SETON HALL LEGISLATIVE JOURNAL

VOL. 3 SUMMER 1978 NO. 2

STATE PREEMPTION OF MUNICIPAL PENAL ORDINANCES UNDER THE NEW JERSEY CODE OF CRIMINAL JUSTICE

*by John C. Kennedy**
*John P. McDonald***

I. INTRODUCTION

The New Jersey Code of Criminal Justice [1] will take effect on September 1, 1979.[2] By abolishing all common law crimes,[3] the Code evidences the intent of the New Jersey Legislature to maximize state legislative input into the substantive body of our criminal law.[4] Consistent with this principle, the Legislature has inserted into the Code a provision which seems to preempt to the greatest extent possible all municipal control over offenses against the state.[5] It is submitted that section 2C:1-5d of the Code, which

* A.B., St. Vincent College, M.S., Fordham University; J.D., Seton Hall University Law Center, Member, New Jersey Bar.

** B.A., Seton Hall University; J.D. Seton Hall University Law Center.

[1] An Act to adopt a New Jersey Code of Criminal Justice to be known as Title 2C of the New Jersey Statutes, to revise and to repeal portions of the statutory law as amended and supplemented, and to provide for the effect and operation of said Title 2C, 1978 N.J. Sess. Law Serv. 279 (West 1978) (to be codified as N.J. STAT. ANN. §§ 2C:1-1 to : 98-4 (West, eff. Sept. 1, 1979)) (hereinafter cited as N.J. STAT. ANN. §§ 2C:1-1 to :98-4 (West)).

[2] N.J. STAT. ANN. § 2C:98-4 (West). Prosecution of common law crimes is presently authorized under N.J. STAT. ANN. § 2A: 85-1 (West 1969).

[3] N.J. STAT. ANN. § 2C:1-5a (West).

[4] *See* Grossman, *The New Jersey Code of Criminal Justice: Analysis and Overview*, 3 SETON HALL LEGIS. J. 1,3 (1978). The author points out that, traditionally, the development of New Jersey's substantive criminal law has been left almost entirely to our judiciary. *Id. See also* Greenberg & Tumulty, *Highlights of the New Code of Criminal Justice*, 102 N.J.L.J. 425, 425 (col. 4) (1978).

[5] N.J. STAT. ANN. § 2C:1-5d (West). This section provides as follows:

> Notwithstanding any other provision of law, the local governmental units of this State may neither enact nor enforce any ordinance or other local law or regulation conflicting with, or preempted by, any provision of this code or with any policy of this State expressed

codifies the preemption principle will create unnecessary uncertainty in the administration and control of penal legislation on the municipal level. This section is vague and offers little guidance to the governing bodies of our local governmental units in the enactment and enforcement of municipal ordinances.[6]

Although the concept of state preemption of municipal legislative authority is already well-established, it is incumbent upon each municipality in the state to reevaluate its penal structure in light of the exhaustive treatment of criminal law under the Code and the strength of the preemption statement in section 2C:1-5d. The importance of such a reevaluation of municipal law cannot be underestimated. For most New Jerseyans, the only contact they will ever have with the criminal justice system is through their municipal courts and ordinances.[7] Further, much needless litigation and expense can be avoided by a thorough and timely reevaluation of municipal law.

II. The Origin and Nature of Municipal Legislative Power

A. The Source of Legislative Authority.

As with any definition of "police power," the scope of municipal regulatory authority is incapable of exact definition.[8] However, such inexactitude is often necessary to preserve the flexibility of such powers.[9] In *Mayor of Pocomoke v. Standard Oil Co. of New Jersey*,[10] the Supreme Court of Maryland aptly noted:

---

by this code, whether that policy be expressed by inclusion of a provision in the code or by exclusion of that subject from the code.

[6] For example, N.J. STAT. ANN. § 2C:1-5d (West) prohibits not only the enactment and enforcement of any local law, ordinance, or regulation which conflicts with or is preempted by a provision of the Code, but also prohibits the same if it conflicts with or is preempted by any "policy" of the state, "whether that policy be expressed by inclusion of a provision in the code or by *exclusion* of that subject from the code." (emphasis added). it will be most difficult for municipalities to conform with this abstract and elusive standard.

[7] In Mayer v. City of Chicago, 404 U.S. 189, 197 (1971), the United States Supreme Court noted:

> [F]ew citizens ever have contact with the higher courts. In the main, it is the police and the lower court Bench and Bar that convey the essence of our democracy to the people. Justice, if it can be measured, must be measured by the experience of the average citizen with the police and lower courts.

[8] *See* Euclid v. Ambler Realty Co., 272 U.S. 365 (1938); Champion v. Ames, 188 U.S. 321 (1903); *In re* Clark, 65 Conn. 17, 31 A. 522 (1921); Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451 (1900); Graff v. Priest, 356 Mo. 401, 201 S.W.2d 945 (1967); Schmidt v. Board of Adjustment of Newark, 9 N.J. 405, 88 A.2d 607 (1952).

[9] 6 McQUILLAN, MUNICIPAL CORPORATIONS § 24.03 (1969).

[10] 162 Md. 368, 159 A. 902 (1931).

> The nature and extent of that power is not susceptible of precise definition, nor reducible to any exact or final formula, but must rather be gathered from its application to the varying facts of actual cases as they arise. To define it or to prescribe its extent would be to instantly reduce the doctrine to the unyielding and permanent rigidity of a statute.[11]

In New Jersey, as in most other states,[12] a municipality is a creation of the state and has the right to exercise such powers as are conferred upon it by statute.[13] Therefore, the potential scope of municipal police powers is coextensive with that of the state. Hence the analogy that has sometimes been drawn between state/municipal relations and federal/state relations is quite misleading.[14] The division of authority between the federal and state governments, of course, is predetermined under the United States Constitution. The division of authority between state and municipal governments is a matter of state discretion.[15]

The right of municipalities to enact ordinances in New Jersey is provided for under N.J. Stat. Ann. §§ 40:48-1, -2.[16] N.J. Stat. Ann. § 40:48-1[17] provides for thirty specific areas in which a municipality may expressly legislate. For the purposes of penal legislation, perhaps the most important subdivisions are:

> **Maintain Order.** 6. Prevent vice, drunkenness and immorality; to preserve the public peace and order; to prevent and quell riots, disturbances and disorderly assemblages;

---

[11] *Id.* at 371, 159 A. at 904.

[12] 6 McQUILLAN, MUNICIPAL CORPORATIONS § 23.04 (1969).

[13] Auto-Rite Supply Co. v. Mayor of Woodbridge, 41 N.J. Super. 303, 124 A.2d 612 (Law Div. 1956).

[14] In Waller v. Flordia, 398 U.S. 387, *rehearing denied*, 398 U.S. 914 (1970), the United States Supreme Court recognized that state and municipal authority stem from the police powers of the state as defined under the United States Constitution. The Court held that the two are not considered as "separate sovereignties" under a claim of double jeopardy in a criminal prosecution. *See also* Reynolds v. Sims, 377 U.S. 533 (1964); Grofton v. United States, 206 U.S. 333 (1907); Star Mfg. Employees Fed. Credit Union v. Araiyo, 91 R.I. 412, 164 A.2d 309 (1960).

[15] This is generally true throughout the United States. *See* Barrett v. State, 44 Ariz. 270, 36 P.2d 260 (1934); McRae v. Americus, 59 Ga. 168, 27 A.R. 390 (1958); Miller v. Spokane, 35 Wash. 2d 113, 211 P.2d 165 (1949); *See also* Comment, *Conflicts Between State Statutes and Local Ordinances in Wisconsin*, 1975 WIS. L. REV. 840; Comment, *The Quasi-Criminal Ordinance Prosecution in Illinois*, 68 NW. U.L. REV. 566 (1978); Comment, *The California Preemption Doctrine: Expanding the Regulatory Power of Local Governments*, U.S.F. L. REV. 728 (1976).

[16] (West 1967).

[17] (West 1967).

> **Punish Beggars; Prevention of Loitering.** 7. Restrain and punish drunkards, vagrants, mendicants and beggars; to prevent loitering, lounging or sleeping in the streets, parks or public places;
>
> . . . .
>
> **Prohibit Annoyance of Persons or Animals.** 10. Regulate or prohibit any practice tending to frighten animals or to annoy or injure persons in the public streets;
>
> . . . .
>
> **Firearms and Fireworks.** 18. Regulate and prohibit the sale and use of guns, pistols, firearms and fireworks of all descriptions.[18]

N.J. Stat. Ann. § 40:48-2 provides for all "necessary and proper" municipal legislation for the "good government, order and protection of persons and property, and for the preservation of the public health, safety, and welfare of the municipality."[19] Further, the New Jersey constitution provides that such legislation "shall be liberally construed" in favor of municipal power.[20]

At first glance, it may appear that the omnibus provisions of N.J. Stat. Ann. § 40:48-2[21] are an open door to a variety of legislative topics not properly within the sphere of municipal power. Indeed, N.J. Stat. Ann. § 40:48-2 is very often relied upon to sustain municipal legislation that might otherwise appear to be outside municipal power. However, the courts have placed limitations on the scope of municipal influence under this statute.[22] Again, while such limitations are not capable of precise definition, the court in *Coast Cigarettes Sales, Inc. v. Mayor of Long Branch*[23] did formulate the generally followed limitation on municipal power:[24]

---

[18] N.J. STAT. ANN. §§ 40:48-1(6), (7), (10), (18) (West 1967).

[19] (West 1967).

[20] N.J. CONST. art. IV, § VII, para. 11.

[21] (West 1967).

[22] *See* 62 C.J.S. *Municipal Corporations*, §147 (1949). For similar limitations imposed by the courts on this type of enactment in other states, *see* Delight Wholesale Co. v. City of Overland Park, 203 Kan. 99, 453 P.2d 82 (1969); Pomeranz v. City of New York, 1 Misc. 2d 486, 151 N.Y.S.2d 798 (Sup. Ct. 1955); Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949); Foltz v. City of Dayton, 22 Ohio Misc. 27, 254 N.E.2d 395 (1969); Courtesy Colo. Co. v. Johnson, 10 Wis.2d 246, 103 N.W. 2d 17 (1960).

[23] 121 N.J. Super. 439, 297 A.2d 599 (Law Div. 1972).

[24] *Id.* at 445, 297 A.2d at 602-03.

> [The municipal powers] relate to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants. They do not extend to matters involving state policy or in the realm of affairs of general public interest and applicability. The needs of such matters inherently in need of uniform treatment do not vary locally and municipal regulation there would not be useful and might, by diverse treatment, cause substantial harm.

The key to understanding this limitation lies in the recognition that municipal ordinances must relate directly to matters that are of peculiar local significance. Statewide affairs are inherently beyond the scope of municipal authority.[25] It is precisely on these grounds that many municipal ordinances are challenged under a claim of preemption.[26]

Enforcement of ordinances is provided for under N.J. Stat. Ann. § 40:49-5,[27] wherein municipalities may imprison violators for up to 90 days or fine them any amount up to $500.00 or both. If a municipality exceeds these maximum penalties, the ordinance is held unenforceable, but not void in toto.[28]

B. Municipal Authority to Enact Penal Ordinances.

> There is considerable confusion in our law, both statutory and decisional, as to the nature of the various kinds of public wrongs which fall short of constituting crimes and as to the sanctions by which the law seeks to prevent them on the one hand, and crimes on the other.[29]

This statement made by Chief Justice Vanderbilt in *Sawran v. Lennon*[30] in 1955 is still valid today. The lack of such precise characterization is especially prevalent in the area of municipal legislation. Ordinances have been

---

[25] *See* Summer v. Township of Teaneck, 53 N.J. 548, 552, 251 A.2d 761, 764 (1969).

[26] *See* pp. 189-195, *infra*.

[27] (West Supp. 1978-1979).

[28] Verona v. Shalit, 96 N.J. Super. 20, 24, 232 A.2d 431, 433 (App. Div. 1967). *See also* State v. Laurel Mills Sewage Co., 46 N.J. Super. 331, 134 A.2d 270 (App. Div. 1957); Treasurer of Plainfield v. Pereira, 13 N.J. Misc. 698, 180 A. 688 (Sup. Ct. 1933); State v. Plunkett, 18 N.J.L. 5 (Sup. Ct. 1840).

[29] Sawran v. Lennon, 19 N.J. 606, 610, 118 A.2d 10, 12 (1955).

[30] 19 N.J. 606, 118 A.2d 10 (1955).

characterized variously as "civil,"[31] "penal,"[32] and "quasi-criminal" enactments.[33] Although characterization may at times be predicated upon the wording of the enabling legislation which underlies the ordinance, the confusion nonetheless is evident.

The early history of municipal legislation in New Jersey indicates that the enforcement of ordinances was largely a civil matter,[34] in the nature of an action for debt if enforcement were by fine. Even imprisonment was viewed as analogous to a *capias* action,[35] and was therefore not determinative with regard to the nature of the enforcement proceeding.

The apparent confusion over the nature of ordinance enforcement proceedings is not confined to the state of New Jersey. In Illinois, for example, courts have characterized the enforcement proceeding as a mixture of civil and criminal actions. In *City of Decatur v. Chasteen*,[36] the Supreme Court of Illinois declared:

> [A]n action to recover a penalty for the violation of a municipal ordinance, though quasi-criminal in character, is civil in form and is ordinarily termed a civil action and not a criminal prosecution.[37]

The net result of this mixture of forms was that the courts were free to choose civil or criminal procedural rules in many cases.[38] The choice selection was usually to the benefit of the municipality.[39]

As suggested above, the importance of classifying municipal ordinance enforcement actions lies in the fact that such classification will largely determine the rights of a defendant. For example, in *Verona v. Shalit*,[40] the

---

[31] Verona v. Shalit, 96 N.J. Super. 20, 22, 232 A.2d 431, 432 (App. Div. 1967).

[32] State v. Delouisa, 89 N.J. Super. 596, 601, 215 A.2d 794, 798, (Union County Ct. 1965); *See also* Edwards v. Mayor of Moonachie, 3 N.J. 17, 68 A.2d 744 (1949); Auto-Rite Supply Co. v. Mayor of Woodbridge, 41 N.J. Super. 303, 124 A.2d 612 (Law Div. 1956).

[33] State v. Yacareno, 3 N.J. 291, 295, 70 A.2d 84, 86 (1949).

[34] Tyler v. Lawron, 30 N.J.L. 120 (Sup. Ct. 1862); McGear v. Woodruff, 33 N.J.L. 213 (Sup. Ct. 1868); Brophy v. Perth Amboy, 49 N.J.L. 217 (E. & A. 1882).

[35] *See* Department of Labor and Indus. v. Rosen, 44 N.J. Super. 42, 129 A.2d 588 (App. Div. 1957); State Bd. of Medical Examiners v. Kornreich, 136 N.J.L. 367, 56 A.2d 490 (Sup. Ct. 1948); Lowrie v. State Bd. of Registration and Examination in Dentistry, 90 N.J.L. 54, 99 A. 927 (Sup. Ct. 1917) (constitution does not bar imprisonment for failure to pay debt).

[36] 19 Ill.2d 204, 166 N.E.2d 29 (1960).

[37] *Id.* at 216, 166 N.E. 2d at 36. *But see* ILL. ANN. STAT. ch. 38, § 107-2(c) (Smith-Hurd 1963). This statute allows an "arrest" in aid of ordinance enforcement.

[38] Chicago v. Joyce, 38 Ill. 2d 368, 232 N.E.2d 289 (1967) (burden of proof); Village of Maywood v. Houston, 10 Ill.2d 117, 139 N.E.2d 233 (1956) (the right of municipalities to appeal). People v. Edge, 406 Ill. 490, 94 N.E.2d 359 (1950) (arrest).

[39] *See* Comment, *The Quasi-Criminal Ordinance Prosecution in Illinois*, 68 Nw. U. L. REV. 566 (1973).

[40] 96 N.J. Super. 20, 232 A.2d 431 (App. Div. 1967).

New Jersey Superior Court, Appellate Division, held that the enforcement proceeding was "civil," thereby enabling the municipality to appeal an adverse ruling in the county court.[41] A similar result was reached by the appellate division in *Department of Conservation and Economic Development v. Scipio*[42] as to the enforcement of a state statute in municipal court.

However, in *City of Newark v. Pulverman*,[43] the New Jersey Supreme Court overturned an appellate division reversal of a county court judgment for the defendant. The defendant was charged with violating a zoning ordinance by operating a parking lot in a restricted area. The supreme court held:

> [Defendant] was not charged with violating any provisions of the Crimes Act, but was charged with violating a provision of Newark's zoning ordinance. There is substantial division of authority throughout the country as to whether such charge is civil in nature and appealable by the city upon a finding for the Defendant, or criminal in nature and, at least in the absence of express provision to the contrary appealable only by the Defendant in the event of conviction.[44]

The court held that because ordinance enforcement proceedings were governed by the rules governing practice in the local criminal courts,[45] which in turn refer to the rules governing criminal practice,[46] such proceedings were, by rule, not appealable by the municipality.[47]

In *State v. Yaccarino,*[48] the Supreme Court of New Jersey held that prosecution for an ordinance violation is "quasi-criminal." The court stated:

> Procedurally, at least within the intendment of R.2: 11, a prosecution for violation of an ordinance is essentially criminal in nature irrespective of whether the penal section of the ordinance provides

---

[41] Verona v. Shalit, 96 N.J. Super. 20, 232 A.2d 431 (App. Div. 1967).

[42] 88 N.J. Super. 315, 212 A.2d 184 (App. Div. 1965).

[43] 12 N.J. 105, 95 A.2d 889 (1953).

[44] *Id.* at 112, 95 A.2d at 892.

[45] N.J. R.R. 8:11-1 (1969) (currently at N.J.R. 7:8-1 (RULES GOVERNING PRACTICE IN THE MUNICIPAL COURTS)). N.J.R. 7:8-1 is referenced to R. 3:23,:24 (RULES GOVERNING CRIMINAL PRACTICE). N.J.R. 7:1 states: "the rule was further amended, effective September 10, 1973, to eliminate the reference to civil actions in the municipal courts since, as a matter of practice, no civil actions are now tried by the municipal courts." PRESSLER, CURRENT N.J. COURT RULES, *Comment* N.J.R. 7:1 (1979).

[46] N.J.R. 3:23,: 24.

[47] City of Newark v. Pulverman, 12 N.J. 105, 112, 95 A.2d 889, 893 (1953).

[48] 3 N.J. 291, 70 A.2d 84 (1949).

> for a fine only or for both fine and imprisonment and even though such violation does not constitute an indictable offense.[49]

The key to this apparent diversity of treatment within New Jersey lies in the distinction between fines and imprisonment on the one hand, and penalties, on the other, as a means of enforcing municipal ordinances. Those ordinances or statutes which merely prescribe "penalties" are considered civil in nature, and the usual safeguards of criminal procedure are not applicable.[50] Those which prescribe fines and/or imprisonment are considered "quasi-criminal" and the usual safeguards are generally applicable.[51]

In *Department of Labor and Industry v. Rosen*,[52] the appellate division held that the recovery of a penalty from an employer who failed to pay his employees in full was a civil action.[53] Although the action was predicated upon a statutory violation the court drew the following distinction between fines and penalties which is equally applicable to actions predicated upon municipal ordinances:

> A penalty, like a fine, is a pecuniary punishment inflicted by the law for its violation. A penalty is that which is demanded for the violation of a statute which violation may or may not be a crime. A fine is a punishment for the commission of a crime. Crimes, except the gravest, can be punished only by fine or imprisonment. A penalty is not in any legal sense a fine. Indeed, nearly all statutes giving a penalty for committing a prohibited act preserve the distinction by providing that the penalty may be recovered in a civil action.[54]

Similarly, in *Sawran v. Lennon*,[55] the New Jersey Supreme Court held that the collection of a "$100.00 penalty" for hunting deer out of season was

---

[49] *Id.* at 295, 70 A.2d at 86; *accord*, State v. Holland, 132 N.J. Super 17, 331 A.2d 626 (App. Div. 1975); State v. Morretti, 50 N.J. Super. 223, 141 A.2d 810 (App. Div. 1958); City of Plainfield v. Phillips, 38 N.J. Super. 260, 118 A.2d 704 (App. Div. 1955); Asbury Park v. Shure, 54 N.J. Super. 46, 148 A.2d 82 (Law Div. 1959); Abbott v. City of Los Angeles, 51 Cal.2d 674, 3 Cal. Rptr. 158, 349 P.2d 924 (1931); Ex Parte Koener, 59 Cal.2d 646, 30 Cal. Rptr. 609, 381 P.2d 633 (1933); Busch Jewelry Co. v. City of Bessemer, 129 Ala. 180, 112 So.2d 344 (1959).

[50] *See* Department of Conservation and Economic Dev. v. Scipio, 88 N.J. Super 315, 322, 212 A.2d 184, 186 (App. Div. 1965).

[51] State v. Yaccarino, 3 N.J. 291, 70 A.2d 84 (1949).

[52] 44 N.J. Super. 42, 129 A.2d 588 (App. Div. 1957).

[53] Department of Labor and Indus. v. Rosen, 44 N.J. Super. 42, 129 A.2d 588 (App. Div. 1957).

[54] *Id.* at 49, 129 A.2d at 591. *See* Note, *Statutory Penalties, A Legal Hybrid*, 51 HARV. L. REV. 1092 (1938); 23 AM. JUR. 2d, *Forfeitures and Penalities* § 28 (1966).

[55] 19 N.J. 606, 118 A.2d 10 (1955).

civil.[56] In *Department of Conservation and Economic Development v. Scipio*,[57] the appellate division declared that the possession of an "illegal missile" was in violation of state fish and game laws and was enforceable in a civil proceeding, as the statute provided only for a penalty.[58] *Verona v. Shalit*[59] held that a municipal health ordinance was also enforceable as a civil action because of its "penalty" provision.[60] Indeed, by the great weight of authority, actions for the collection or enforcement of a penalty only are civil actions.[61]

Thus, it appears that the legislative classification of the enforcement provision of a municipal ordinance will have a great effect on the rights accorded to a defendant at trial. For example, where the ordinance enforcement has been characterized as "quasi-criminal," the defendants in such actions have been afforded such procedural safeguards as: proof beyond a reasonable doubt,[62] no right of appeal by the municipality, the "vagueness test" generally applied to criminal legislation, strict construction of the statute,[63] and the right of criminal discovery.[64]

However, the slim distinction between a fine and a penalty is hardly an appropriate ground for denying the plethora of procedural safeguards that apply in more conventional criminal prosecutions. It would seem that municipalities could make the enforcement of ordinances an easier affair merely by characterizing as "penalties," those enforcement provisions previously called "fines." Of course, the municipality must abide by the terms of the enabling legislation which may provide for enforcement by either fines or penalties, or both. It would appear that if the enabling legislation called for enforcement by "fine," the municipality could not substitute a "penalty" without acting outside the scope of such legislation.

III. State Preemption of Municipal Legislative Authority

A. The Concept of Preemption

Preemption, as a concept, implies the existence of two or more sovereignties which have concurrent jurisdictional powers over a given sub-

[56] *Id.* at 614, 118 A.2d at 13.

[57] 88 N.J. Super. 315, 212 A.2d 184 (App. Div. 1965).

[58] *Id.* at 322, 212 A.2d at 190.

[59] 96 N.J. Super. 20, 232 A.2d 431 (App. Div. 1967).

[60] *Id.* at 22, 232 A.2d at 432.

[61] Zuest v. Ingro, 134 N.J.L. 15, 45 A.2d 810 (E. & A. 1945), State Bd. v. Curtis, 94 N.J.L. 324, 110 A. 816 (Sup. Ct. 1920); State v. Lakewood Market Co., 84 N.J.L. 512, 89 A. 194 (Sup. Ct. 1913).

[62] City of Plainfield v. Philips, 38 N.J. Super. 268, 118 A.2d 704 (App. Div. 1955).

[63] City of Newark v. Pulverman, 12 N.J. 105, 95 A.2d 889 (1953).

[64] State v. N.Y. Cent. R.R., 37 N.J. Super 12, 116 A.2d 800 (App. Div. 1955).

ject. While preemption is a matter of constitutional mandate[65] insofar as federal and state powers are concerned, the concept has no such independent source in the context of the division of legislative authority between the state and its municipalities.[66] In New Jersey, as indicated previously,[67] municipal authority stems from statutory grants of power by the Legislature.[68]

However, in view of the broad nature of municipal police powers, the concept of preemption arises in order to facilitate a rational and orderly division of authority in areas of overlapping jurisdiction. Although state preemption of municipal legislative authority is a much discussed issue, it remains somewhat difficult to define.

Our courts have frequently dealt with the question of preemption by the state of municipal control over state criminal offenses. Generally, it has been held that preemption is a judicially created principle based on the proposition that a municipality, as an agent of the state, cannot act in a manner which is contrary to the policy or dictates of the state.[69] The Supreme Court of New Jersey, in *Overlook Terrace Management Corp. v. Rent Control Board of West New York*,[70] discussed the necessary considerations in the preemption issue analysis:

> Preemption analysis calls for the answer initially to whether the field or subject matter in which the ordinance operates, including its effects, is the same as that in which the State has acted. If not, then preemption is clearly inapplicable. An affirmative answer calls for a further search for "[i]t is not enough that the Legislature has legislated upon the subject. . . .
>
> Pertinent questions for consideration in determining the applicability of preemption are:
>
> 1. Does the ordinance conflict with state law, either because of conflicting policies of operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?

---

[65] U.S. CONST. art. VI.

[66] *See* discussion of the sources of municipal legislative authority in Part II pp. 185-189, *supra*.

[67] *See* p. 189, *supra*.

[68] *E.g.*, N.J. STAT. ANN. §§ 40:48-1, -2 (West 1967).

[69] Overlook Terrace Management Corp. v. Rent Control Bd. of West New York, 71 N.J. 451, 366 A.2d 321 (1976). This case held that a municipal rent control ordinance could not restrict rental increases approved and ordered by the New Jersey Housing Finance Agency for dwelling units in a housing project which was financed, supervised, and regulated by that Agency. *See also* Summer v. Township of Teaneck, 53 N.J. 548, 251 A.2d 761 (1969).

[70] 71 N.J. 451, 366 A.2d 321 (1976).

2. Was the state law intended, expressly or impliedly, to be exclusive in the field?

3. Does the subject matter reflect a need for uniformity?

4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?

5. Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature? [71]

Thus, municipalities may enact regulatory ordinances on any subject within an appropriate enabling statute provided that such ordinances, do not conflict with state enactments, that, run afoul of the state's intention to retain exclusive control of a given area, and the subject matter does not necessarily require uniform state regulation.[72]

Township of Chester v. Panicucci [73] dealt with the question of whether a municipality may enact more stringent regulations concerning gun control than the state had provided for in its gun control law.[74] The state law in *Township of Chester* prohibited the possession of a loaded gun by hunters within a certain distance of the populace.[75] The municipal ordinance broadened the application of the state law by deleting the word "hunter." [76] The court found no attempt by the state legislature to preempt the field and concluded that such a municipal ordinance will stand if the regulation imposed is reasonable.[77] Since the ordinance did not conflict with the state law, and there is no intent to preempt the field by the state, the municipality's general police power [78] was sufficient to support the local legislation.

---

[71] *Id.* at 461-62, 366 A.2d at 326 (citations omitted).

[72] Lehrhaupt v. Flynn, 140 N.J. Super. 250, 356 A.2d 35 (App. Div. 1976). The municipal ordinance challenged in *Lehrhaupt* required financial disclosure by certain appointed municipal officials, including members of the zoning board of adjustment and planning board. These offices are created by state statute and are generally not subject to control by the municipal governing body. N.J. STAT. ANN. §§ 55D-23, -69 (West Supp. 1978-1979) (repealing N.J. STAT. ANN. §§ 40:55-1.4, -36 (West 1967)). The court nevertheless held that the mere independent status of their functions does not insulate them from regulatory legislation aimed at their performance as officials of the municipality. The financial disclosure regulation was not a subject matter which necessarily required uniform treatment on a statewide basis, nor was there any intent by the state to preempt the field. 140 N.J. Super. at 267-68, 356 A.2d at 45.

[73] 62 N.J. 94, 299 A.2d 385 (1973).

[74] N.J. STAT. ANN. §§ 151-1 to -63 (West 1969 & Supp. 1978-1979).

[75] Township of Chester v. Panicucci, 62 N.J. 94, 96-97, 299 A.2d 385, 386 (1973).

[76] *Id.* at 97, 299 A.2d at 386.

[77] *Id.* at 102, 299 A.2d at 389.

[78] N.J. STAT. ANN. §§ 40:48-1,-2 (West 1967). Under its police power, it has been held that a municipal corporation has the implied authority to penalize by ordinance acts, which are already punish-

In *Hertz Washmobile System v. South Orange*,[79] the court held that a municipal ordinance which selectively prohibited businesses from opening on Sundays conflicted with the state statute on Sunday closing. The court noted that an ordinance conflicts with a statute if it "permits what a statute expressly forbids or forbids what a statute expressly authorizes."[80]

Absent such evident conflicts with expressed state policy, the question of preemption becomes largely a matter of intention—either expressed or implied. In *State v. Ulesky*,[81] the New Jersey Supreme Court considered a claim of preemption in the context of an ordinance requiring criminal registration. The court noted:

> [A] municipality may not deal with a subject if the Legislature intends its own action, whether it exhausts the field or touches only part of it, to be exclusive and therefore to bar municipal legislation. As a general proposition, an intent to preempt the power of municipalities will not be lightly inferred, *Kennedy v. City of Newark*, 29 N.J. 178, 187 (1956), but in the final analysis, the answer must depend upon the particular setting, the values involved, and the impact of local legislation upon those values.[82]

While noting that the problem of criminal recidivism "no doubt varies locally in intensity."[83] the court held that the area of criminal registration was impliedly preempted by state legislation on parole, probation and narcotics addict registration.[84] One of the factors that the court considered in announcing its decision was the "substantial burden" registration would impose upon released convicts, if such registration were to be required throughout the state.[85]

As indicated, absent a clear conflict or an expression of state exclusivity on a given subject, the claim of preemption is determined in large measure upon a balancing of the various interests involved.[86] Where the purpose

---

able by statute where the exigencies of municipal life require more rigid regulations than are required in the statute at large. Guidoni v. Wheller, 250 F. 93, 96 (D.N.J. 1916).

[79] 41 N.J. Super. 110, 124 A.2d 68 (Law Div. 1956).

[80] *See* Auto-Rite Supply Co. v. Mayor of Woodbridge 25 N.J. 188, 135 A.2d 468 (1957); Magnolia Dev. Co. v. Coles, 10 N.J. 223, 89 A.2d 644 (1952); Tazmire v. Atlantic City, 35 N.J. Super. 11, 113 A.2d 59 (App. Div. 1955); Geisler v. Davis, 9 N.J. Misc. 185, 315 A.2d 35 (Supp. Ct. 1931).

[81] 54 N.J. 26, 252 A.2d 720 (1969).

[82] *Id.* at 29, 252 A.2d at 722.

[83] *Id.* at 30, 252 A.2d at 721.

[84] *Id.* at 31, 252 A.2d at 723.

[85] *Id.*

[86] Summer v. Township of Teaneck, 53 N.J. 548, 251 A.2d 761 (1969).

and effect of an ordinance focus upon a strong local concern, and where the impact upon state policy is slight or otherwise justifiable, the ordinance will be upheld.

For example, in *Summer v. Township of Teaneck*,[87] the New Jersey Supreme Court held that a municipal ordinance providing for a $200.00 fine and/or thirty days imprisonment for real estate brokers engaged in "blockbusting" was an appropriate expression of municipal authority. The court declared that the ordinance addressed itself to a legitimate "local concern" not reached by state law under the New Jersey Real Estate Commission Act.[88]

Claims of preemption predicated upon pervasive state legislation in the area or upon an allegation that the subject is inherently beyond the scope of municipal power are not easily distinguished. In this regard, it was stated by the Supreme Court of New Jersey, in *Township of Chester v. Panicucci*,[89] as follows:

> Municipalities have been granted broad police power over matters of local concern and interest, both in numerous specified instances, as here, by *N.J.S.A.* 40:48-1 and generally by *N.J.S.A.* 40:48-2. Our Constitution, Art. IV, Sec. VII, para. 11, ordains liberal construction of these powers. Their scope, however, does not extend to subjects inherently in need of uniform treatment or to matters of general public interest and applicability which necessarily require an exclusive State policy. In addition, a municipality may be foreclosed from exercising power it would otherwise have if the state has sufficiently acted in a particular field . . . Beyond such manifest conflicts with State policy, our cases establish that a municipality is precluded from exercising its powers in an area which the State has preempted.[90]

The court then concluded that the municipal legislation was neither ultra vires nor preempted, because it dealt with a legitimate local concern and was aimed at deterring an evil different from that under the state statute.[91]

---

[87] 53 N.J. 548, 251 A.2d 761 (1969).

[88] *Id.* at 554, 251 A.2d at 764. The court also noted: "The ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize municipalities from dealing with local aspects otherwise within their power to act." *Id.* at 555, 251 A.2d at 764-765.

[89] 62 N.J. 94, 299 A.2d 385 (1973).

[90] *Id.* at 99-100, 299 A.2d at 387-88.

[91] *Id.* at 104, 299 A.2d at 388-89; *cf.* State v. Hackney, 83 N.J. Super 400, 200 A.2d 140 (1964) (municipal ordinance conflicting with the declared public policy of the state is ultra vires and void).

Allegations that a municipality has dealt with an area inherently in need of state-wide treatment are not strictly claims of *preemption*. As discussed earlier,[92] preemption only arises as an issue where two sovereignties are empowered to act in the same area. Municipalities, of course, are simply not authorized to deal with areas of state-wide concern, and therefore, the dual sovereignty issue claims should be viewed as allegations that the municipality has acted ultra vires. Such claims are analogous to claims of preemption, however, and, indeed, are treated as preemption questions by many courts.[93] They will be considered as such by the authors.

Merely because the state has acted in a given area, a municipality is not thereby precluded from legislating on the same subject per se.[94] This is true even if the municipality has enacted an ordinance which deals with an area covered by state criminal law. In *State v. Greco*,[95] a defendant was charged with possessing a false identification card to obtain alcohol, in violation of a municipal ordinance, as well as a state statute. The court noted:

> Even if the same act of having altered or falsified identification cards for the purposes of establishing age in order to enter a tavern selling alcoholic beverages may constitute an offense against the State and an offense within the Township, this Court believes that the act falls within that category which permits both the State and municipality to punish for the violation thereof without trespassing on any Constitutional principle.[96]

Where such overlapping exists, the "proper prosecuting authority in the sound exercise of the discretion committed to him may proceed under either. . . ."[97]

---

[92] *See* pp. 189-190, *supra*.

[93] *See* Masters-Jersey, Inc. v. Mayor of Paramus, 32 N.J. 296, 160 A.2d 841 (1960); Levin v. City of Asbury Park, 9 N.J. Misc. 515, 159 A.742 (Sup. Ct. 1931); State v. Plunkett, 18 N.J.L. 5 (Sup. Ct. 1840).

[94] "Under its general powers, it has been held, a municipal corporation has implied authority in police control to penalize by ordinance acts which are already punishable by statute where the exigencies of municipal life seem to require more rigid regulations than are required in the State at large." 6 McQUILLAN, MUNICIPAL CORPORATIONS, § 23.04 (1969). *See* Kligman v. Lautmar, 98 N.J. Super. 344, 237 A.2d 483 (App. Div. 1967).

[95] 86 N.J. Super. 551, 207 A.2d 363 (Atlantic County Ct. 1965).

[96] *Id.* at 559; *See* State v. Delouisa, 89 N.J. Super 596, 215 A.2d 294 (Union County Ct. 1965), Hunter v. Township of Teaneck, 128 N.J.L. 164, 24 A.2d 553 (Sup. Ct. 1942); Minochian v. Paterson, 106 N.J.L. 436, 149 A. 61 (E. & A. 1930); *See also* 62 C.J.S., *Municipal Corporations*, § 145.46 (1949).

[97] State v. States, 44 N.J. 285, 292, 208 A.2d 633, 636 (1965).

In any event, it is a question of fact for the court as to whether in a given circumstance there is valid concurrent jurisdiction or whether the municipal ordinance is preempted.[98] Further preemption will not be lightly inferred.[99] Rather, the state must declare a policy "at war" with the notion of concurrent municipal legislative authority.[100]

B. Preemption Under the Code

It is beyond question that municipal corporations are agents of the state and have only such power as the legislature gives them.[101] When considering the power and function of municipalities in controlling offenses against the state, it is helpful to consider the question as constituting fundamentally two aspects: 1) participation by municipalities in the administration of state criminal law, and 2) municipal ordaining of offenses or of infractions or violations of law deemed to be below the grade of offenses.[102] Section 2C:1-5d of the Code appears to primarily focus on the first aspect, *i.e.*, municipal participation in the enactment and enforcement of criminal statutory offenses. This section is not intended to preempt traditional municipal control over offenses such as violations of parking, local licensing, land use and health ordinances.

The general police power delegated by the state to municipalities to enact regulatory ordinances is contained in Title 40 of the New Jersey Revised Statutes.[103] The New Jersey constitution mandates that this broad grant of power be liberally construed in favor of municipal corporations, and that they possess implied as well as expressly granted powers.[104] Municipalities are expressly prohibited by the same constitutional provision from enacting

---

[98] State v. Pinkos, 117 N.J. Super. 104, 283 A.2d 755 (App. Div. 1971).

[99] Summer v. Township of Teaneck, 53 N.J. 548, 554, 251 A.2d 761, 763 (1969).

[100] Kennedy v. City of Newark, 29 N.J. 178, 187, 148 A.2d 473, 478 (1959).

[101] City of Newark v. Benjamin, 144 N.J. Super. 58, 364 A.2d 563 (Ch. Div.), *aff'd*, 75 N.J. 311, 381 A.2d 793 (1978); Wagner v. City of Newark, 24 N.J. 467, 132 A.2d 794 (1957); Taxi's Inc. v. Borough of E. Rutherford, 149 N.J. Super. 294, 373 A.2d 717 (Law Div. 1977); *see generally* 1 McQUILLAN, MUNICIPAL CORPORATIONS §§ 2.08a (1971). The United States Supreme Court has also recognized this principle. Southern Iowa Elec. Co. v. Chariton, 255 C.S. 539 (1921); Palls County Ct. v. United States *ex rel.* Douglas, 105 U.S. 514 (1879).

[102] *See* 6 McQUILLAN, MUNICIPAL CORPORATIONS § 23.01 (1969).

[103] N.J. STAT. ANN. §§ 40:48-1,-2 (West 1967).

[104] N.J. CONST. art. IV, § VII, para. 11 provides as follows:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government . . . shall be liberally construed in their favor. The powers of . . . such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

ordinances or regulations which conflict or are inconsistent with the state law.[105] The fundamental concept of preemption as expressed in the new Code is, consequently, consistent with present law. The problem lies in the ability of the governing body of a municipality to discern the *unexpressed* intent and policy behind all provisions of the Code.

This problem is typified by an analysis of the preemption issue with respect to the Code's provisions concerning obscenity,[106] a traditionally problematic area. N.J. Stat. Ann. § 40:48-1(6)[107] grants municipalities the power to "(p)revent vice, drunkenness and immorality. . . ." This statutory provision gives municipal corporations the specific authority, apparently, to regulate obscenity despite pervasive state obscenity regulation.[108] The Supreme Court of New Jersey, in *Adams Newark Theatre Co. v. City of Newark*,[109] held that the state, under its police power, could properly delegate to municipalities the power to regulate obscenity.[110] But the validity of this delegation of power alone does not overcome the preemption problem. *Dimor, Inc. v. City of Passaic*[111] pointed out that the exercise of such a delegated power was limited and subject to the control of state law in the area.[112] The court in *Dimor, Inc.* held that the matter of obscenity necessitated uniform treatment and found that the state legislature intended to preempt the field.[113] The *Dimor, Inc.* decision was followed as controlling by the Superior Court, Appellate Division, in *Wein v. Town of Irvington*.[114]

---

[105] *Id.*

[106] N.J. STAT. ANN. § 2C:34-2 to -4 (West).

[107] (West 1967).

[108] N.J. STAT. ANN. §§ 2A:115-1 to -6 (West 1969 & Supp. 1978-1979).

[109] 22 N.J. 472, 126 A.2d 340 (1956), *aff'd*, 354 U.S. 931, *rehearing denied*, 355 U.S. 851 (1957)

[110] 22 N.J. at 475, 126 A.2d at 342. *See also* Adams Theatre Co. v. Keenan, 12 N.J. 267, 96 A.2d 519 (1953) (city may control exhibitions of lewd and indecent plays and motion pictures through licensing power in view of statutory delegation of power to regulate vice, drunkenness, and immorality under N.J. STAT. ANN. § 40:48-1(6) (West 1967)). Note that both of the above *Adams Theatre* cases involved live shows and motion pictures which may be regulated by municipalites under their licensing power, N.J. STAT. ANN. § 40: 52-1(f) (West Supp. 1978-1979). This statutory provision provides that:

> The governing body (of a municipality) may make, amend, repeal and enforce ordinances to license and regulate:
>
> . . . .
>
> f. Theatres, cinema and show houses. . . .
>
> . . . .

This fact may somewhat diminish the overall weight and precedential value of the two cases.

[111] 122 N.J. Super. 296, 300 A.2d 191 (Law Div. 1973).

[112] *Id.* at 301, 300 A.2d at 193-94.

[113] *Id.* at 302, 300 A.2d at 194-95. The court did not mention N.J. STAT. ANN. § 40:48-1(20) (West 1967) (municipal licensing power to regulate theatres, and cinemas). Nor did it cite the two *Adams Theatre* cases, decided by the New Jersey Supreme Court, discussed in note 110, *supra*, despite the fact that the case involved the showing of obscene motion pictures as did those cases.

[114] 126 N.J. Super. 410, 315 A.2d 35 (App. Div.), *certif. denied*, 65 N.J. 287, 321 A.2d 248 (1974).

Wein involved the validity of a municipal obscenity ordinance as it related to an "adult" bookstore. The court held that the state legislature intended to occupy the field of obscenity legislation completely and thus preempt all municipal legislative action in the area, whether in conflict or not.[115] The reasoning of the court was that supplemental state legislative amendments[116] to the obscenity law in 1971 evidenced the intent to preempt.[117]

In 1977, a new twist to the obscenity preemption issue was added by the decision in *Expo, Inc. v. City of Passaic.*[118] The court in *Expo, Inc.* distinguished the *Dimor, Inc.*[119] and *Wein*[120] cases by holding that they applied only to obscene *materials, i.e.,* motion pictures and books respectively.[121] The *Expo, Inc.* case was concerned with a municipal ordinance which prohibited obscene, lewd, immoral or indecent *acts* or *activities.* The court found no intention by the State Legislature to preempt municipal action in the latter area. It reasoned that since the 1971 state legislative amendments to obscenity law[122] dealt only with obscene materials, and not acts or activities, no intent to preempt was evident.[123]

---

[115] 126 N.J. Super. at 416-17, 315 A.2d at 39.

[116] N.J. STAT. ANN. §§ 2A:115-1.1 to -3.4 (West Supp. 1978-1979).

[117] 126 N.J. Super. at 414, 315 A.2d at 38. The appellate division distinguished Adams Theatre Co. v. City of Newark, 22 N.J. 472, 126 A.2d 340 (1956), *aff'd.* 354 U.S. 931, *rehearing denied,* 355 U.S. 851 (1957), on the ground that "the question of preemption did not arise in that case." 126 N.J. Super. at 413, 315 A.2d at 37. The court did recognize, however, that municipalities have the statutory power to deal with obscenity, *id.* at 414, 315 A.2d at 38, which could be of importance when dealing with the intention of the Legislature under the Code. The *Dimor, Inc.* court did not discuss such power. *See* note 113, *supra*, and accompanying text.

[118] 149 N.J. Super. 416, 373 A.2d 1045 (Law Div. 1977).

[119] 122 N.J. Super. 296, 300 A.2d 191 (Law Div. 1973).

[120] 126 N.J. Super. 410, 315 A.2d 35 (App. Div.), *certif. denied,* 65 N.J. 287, 321 A.2d 248 (1974).

[121] 149 N.J. Super. at 421, 373 A.2d at 1048.

[122] N.J. STAT. ANN. §§ 2A:115-1.1 to -3.4 (West Supp. 1978-1979).

[123] 149 N.J. Super. at 422, 373 A.2d at 1048. The court stated:

> New Jersey obscenity laws have had frequent amendments, both in 1957 and 1971. N.J.S.A. 2A:115-1.1 *et seq.* All these amendments are declarative of a concern for obscene *materials.* See *N.J.S.A.* 2A:115-1.6 and 2A:115-2.1, all referring to *materials.* Materials are repeatedly defined as descriptions, depictions, narrative accounts, films, etc. *N.J.S.A.* 2A:115-1.7, 2A:115-2.2. The Legislature seems preoccupied with a need for uniform treatment and standards for books, pictures, films, recordings—items that are of a permanent nature.
>
> Live entertainment is something else. It not only varies from place to place, but night to night. Uniform treatment for immutable material is logical. Not so with live performances.

Id. at 421-22, 373 A.2d at 1048 (emphasis in original). This rationale is further supported by the fact that the state statute dealing with obscene acts, N.J. STAT. ANN. § 2A:115-1 to -6 (West 1969), has remained unchanged since 1906.

The provisions of the Code with respect to obscenity significantly change present law.[124] It is interesting to note, however, that the New Jersey Criminal Law Revision Commission, created in 1968 by the New Jersey Legislature to prepare a revision of our criminal law,[125] made no recommendation in the area of obscenity.[126] The Commission stated that because the Legislature had submitted the obscenity issue to a separate study commission for review and recommendations,[127] it felt that it was "inappropriate . . . to make any recommendation in the area."[128]

The Code provides for basically two types of obscenity offenses: adult obscenity[129] and pornographic exploitation of children.[130] Since the section relating to adult obscenity makes punishable only *sales*[131] of obscene materials,[132] the Code legalizes the following transactions punishable under current law: "print," "loan," "publish," "distribute," "import," "give away," and possession with intent to perform the above transactions or possession with intent to "design," "prepare," or "offer for sale."[133] Municipalities, it is clear, will not be able to regulate in any fashion adult obscene transactions other than "sales." The difficult question is whether the local governmental units have been entirely preempted by the Code from enacting any obscenity legislation.

[124] *Compare* N.J. STAT. ANN. 2C:34-2 to -4 (West) with N.J. STAT. ANN. § 2A:115-1 to -6 (West 1969 & Supp. 1978-1979).

[125] N.J. STAT. ANN. § 2A:115-1 to -6 (West 1969 & Supp. 1978-1979).

[126] N.J. STAT. ANN. § 1:19-4 (West 1969).

[127] N.J. CRIMINAL LAW REVISION COMMISSION, 194th N.J. Legis., 2d Sess., THE N.J. PENAL CODE, VOL. I: REPORT AND PENAL CODE 122 (1971).

[128] An Act creating a commission to study obscenity and depravity in public media, prescribing its powers and duties, and making an appropriation therefore, ch. 121, 1969 N.J. Laws 380 (temporary act). This commission recommended a single tripartite statute regulating juvenile access to pornographic materials, offensive public displays, and adult access to pornographic materials. COMM. TO STUDY OBSCENITY AND DEPRAVITY IN PUBLIC MEDIA, 194th N.J. Legis., 1st Sess., REPORT TO THE GOVERNOR AND LEGISLATURE 43 (1970). Its proposal eventually died in a Senate committee. 1971 N.J. SENATE J. 232, 660.

[129] N.J. CRIMINAL LAW REVISION COMMISSION, 194th N.J. Legis., 2d Sess., THE N.J. PENAL CODE, VOL. II: COMMENTARY 306 (1971).

[130] N.J. STAT. ANN. § 2C:34-2 (West).

[131] N.J. STAT. ANN. § 2C:34-3 (West). There is a third provision, however, which deals with the "public communication of obscenity," *i.e.*, to communicate obscene material in such a manner that it may be readily seen or heard by members of public without their consent (for example, outdoor theatre screen which is in view of shopping center). N.J. STAT. ANN. § 2C:34-4 (West). Note that all prior state obscenity laws are expressly repealed by the Code. N.J. STAT. ANN. § 2C:98-2 (West).

[132] N.J. STAT. ANN. § 2C:34-2b (West).

[133] "Obscene materials" is defined broadly by the Code to include "any description, narrative account, display or depiction of sexual activity or anatomical area contained in, or consisting of, a picture or other representation, publication, sound recording, live performance, or film. . . ." N.J. STAT. ANN. § 2C:34-2(1) (West). This eliminates the distinction for purposes of the preemption issue between obscene "materials" and "acts or activities." *See* note 123, *supra*, and accompanying text.

In the Code, the Legislature evidences the intent of providing greater protection to minors from the effects and exposure of obscene materials.[134] Penalties are stiffer for offenders[135] and the definition of obscene materials is broader with respect to minors.[136] It has been held that this age distinction is not of constitutional significance.[137] But even with the greater proscription of obscene materials concerning minors, the Code, like present law,[138] still only forbids sales of obscene materials to minors and knowing admission to an exibition of an obscene film.[139] There is, for example, no provision for the punishment of those who knowingly *expose* minors to obscene materials outside of a commercial transaction,[140] at least insofar as obscenity law is concerned.[141] The question is then presented: could a municipality enact, consistent with the Code, a local obscenity ordinance prohibiting the exposure of obscene materials to children under the age of eighteen?

A defendant prosecuted under such an ordinance could validly raise the preemption issue and point to the more liberal policy of the state, as evidenced by the Code, with regard to the possession and exhibition of obscene materials. If the actions of the defendant do not rise to the level of "child abuse,"[142] and thus warrant a state prosecution, the defendant may be relieved of responsibility by the argument of complete state preemption of obscenity law.

The original draft of the Code provision relating to municipal control of offenses against the state did not specifically prohibit municipal ordinances

---

[134] *See* N.J. STAT. ANN. § 2C:34-3b (West) (a party knowingly selling obscene material to a person under 18 years of age is guilty of a crime of the fourth degree).

[135] *See* N.J. STAT. ANN. § 2C:34-3 (West).

[136] Obscenity offenses where adults (18 years of age or older) are involved are disorderly persons offenses, while, if minors are involved, it is a crime of the fourth degree. N.J. STAT. ANN. §§ 2C:34-2b, -3b, -3c (West).

[137] *Compare* N.J. STAT. ANN. §§ 2C:34-2a(1)(a) to (c) (West) *with* N.J. STAT. ANN. §§ 2C:34-3a(1) to (5)(b) (West).

[138] *See, e.g.*, State v. Seigel, 139 N.J. Super. 373, 354 A.2d 103 (Law Div. 1975).

[139] N.J. STAT. ANN. §§ 2A:115-1.6 to .11 (West Supp. 1978-1979).

[140] N.J. STAT. ANN. §§ 2C:34, -3b,c (West).

[141] The Code specifically repeals N.J. STAT. ANN. § 2A:96-3 (West 1969) (debauching or impairing morals of a child under 16) (*see* State v. White, 105 N.J. Super. 234, 251 A.2d 766 (App. Div. 1969), in this regard, holding that exposure of obscene materials to minor girls violated this section) and N.J. STAT. ANN. § 2A:96-4 (West 1969) (parent, guardian or legal custodian contributing to delinquency of minor, *i.e.*, child under 18, State v. Montalbo, 33 N.J. Super. 462, 110 A.2d 572 (Hudson County Ct. 1955)).

[142] N.J. STAT. ANN. §§ 9:6-1, -3 (West 1976) ("abuse of children" includes the performing of any indecent or immoral act in the presence of a child which may tend to debauch, endanger or degrade the morals of a child, the violation of which exposes the offender to a fine not exceeding $500.00 and/or imprisonment not exceeding three years).

which were "preempted" by the Code or its policies, only those which were in "conflict" therewith.[143] Section 2C:1-5d is not so limited.[144] This arguably indicates that the Legislature, by enacting the present provision, intended to completely occupy the field.

It is further evident that the distinction made in *Expo, Inc.*[145] between obscene materials and acts or activities, and, therefore, the Legislature's intention relative to preemption,[146] is no longer viable under the Code. The definition of obscene material in the Code is all encompassing.[147] It will now be most difficult for municipal corporations to overcome the preemption principles enunciated in *Wein v. Town of Irvington.*[148] Absent a subsequent contrary expression by the Legislature, it seems apparent that any municipal regulation of obscenity will be deemed preempted by the state. Whether the Legislature truly intended such a result is another question.

It must be remembered, however, that in the final analysis it will be the courts who will decide the intention of the Legislature with respect to preemption. Whether municipalities should or should not play an active role in the local prosecution of offenses against the state is a policy question within the power of the state and is not the issue;[149] the issue is whether the Code needlessly creates practical difficulties for the governing bodies of municipal corporations in their determination of the permissable scope of local regulation of state criminal offenses. As one commentator has questioned and noted:

> Did the legislature intend the statutory standards to be merely minimum requirements which would not preclude adoption of local supplementary regulations covering omitted subjects? Or were the statutory provisions intended to represent the maximum permissible degree of regulation in the area, thus precluding further control at the local level even of aspects not touched by the legislature?

---

[143] N.J. CRIMINAL LAW REVISION COMM. 194th N.J. Legis., 2d Sess., THE N.J. PENAL CODE, VOL. I: REPORT AND PENAL CODE 5 (1971).

[144] In addition, the final draft prohibited not only conflicting and preempted ordinances, but also "other local law[s] or regulation[s]." N.J. STAT. ANN. § 2C:1-5d (West).

[145] 149 N.J. Super. 416, 373 A.2d 1045 (Law Div. 1977).

[146] *See* note 123, *supra*, and accompanying text.

[147] N.J. STAT. ANN. §§ 34-2a(1), -3(a)(1) (West).

[148] 126 N.J. Super. 410, 315 A.2d 35 (App. Div.), *certif. denied*, 65 N.J. 287, 321 A.2d 248 (1974). The court therein held that since the subject matter of obscenity was encompassed within state law, the municipal ordinance, though not in conflict, was preempted. *Id.* at 416-17, 315 A.2d at 39.

[149] N.J. STAT. ANN. § 2C:34-2b (West). The local governmental units of New Jersey have the power to zone pursuant to the Municipal Land Use Law, N.J. STAT. ANN. §§ 40:55d-1 to -92 (West Supp. 1978-1979).

> *(Obviously, although the legal issue is generally framed in terms of a legislative "intent," this is only a convenient fiction; the judicial task is one of policy identification, evaluation, and articulation.)* [150]

With such a strong commitment to a comprehensive and exhaustive treatment of the criminal law in New Jersey underlying the Code, it seems assured that the courts will take a correspondingly stern view of municipal enactments which may touch upon areas addressed by the Code. This is probably so despite the admonition of the New Jersey Constitution [151] that municipal legislation is to be "liberally construed." For, as indicated previously, preemption is largely a matter of Legislative intent,[152] and where the Legislature intends its policies to be exclusive, municipal authority must lapse.

IV. CONCLUSION

In the final analysis, one might conclude that section 2C:1-5d adds nothing to the body of law on the subject of state preemption of municipal penal legislation. This is so because the doctrine of preemption would have operated irrespective of section 2C:1-5d to check municipal enactments in areas co-opted by the state. Section 2C:1-5d is merely a legislative restatement of a judicially developed doctrine that courts have long employed without the need of legislative direction. Section 2C:1-5d of the Code, therefore, in actuality does not intrinsically change prior New Jersey preemption law. It is somewhat superficial in this respect. The evil of this preemption provision however lies in the lack of guidance given to our local governmental units. A commentator on the Code's preemption provision has aptly noted as follows:

> The requirement that a local ordinance must not be contrary to "any policy of this State . . . whether that policy be expressed by inclusion of a provision in the Code *or by exclusion of that subject from the Code*," places upon a local governing body a well-nigh impossible task of ascertaining whether a proposed ordinance would conflict with an abstract standard which finds no direct expression in the Code. The inquiry would often focus on determining whether something was omitted from the Code through sheer inadvertence or for a policy reason. Local lawmakers cannot reasonably

---

[150] S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 259 (1970) (emphasis added).

[151] N.J. CONST. art IV, § VII, para. 11.

[152] Summer v. Township of Teaneck, 53 N.J. 548, 554, 251 A.2d 761, 764 (1969).

> be expected to make such thorny judgments. So, too, a high degree of uncertainty would be injected into any local ordinance until such time as a court determines whether a particular ordinance meets this standard. In short, the standard provided by the final phrase of subsection d is too nebulous to provide a meaningful guideline, and it should be deleted.[153]

If, therefore, the doctrine of preemption would have been a judicial concern without the mandate of section 2C:1-5d, what is the value of the provision? What is added to the body of New Jersey law when the Legislature declares, in effect, that all municipal legislation may stand except that which is preempted? Is it merely a restatement of the obvious?

Perhaps the value of the provision lies in the fact that the state Legislature has thereby reaffirmed its commitment to a comprehensive criminal code and indicated that the courts are to strictly construe any other enactments which bear upon state policy thus expressed. Legislative recognition of the preemption doctrine may serve to emphasize the Legislature's desire for a single, integrated code of criminal justice.

However, even under the preemption doctrine as it has developed in New Jersey, considerations arise which may frustrate the Legislature's purpose in enacting section 2C:1-5d. As discussed earlier,[154] a municipality may avoid the strictures of criminal procedure in prosecuting ordinance violations by declaring their enforcement provisions to be "penalties". It is an open question whether, by doing so, a municipality may avoid what would otherwise be a fatal clash with the state criminal code.

Further, decisions in cases such as *State v. Greco* [155] indicate that the state and the municipality have concurrent authority over many areas of criminal justice, irrespective of the doctrine of preemption. Are these cases now to be overruled by implication?

Obviously, the answers to these questions must await judicial disposition or legislative clarification. A concept as ephemeral as preemption does not lend itself to ready and predictable analysis. Despite such difficulties, however, a municipality may profitably engage in a re-examination of its ordinance structure in order to ferret out those enactments which reasonably appear to offend state policy. Such an examination would save much needless litigation in the future and, in the last analysis, facilitate a quicker and more just disposition of criminal prosecutions.

---

[153] Grossman, *The New Jersey Code of Criminal Justices: Analysis and Overview*, 3 SETON HALL LEGIS. J. 1, 6-7 (1978) (footnotes omitted) (emphasis in original).

[154] *See* p. 189, *supra*.

[155] 86 N.J. Super. 551, 207 A.2d 363 (Atlantic County Ct. 1965).