in state jurisprudence similarly reflects the ideological ascendance of the war on crime.<sup>102</sup>

Yet the minor role of lenity in state criminal law has an earlier source. As Professor Zachary Price observed, “Many state legislatures have passed statutes abrogating strict construction or urging alternative interpretive priorities.”<sup>103</sup> Indeed, twelve state codes explicitly reject lenity.<sup>104</sup> Another

97. *Id.*

98. *Id.* (citing *Bollier v. People*, 635 P.2d 543, 545 (Colo. 1981)).

99. COLO. REV. STAT. §§ 18-1-103, -503(2) (2021). Section 18-1-103 authorizes the use of section 18-1-503(2). *See* § 18-1-103.

100. Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 920–21 (2020).

101. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 901–06 (2004).

102. *See* Hopwood, *supra* note 100, at 920–21. For varying accounts of the politics of the war on crime, see generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); JOHN PFAFF, *LOCKED IN* (2017); JONATHAN SIMON, *GOVERNING THROUGH CRIME* (2007); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

103. Price, *supra* note 101, at 886.

104. ARIZ. REV. STAT. ANN. §§ 13-101, -104 (2021); CAL. PENAL CODE § 4 (West 2021); DEL. CODE ANN. tit. 11, §§ 201, 203 (2021); KY. REV. STAT. ANN. §§ 446.080(1), 500.030 (West



thirteen implicitly do so by requiring interpretation to effectuate their code's stated purposes,<sup>105</sup> and three more do so simply by enumerating such purposes.<sup>106</sup> Price suggested that these code provisions might indicate "that legislatures prefer expansive readings,"<sup>107</sup> but they more likely reflect the influence of Model Penal Code section 1.02, which follows a statement of purposes with this admonition: "The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved."<sup>108</sup> These purposes included such lenient aims as "to safeguard conduct that is without fault from condemnation as criminal,"<sup>109</sup> "to give fair warning of the nature of the conduct declared to constitute an offense,"<sup>110</sup> "to differentiate on reasonable grounds between serious and minor offenses,"<sup>111</sup> and "to safeguard offenders against excessive, disproportionate or arbitrary punishment."<sup>112</sup> The commentary explains:

The ancient rule that penal law must be strictly construed, found in many American penal codes, is not preserved as such because it unduly emphasized only one aspect of the problem that the courts must face. Instead, Subsections (1)(d) and (2)(d) affirm that fair warning is one of the major purposes to be served. Construction of ambiguous statutes in terms that strike an accommodation of the general principles here set forth . . . is a far more desirable charge.<sup>113</sup>

Thus, the decline of lenity in state criminal law reflects not a recent determination of legislatures to expand criminal liability but an earlier commitment to confine liability by defining offenses systematically. It seems

2021); MICH. COMP. LAWS § 750.2 (2021); MONT. CODE ANN. § 45-1-102(2) (2021); N.H. REV. STAT. ANN. § 625:3 (2021); N.Y. PENAL LAW §§ 1.05, 5.00 (McKinney 2021); OR. REV. STAT. § 161.025 (2021); 18 PA. CONS. STAT. §§ 104, 105 (2021); S.D. CODIFIED LAWS § 22-1-1 (2021); TEX. PENAL CODE ANN. §§ 1.02, .05 (West 2021).

105. ALA. CODE § 13A-1-3, -6 (2021); COLO. REV. STAT. § 18-1-102 (2021); HAW. REV. STAT. §§ 701-103, -104 (2021); IND. CODE § 35-32-1-1 (2021); LA. STAT. ANN. § 14:3 (2021); MINN. STAT. § 609.01 (2021); NEB. REV. STAT. § 28-102 (2021); NEV. REV. STAT. § 193.030 (2021); N.J. STAT. ANN. § 2C:1-2 (West 2021); N.D. CENT. CODE § 12.1-01-02 (2021); TENN. CODE ANN. §§ 39-11-101, -104 (2021); UTAH CODE ANN. § 76-1-104 (West 2021); WASH. REV. CODE § 9A.04.020 (2021).

106. ALASKA STAT. § 11.81.100 (2021); GA. CODE ANN. § 16-1-2 (2021); 720 ILL. COMP. STAT. 5/1-2 (2021).

107. Price, *supra* note 101, at 886.

108. MODEL PENAL CODE § 1.02(3) (AM. L. INST. 1985).

109. *Id.* § 1.02(1)(c).

110. *Id.* § 1.02(1)(d).

111. *Id.* § 1.02(1)(e).

112. *Id.* § 1.02(2)(c).

113. *Id.* § 1.02 cmt. 4, at 32–33 (footnotes omitted).

the Model Penal Code's hierarchy of mental states and culpability default rules was part of a drafting strategy intended to obviate lenity and achieve its ends by other means. But in the many states without systematic culpability schemes in their state codes, the rule of lenity is a resource courts can, and arguably should, apply in constructing the mental elements of local offenses.

## 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 the federal preemption context: express preemption and implied preemption (due to "conflict" or "occupation of the field").<sup>114</sup> 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 [sic] state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no 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."<sup>115</sup>

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.

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114. See Dinh, *supra* note 12, at 2100–07 (discussing federal categories); see also Diller *supra* note 11, at 1140–42 (citing state law and noting that "[d]espite some superficial distinctions, most states' preemption analyses are similar in form to the federal model").

115. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203–04 (1983) (cleaned up).

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

In the context of relations between states and localities, state courts have substantially elaborated the concept 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.<sup>116</sup>

Since criminal law almost always speaks in the form of a prohibition, though, a local offense could only be preempted under the 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, any conduct not made criminal 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 with home rule powers that include criminalization.<sup>117</sup> 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.<sup>118</sup>

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.”<sup>119</sup>

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116. Diller, *supra* note 11, at 1142. Diller is highly critical of the test. *Id.* (“[It] is 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.”)

117. *See id.* at 1142–43. South Carolina’s high court employed this interpretation most often. *See Beachfront Ent., Inc. v. Town of Sullivan’s Island*, 666 S.E.2d 912, 914 (S.C. 2008) (preempting ordinance that barred smoking in workplace because “it conflicts with State criminal law by imposing a criminal penalty for conduct that is not illegal under State law”); *see also Palmetto Princess, LLC v. Town of Edisto Beach*, 631 S.E.2d 76, 77–78 (S.C. 2006) (applying the same reasoning to preempt an ordinance prohibiting possession of gambling devices on a vessel); *Diamonds v. Greenville Cnty.*, 480 S.E.2d 718, 719–20 (S.C. 1997) (applying the same reasoning to preempt an ordinance prohibiting public nudity); *Connor v. Town of Hilton Head Island*, 442 S.E.2d 608, 609, 611 (S.C. 1994) (applying the same reasoning with respect to an ordinance prohibiting nude barroom dancing).

118. *City of Portland v. Jackson*, 850 P.2d 1093, 1095 (Or. 1993).

119. *Id.* at 1096. The court upheld a local ordinance that imposed strict liability for public exposure, while the analogous state statute required “intent of arousing the sexual desire of the

But many states have created a further elaboration of the “prohibit/permit” test to “escape the anti-local conclusions” the “extreme” position would lead to—an interpretation of the test that Diller calls the “more stringent” test.<sup>120</sup> 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.<sup>121</sup> For criminal offenses, this means that the local offense must punish more conduct than does the analogous state offense—not less. This is true if new offenses are invented that 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.<sup>122</sup> The ordinance prohibited “knowingly . . . [c]arrying on one’s person . . . [a] dangerous knife . . . or . . . any pistol, revolver, or other firearm.”<sup>123</sup> 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.”<sup>124</sup> 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.<sup>125</sup> 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.”<sup>126</sup> Were either the concealment or the unlawful intent elements imposed, as

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person or another person” because no legislative history indicated permission for non-sexually motivated exposure. *Id.* at 1097–99; *see also* *State v. Tyler*, 7 P.3d 624, 626 (Or. 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*, 447 A.2d 565, 567 (N.J. 1982) (explaining that doctrine of “preemption by exclusion” from state criminal code applied if a court could “infer legislative intent from the overall structure of the Penal Code and its legislative history” to “decriminalize that conduct”); *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.”).

120. Diller, *supra* note 11, at 1145–46.

121. *Id.* at 1146.

122. 532 P.2d 1292, 1297–98 (Kan. 1975).

123. *Id.* at 1296 (quoting JUNCTION CITY, KAN., CODE OF ORDINANCES No. G-360 (1973) (superseded 1980) (repealed 2015)).

124. *Id.* at 1297 (quoting KAN. STAT. ANN. § 21-4201(1)(b), (d) (repealed 2011)).

125. *Id.*

126. *Id.* at 1294.

required by state law, the defendant would not have committed an offense.<sup>127</sup> Because the ordinance was broader, though, the court held that it was not preempted.<sup>128</sup> “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.”<sup>129</sup>

Another example is *Kansas City v. LaRose*, a decision by the Missouri Supreme Court upholding a local ordinance punishing interference with a police officer.<sup>130</sup> The ordinance prohibited “hinder[ing], obstruct[ing], molest[ing], resist[ing], or otherwise interfer[ing] with” a police officer acting pursuant to his or her official duties.<sup>131</sup> The closest state law offense on point prohibited that the same conduct be “knowingly and willfully” committed.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> But her claim that she “had no actual knowledge that she had a duty to admit the

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127. *See id.* at 1297.

128. *Id.* at 1297–99.

129. *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.

*Id.* at 1298.

130. 524 S.W.2d 112 (Mo. 1975).

131. *Id.* at 116 (quoting KANSAS CITY, MO., CODE OF ORDINANCES § 26.35 (1967) (current version at § 50-44(a))).

132. *Id.* (quoting MO. REV. STAT. § 557.210 (1969) (repealed 1977)).

133. *Id.* at 115.

134. *Id.* at 119–20.

officers” was rebuffed.<sup>135</sup> 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.<sup>136</sup> 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 [willfulness] is not shown.<sup>137</sup>

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

Finally, some jurisdictions will find that a local offense is conflict-preempted not because of the conduct it covers but because of the punishment it metes out. These jurisdictions allow for ordinances that punish the same or less than their state law analogues, but not those that punish more severely.<sup>138</sup> One example can be found in the Florida Supreme Court’s analysis of a preemption claim in *Wyche v. State*.<sup>139</sup> The defendant was convicted of “loitering for the purpose of prostitution,” an offense created by the city of Tampa that carried a maximum punishment of six months’ imprisonment.<sup>140</sup> Because this exceeded the maximum punishment allowed by the analogous state law offenses (sixty days), the court found conflict preemption: “Conflict arises when municipalities punish misconduct more severely than is permitted by state statutes.”<sup>141</sup>

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135. *Id.* at 120.

136. *Id.* at 117, 120.

137. *Id.* at 117.

138. *Wyche v. State*, 619 So. 2d 231, 238 (Fla. 1993); *City of Fargo v. Little Brown Jug*, 468 N.W.2d 392, 396 (N.D. 1991) (“[T]he penalty of a municipal ordinance may differ from the penalty imposed by the state law [only if] the municipality authorizes imposition of up to the maximum allowable municipal penalty which is lesser than the state law penalty for an equivalent statute.”). *But see State v. Burnett*, 755 N.E.2d 857, 868 (Ohio 2001) (“It is true that a municipal ordinance may proscribe the same conduct as a state criminal statute and impose a penalty greater than the state criminal code imposes.”).

139. 619 So.2d at 233.

140. *Id.* at 233, 237.

141. *Id.* at 237–38.

### B. Field Preemption

A second version of preemption that is also implicated by local criminal laws is field preemption—when a substantive area of regulation is intended to be completely taken over or “occupied” by the state offenses relating to that area.<sup>142</sup> Recall the Supreme Court’s description of this in the federal context: a “scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it.”<sup>143</sup>

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*.<sup>144</sup> In *Crawley*, the city of Newark had enacted a local offense punishing loitering defined as “remaining idle in essentially one place.”<sup>145</sup> While relying in part on legislative history indicating an intent to decriminalize loitering-type conduct (and rejecting the more stringent test),<sup>146</sup> the court went further and applied field preemption principles, asking “Was the state law intended expressly or impliedly to be exclusive in the field?”<sup>147</sup> 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.<sup>148</sup> 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

142. Diller, *supra* note 11, at 1153–57.

143. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203–04 (quoting *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

144. 447 A.2d 565, 571 (N.J. 1982).

145. *Id.* at 569–70, 570 n.4 (quoting NEWARK, N.J., REV. ORDINANCES § 17:2-14 (1966) (repealed 2009)).

146. *Id.* at 568 (describing concerns with loitering ordinances following the *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.” *Id.* at 570.

147. *Id.* at 569.

148. *Id.* at 569–70.

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.”<sup>149</sup>

While this comprehensive aspiration would appear to preclude any criminal offense creation by localities, the court did not 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.”<sup>150</sup>

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*.<sup>151</sup> 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.”<sup>152</sup> 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 . . . .”<sup>153</sup> 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.<sup>154</sup> 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

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149. *Id.* at 570.

150. *Id.* (emphasis added). 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.

151. 777 S.W.2d 926, 927 (Ky. 1989).

152. *Id.* at 927–28 (emphasis omitted).

153. *Id.* at 927 (emphasis omitted).

154. *Id.* at 928.



stringent” test).<sup>155</sup> Because the ordinance “directly addresse[d] criminal conduct which is comprehensively addressed by state statutes,” it was preempted.<sup>156</sup> The general criminal solicitation offense in state law, then, was “comprehensive” with respect to all solicitation-type offenses, regardless of subject matter.<sup>157</sup> 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.”<sup>158</sup>

### 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.<sup>159</sup> However, contemporary doctrine imposes important limits on how ameliorative either mens rea construction or preemption can be.

#### A. Constructing Mens Rea

First, consider how the doctrine of mens rea construction typically 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.<sup>160</sup> 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

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155. “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.* The court was also very concerned with the excessive penalty. *See id.*

156. *Id.*

157. *Id.* “Thus the ordinance enacted by the City of Florence directly addresses criminal conduct which is comprehensively addressed by state statutes.” *Id.*

158. *Id.*

159. 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.

160. Brown, *supra* note 1, at 315–16 & n.118.

conduct harmful to “public welfare.”<sup>161</sup> This doctrine, when it applies, is somewhat ameliorative of harmful asymmetry: it results in a judicial rewriting 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 rewrote a local strict liability offense punishing “interfer[ing] with or hinder[ing] [a police officer] in the discharge of his duty.”<sup>162</sup> Because the conduct covered by the ordinance originated in “common law” and could include protected speech, the court imputed a mental state of “knowingly.”<sup>163</sup>

At least in the category of offenses that trigger construction 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 “regulatory” or “public welfare”-type offense—and this is likely a very large category of local offenses. Consider the plight of the landlord–defendant in *Kiejdan* convicted of failure to maintain a certain temperature in his apartment units (caused not by his negligence, but by others’ vandalism of the heater).<sup>164</sup> Because this offense is of the type that fails to trigger mens rea construction, this doctrine will be of no help.

### 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 Model Penal Code 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

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161. Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 344–45, 350–51 (2003).

162. *City of Englewood v. Hammes*, 671 P.2d 947, 953 n.1 (Colo. 1983).

163. *Id.* at 952.

164. *State v. Kiejdan*, 437 A.2d 324, 325 (N.J. Super. Ct. App. Div. 1981).

offense with a well-drafted state offense. Recall the Missouri Supreme Court case of *LaRose* discussed above.<sup>165</sup> Missouri, a modern-code state, punished “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] with” a police officer without reference to a culpability requirement.<sup>166</sup> Applying the “more stringent” test, the court upheld the ordinance because it had “simply gone further and prohibited interference” without willfulness.<sup>167</sup> 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 entire categories of criminalized conduct being walled off from local regulatory innovation.<sup>168</sup> 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*.<sup>169</sup> 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.”<sup>170</sup> New Jersey, a modern-code state, punished similar conduct but defined it with precision and with a mental state.<sup>171</sup> 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.<sup>172</sup> 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

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165. *Kansas City v. LaRose*, 524 S.W.2d 112 (Mo. 1975).

166. *Id.* at 116.

167. *Id.* at 117.

168. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000) (defining field preemption).

169. *State v. Crawley*, 447 A.2d 565, 571 (N.J. 1982).

170. *Id.* at 570 n.4.

171. See *id.* at 567–68 (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) [e]ngages in fighting or threatening, or in violent or tumultuous behavior; or (2) [c]reates a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor.

N.J. STAT. ANN § 2C:33-2 (West 2021).

172. *Id.* at 570.

the law in a logical, clear and concise manner.”<sup>173</sup> 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

Strict liability ordinances are widespread in local criminal law, but given the doctrines available, the power of judges to “fix” this problem is not absolute. Field preemption is the strongest response, with the most potential for reintroducing mens rea, but it requires making a claim that local law concerning a category of conduct is completely displaced—something judges may be reluctant to do. Similarly, mens rea construction can do the valuable work of bringing culpability requirements back into archaic local law, but the factor test most often applied to determine whether or not mens rea is constructed is itself indeterminate. Courts reach for the factor test for a variety of reasons, including the lack of default rules (in some states), the legislative intent exception to statutory presumptions of culpability (in others), or as a safe harbor from due process challenges (in some cases). The value of this doctrine will therefore depend on how and why courts apply the test. Least useful is the doctrine of conflict preemption: modern state offenses will not preempt an archaic strict liability local offense if the test for conflict preemption is whether the local offense is “more stringent,” as strict liability offenses cover more conduct than do offenses requiring culpability. Overall, we conclude that judges can play a valuable role in the response to strict liability local ordinances, but neither their capacity nor their will to do so should be presumed.

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173. *Id.*

