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The Status of the Police Power of Ohio Municipalities to Enact Criminal Ordinances

Prior to 1912, Ohio municipalities were divided into two classes according to their size. This arbitrary division was the sole means employed to determine governmental structure.¹ Such a system, whereby "the municipal code provides . . . one single form of government for all villages,"² failed to meet the ever increasing needs of cities which were beginning to develop their modern appearance in an industrial society. Moreover, since municipal corporations possessed such powers as were

expressly granted by statute, and such as may be implied as essential to carrying into effect those which are expressly granted, the result . . . was that the Legislature assumed the full and complete authority over the governmental powers of municipalities.³

With the predominantly agrarian sector in almost complete control of the legislature, the straight jacket began to tighten on the cities, and relief was imminent.

Relief manifested itself in the Home Rule Amendment to the Ohio Constitution⁴ which, among other things, opened the door for each city to adopt the form of government it desired, and removed centralized legislative control over municipal functions.⁵

Some proponents of the Home Rule Amendment envisioned municipalities as having all powers of local self-government, an "*imperium in imperio*."⁶ The early decisions, however, left little doubt that at least "police, sanitary, and other similar regulations" would be subject to the prohibition that they not "conflict with general laws" of the state.⁷ How

1. The Ohio Municipal Code of 1902 divided municipalities into two groups "including all places with a population in excess of 5,000 and villages, which could have 5000 [sic] or less. One uniform plan of government was provided for each of these two groups." Walker, *Municipal Government in Ohio Before 1912*, 9 OHIO ST. L.J. 1, 12 (1948).

2. *Id.* at 13 n. 21.

3. 1 CROWLEY, OHIO MUNICIPAL LAW § 5.04, at 41 (1962).

4. The grant of home rule to municipalities is primarily in article XVIII, section 3 of the Ohio Constitution: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

5. 1 CROWLEY, *op. cit. supra* note 3, § 5.09.

6. Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 21 (1948).

7. In analyzing article XVIII, section 3 of the Ohio Constitution, the early decisions concluded that there are two separate and distinct grants of power. Whether the "non-conflict" clause, therefore, limits both grants of power or only the second one relating to police, sanitary, and other similar regulations has been resolved in *State ex rel. Arey v. Sherrill*, 142 Ohio St. 574, 53 N.E.2d 501 (1944), to pertain only to the second grant of power. *But see Benjamin v. City of Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957). It is undisputable, nevertheless, that the grant of police power is subject to the limitation that it will not be in conflict

much authority was actually given, and how much power municipalities now have to define crimes and impose penal sanctions in accordance with the exercising of police power are questions which are still being resolved by the legislature and courts today.

The legislature had exclusive control over municipalities before the Home Rule Amendment to the Ohio Constitution. And even after the amendment, some courts were still of the opinion that "there is no such thing as municipal police power as distinguished from state police power [P]olice power is a power that inheres only in the sovereign."⁸ Since municipalities are not sovereigns, they are not inherently able to exercise that power. Subsequently, however, a view was expounded by some courts that municipalities themselves, and not the state, have inherent police power.⁹ But the view accepted by the majority of courts has been that article XVIII, section 3 of the Ohio Constitution "contemplates that both the state and the municipalities of the state may exercise the same police power; the only limitation being that the exercise of that power by a municipality shall not conflict with the general laws of the state."¹⁰

If municipalities have their own police power up to the point that the exercise of such power "conflicts" with the "general laws" of the state, the obvious problem is to define "general laws" and "conflicts."

WHAT ARE "GENERAL LAWS"?

Before the 1912 Home Rule Amendment was passed, the municipality was completely dominated by the state. A statute such as section 6307-6 of the General Code was typical. It provided that local authorities could not regulate the speed of motor vehicles by ordinance. The question of whether this statute was an example of the "general laws" referred to in the Ohio Constitution was decided in the negative in *City of Fremont v. Keating*.¹¹ Here, the court held that "general laws" were not statutes which expressly granted or denied power to municipalities. They are, however, statutes which contain provisions of

with the general laws of the state. For a general discussion of the history and the varied interpretations which have been given to section 3 of the Home Rule Amendment, see 3 FARRELL-ELLIS, OHIO MUNICIPAL CODE §§ 1.20-1.30 (11th ed. 1962), and Fordham & Asher, *supra* note 6, at 18-27.

8. *Cleveland Tel. Co. v. City of Cleveland*, 98 Ohio St. 358, 362, 121 N.E. 701, 702 (1918).

9. *State ex rel. Ellis v. Blakemore*, 116 Ohio St. 650, 660, 157 N.E. 330, 333 (1927).

10. *Greenburg v. City of Cleveland*, 98 Ohio St. 282, 286, 120 N.E. 829, 830 (1918).

11. 96 Ohio St. 468, 470, 118 N.E. 114 (1917); *accord*, *Greenburg v. City of Cleveland*, *supra* note 10, at 286, 120 N.E. at 830. "The purpose of the non-conflict provision . . . is not to empower the General Assembly to directly limit or restrict the power of municipalities to adopt police regulations, but, instead, is to secure uniform operation of state police regulations throughout all the political subdivisions of the state." 3 FARRELL-ELLIS, *op. cit. supra* note 7, § 1.30(a), at 40.

substantive law to be followed *generally* throughout the state.¹² Section 6307-6, therefore, was unconstitutional.

The rule in the *Keating* case has been generally accepted by Ohio courts. In *City of Youngstown v. Evans*,¹³ the statute in question limited the term of imprisonment a municipal ordinance could impose to six months. The court found this statute unconstitutional as it was not a "general law" contemplated under the Home Rule Amendment.

WHAT IS "CONFLICT"?

Whether substantive powers to define crimes and impose criminal sanctions are to be exercised by the state exclusively, by the state and the municipality concurrently, or by the municipality itself are issues which should have been answered simply. That is, since the municipal corporation can exercise its police power up to the point of "conflict" with substantive provisions of state law, it would seem relatively simple to develop a workable definition of "conflict." But the courts of Ohio have not taken the simplest approach. For one thing, the decisions which develop the concept of "conflict" are sensitive to overriding policy determinations, necessitating some relaxation of strict logical principles. Moreover, the decisions which attempt to rely solely on precedent are conflicting in many instances. This writer will attempt to give the reader an insight into the various possibilities of construing "conflict." A discussion of underlying policy considerations, which have so much effect in most decisions, will follow.

Implied Conflict

One alternative in defining conflict is to provide that where the state has a statute covering the same subject matter as the municipal ordinance, the ordinance is void if it attempts to modify the statute. This is so even if the statute could have prohibited an act and did not. The municipality has no right to modify a state statute. Although an implied right to do an act not expressly prohibited by the state has accrued, no power exists in the municipality to infringe on the state's pre-emption of the subject matter. The rationale of such a policy is based upon the principle that only the state has the power to define crimes. Therefore, since there are no common-law crimes in Ohio,¹⁴ conduct the state does not define as a crime must be a legal act. One of the strong arguments for such a policy is the need for uniformity in criminal law.

12. "General law" includes regulations of administrative agencies as they are the "voice of the general assembly. . . ." *Neil House Hotel Co. v. City of Columbus*, 144 Ohio St. 248, 252, 58 N.E.2d 665, 667 (1944).

13. 121 Ohio St. 342, 168 N.E. 844 (1929).

14. *State v. Healy*, 156 Ohio St. 229, 239, 102 N.E.2d 233, 239 (1951); *Vanvalkenburg v. State*, 11 Ohio 404, 405 (1842).

Although this view has been adopted by several jurisdictions, Ohio, with a few exceptions, has avoided this rule. The most notable exception is *Neil House Hotel Co. v. City of Columbus*.¹⁵ In that case a state statute prohibited the sale of beer and intoxicating liquors after 2:30 a.m. on Sunday. The court invalidated a Columbus ordinance which banned the sale of intoxicating beverages after midnight as conflicting with the general law of the state. In so doing, the court emphasized that since under the state law, selling liquor after midnight but before 2:30 a.m. was not prohibited, an ordinance which banned this must be invalid. There is a right to do what the state does not prohibit.¹⁶ The dissent,¹⁷ however, recognized the need for local, rather than centralized control, holding that just because there is no wrong created by statute, there is no absolute right created either. Moreover, under the implied right theory, it is foreseeable that the state legislature might nullify the power of municipalities to pass penal ordinances. Any enactment by the legislature in the police power domain would virtually pre-empt municipalities from legislating in that particular field. This is clearly abortive to the concept of municipal home rule.

However, the compelling policy reason for the rule announced in the *Neil House* case is the desirability of a uniform criminal law.¹⁸ But whether uniformity is desired to the exclusion of local control in all instances is a question considered throughout this study.

Express Conflict

Another alternative for allocating the power to pass penal ordinances is to allow both the state and municipality to legislate concurrently. This rule is analogous to the rule that the same act may be an offense against the state and also an offense against the federal government, each offense being punished without violation of the double jeopardy provisions of

15. 144 Ohio St. 248, 58 N.E.2d 665 (1944).

16. In *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 86, 167 N.E. 158, 160 (1929), the court held that "when the law of the state provides that a rate of speed greater than a rate therein specified shall be unlawful, it is equivalent to stating that driving at a less rate of speed shall not be a violation of the law. . . ." This clearly is an application of the "implied conflict" principle, although the court specifically stated that the test is the "express conflict" rule announced in *Village of Struthers v. Sokol*, 108 Ohio St. 263, 268, 140 N.E. 519, 521 (1923). The statute, however, was changed to read: "It shall be *prima facie* lawful for the operator of a motor vehicle to drive the same at a speed not exceeding the following" OHIO GEN. CODE § 12603 (Emphasis added). In *Schwartz v. Badila*, 133 Ohio St. 441, 14 N.E.2d 609 (1938), which had an almost identical factual situation, the proper decision was reached.

17. *Neil House Hotel Co. v. City of Columbus*, 144 Ohio St. 248, 253, 58 N.E.2d 665, 668 (1944) (dissenting opinion).

18. *Noey v. City of Saginaw*, 271 Mich. 595, 261 N.W. 88 (1935); *Williams v. City of Jackson*, 164 N.E.2d 195 (Ohio C.P. 1959).

the United States Constitution.¹⁹ The federal-state dichotomy is based on double sovereignty or division of power.

But there is no analogous double sovereignty of, or division of power between state and municipality. There is, nevertheless, a division of power between state and municipality in the sense at least of a delegation of part of the state power to a municipality relative to municipal affairs.²⁰

Another reason often given for this dual authority is that offenses committed in municipalities may cause more serious consequences than the same offenses committed outside the city boundaries. This is due to additional injuries which could occur because of the greater number of inhabitants in the cities.²¹

In Ohio, the earliest decision advocating this view was *Greenburg v. City of Cleveland*.²² While interpreting the intent of the people in adopting the Home Rule Amendment, the court held that both the state and municipalities may exercise the same power so long as they do not conflict with each other. The court noted that there was no express statute covering the identical offense the ordinance defined. However, by way of dictum, the court said that "even if the general assembly . . . in express terms prohibited the municipality from legislating upon the same subject-matter," the ordinance still would be valid.²³

It also has been held that Ohio municipalities have concurrent power with the state legislature to define the crime of assault and battery.²⁴ Furthermore, where the state defined a crime involving lotteries, it did not pre-empt the municipality from passing a similar ordinance.²⁵

Of course, there is a limit to how far the municipality can go in exercising its independent jurisdiction as a dual sovereign. Illustrative of this limit is the court's decision in *Village of Struthers v. Sokol*,²⁶ which validated a municipal ordinance that prohibited the manufacture and sale of liquor. "No real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa."²⁷ Unless one authority grants a license to do something expressly prohibited by the other, there can be no "conflict."

This definition of "conflict" has been followed by the majority of

19. 6 MCQUILLIN, MUNICIPAL CORPORATIONS § 23.10, at 402-04 (3d ed. 1949); *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923).

20. 6 MCQUILLIN, *op. cit. supra* note 19, at 404.

21. *Id.* at 405.

22. 98 Ohio St. 282, 120 N.E. 829 (1918).

23. *Id.* at 286, 120 N.E. at 830.

24. *City of Dayton v. Miller*, 154 Ohio St. 500, 96 N.E.2d 780 (1951).

25. *City of Cleveland v. Jones*, 184 N.E.2d 494 (Ohio Ct. App. 1962).

26. 108 Ohio St. 263, 140 N.E. 519 (1923).

27. *Id.* at 268, 140 N.E. at 521.

Ohio courts. For example, driving under certain enumerated speed limits was prima facie lawful under the applicable state statute. A municipal ordinance, however, stated that driving under these speed limits may be prima facie recklessness due to adverse weather conditions. The ordinance, therefore, was in "conflict" with the "general law" of the state and invalid.²⁸ But an ordinance relating to "beggars" within the city limits is not in conflict with a state law applying only to male "tramps" outside of their home community.²⁹ The court found no conflict, *i.e.*, no "discord of action, feeling or effect; nor antagonism of interests or principles"³⁰

In conjunction with the problem of dual sovereignty is the problem of double jeopardy. There is still some doubt in various jurisdictions as to whether punishment under a statute can be imposed for an act constituting violation of the statute and an ordinance concurrently.³¹ The view in Ohio is that punishment for one offense is not a bar to punishment for another offense growing out of the same act.³² Moreover, whether it is unfair to subject one to double prosecution for one act is not a judicial problem, but one in the realm of legislative determination.³³

Having determined that the "implied right" theory announced in the *Neil House* case advocates uniformity in the law, it is readily seen that creating a type of dual sovereignty is an attempt to decentralize the power of the state to define crimes and to give this power to the individual municipality. Whether this is a valid consideration will be scrutinized in a subsequent section.

"CONFLICT" IN PENALTIES

In the above discussion, "conflict" was determined by comparing the substantive provisions of statutes and municipal ordinances. While this determination is the first step in ascertaining whether an ordinance is in conflict with a state statute, it is not the exclusive test. Not only must the ordinance and statute be substantively non-conflicting, but the punishment prescribed in the ordinance must also be in harmony with the punishment designated in the statute.³⁴

28. *Schwartz v. Badila*, 133 Ohio St. 441, 14 N.E.2d 609 (1938).

29. *City of Cleveland v. Gogola*, 113 N.E.2d 264, 265 (Ohio Ct. App. 1953).

30. *Village of Struthers v. Sokol*, 108 Ohio St. 263, 268, 140 N.E. 519, 521 (1923), citing THE CENTURY DICTIONARY when defining "conflict" as used in article XVIII, section 3 of the Ohio Constitution.

31. 6 McQUILLIN, *op. cit. supra* note 19, § 23.12.

32. *State v. Martin*, 154 Ohio St. 539, 96 N.E.2d 776 (1951); *Koch v. State*, 53 Ohio St. 433, 41 N.E. 689 (1895).

33. *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923).

34. *City of Dayton v. Miller*, 154 Ohio St. 500, N.E.2d 780 (1951). *Village of Struthers v. Sokol*, *supra* note 33.

When an ordinance and statute define the same act as a crime, but impose different penalties, the technical test of "conflict" enunciated in the *Struthers* case does not apply. Therefore, even though some courts hold that they are following the *Struthers* decision, they invariably apply the test: is the municipality empowered to impose such a penalty under the Home Rule Amendment to the Ohio Constitution?³⁵

Both Misdemeanors

Ohio courts have been unanimous in their decisions when the penalties in the statute and ordinance are both misdemeanors. For example, "Where the only distinction between a state statute and a municipal ordinance . . . is as to the penalty only but not to the degree (misdemeanor or felony) of the offense, the ordinance is not in conflict with the general law of the state."³⁶ Thus, where state law prescribes a mandatory three-day jail sentence for a conviction of drunken driving, a municipal ordinance which does not require the mandatory sentence is not in conflict with the general law.³⁷

Statute is a Felony; Ordinance a Misdemeanor

Another approach is taken by the courts, however, when the difference between the statute and the ordinance is that the statute makes the violation of an act a felony, but violation of the same act under the ordinance is a misdemeanor. Although the court recognized that

as a practical matter . . . [it] might be desirable to encourage the apprehension and prosecution [of those who commit this crime by the municipality itself] [It could not] ignore those provisions of organic and statutory law which preclude such a result.³⁸

Where the state statute on obscene literature differed from the Cincinnati ordinance in respect to degree of punishment — the statute making the offense a felony and the ordinance a misdemeanor — the ordinance contravened the statute. The demurrer to the affidavit of the city, therefore, was sustained on appeal.³⁹

There are some Ohio courts, however, which follow a different line of reasoning and achieve an opposite result. Notably, in *Savage v. Alvis*,⁴⁰ an Ohio appellate court found no justification for prohibiting a municipality from punishing an offense as a misdemeanor, although the

35. In *City of Cleveland v. Betts*, 168 Ohio St. 386, 154 N.E.2d 917 (1958), the court determined that *Struthers* was not the "exclusive" test.

36. *City of Toledo v. Best*, 172 Ohio St. 371, 176 N.E.2d 520 (1961) (syllabus).

37. *Id.* at 375, 176 N.E.2d at 522.

38. *City of Cleveland v. Betts*, 168 Ohio St. 386, 390, 154 N.E.2d 917, 919 (1958).

39. *City of Cincinnati v. Coy*, 115 Ohio App. 478, 182 N.E.2d 628 (1962).

40. 109 Ohio App. 523, 161 N.E.2d 633 (1959).

penalty under the statute was a felony. The legislature can create several crimes arising out of a single transaction. In addition, more than one penal statute can be enacted covering the same offense, without prosecution for one crime being a bar to subsequent prosecution for the other. Therefore, the municipality should be allowed to punish crimes as misdemeanors whether the legislature has designated the punishment for the same crime a felony or misdemeanor.⁴¹ The court in the *Savage* case, however, is in the minority in Ohio. The dissenting opinion expressed the popular Ohio view:

We do not believe that an offense can be both a felony and a misdemeanor . . . [Since both] statutes are repugnant as to the punishment, they should not be permitted to stand.⁴²

*Penalty in Ordinance is Much Greater Than Statute,
But Not a Felony*

Thus far it has been observed that where the statute prescribes a penalty that is only slightly greater than the comparable municipal ordinance, the courts of Ohio have refused to strike down the ordinance. There is no conflict with the general laws of the state under article XVIII, section 3 of the Ohio Constitution. It has also been noted that where the penalty is so different that the statute imposes a felony and the ordinance a misdemeanor, the ordinance has been held invalid as conflicting with the general laws of the state. The remaining situation, therefore, is where the penalty in the ordinance is much greater than in the statute, but is not as great as the punishment for a felony. Such a situation was present in *Matthews v. Russell*.⁴³ The City of Dayton had a municipal ordinance which punished the crime of assault and battery with a maximum of a one thousand dollar fine and one year in the workhouse. The state statute designated a fine of not more than two hundred dollars, or imprisonment for not more than six months, or both. Clearly, the penalty was much greater in the ordinance, but the court refused to strike it down on the theory that the penalty in an ordinance is not confined or limited to the penalty in the state statute.⁴⁴

DETERMINATION BY SUBJECT MATTER

Limiting the discussion thus far to the technical meaning of "conflict with general laws" has resulted in a neglect of policy considerations.

41. *Id.* at 527, 161 N.E.2d at 636.

42. *Savage v. Alvis*, 109 Ohio App. 523, 529-30, 161 N.E.2d 633, 637 (1959) (dissenting opinion).

43. 87 Ohio App. 443, 95 N.E.2d 696 (1949).

44. *Id.* at 445, 95 N.E.2d at 697. At the time of *City of Dayton v. Miller*, 154 Ohio St. 500, 96 N.E.2d 780 (1951), there was a question of whether this doctrine would be extended to include felonies. See generally 13 OHIO ST. L.J. 111 (1952).

Courts, however, are conscious of the possible effects of their decisions upon society, even though they may not mention this in their opinion. Therefore, policy arguments have great influence upon courts in weighing first, what substantive powers were intended to be conferred exclusively to the municipalities, and second, which powers were intended to come under police powers. Moreover, once an ordinance is classified under the police power, policy arguments must be considered in determining "conflict" with similar state laws.

Streets and Traffic

The problem of controlling streets and traffic is best illustrated by the case of *Schneiderman v. Sesanstein*.⁴⁵ This case involved section 12603 of the Ohio General Code, which made a rate of speed greater than twenty-five miles per hour prima facie evidence of unreasonable and improper driving outside the business district of a municipal corporation. Section 12608 of the General Code stated that the above provisions "shall not be diminished, restricted or prohibited by an ordinance . . . of a municipality . . ." A comparable ordinance in the city of Akron established a speed limit of fifteen miles per hour in a school zone. The alleged injury in this civil action occurred outside the Akron business district, but in a school zone, bringing into play the statutes and the ordinance.

The dissenting opinion⁴⁶ took the view that the right to regulate traffic on city streets is a power peculiar to the municipality. After all, the argument continued, traffic problems are different in every community. Therefore, traffic regulation should be handled by each municipality rather than by the state. In recognition of this fact, the dissent concluded that the power to regulate traffic on the streets of the city should be a power of local self-government. The majority, however, categorized the regulation of traffic as part of the police power of the state. Therefore, municipal traffic ordinances must not be in conflict with comparable state statutes. Thus, using the "implied right" theory for determining substantive conflict,⁴⁷ especially when coupled with General Code section 12687,⁴⁸ the ordinance was declared to be invalid.

45. 121 Ohio St. 80, 167 N.E. 158 (1929).

46. *Id.* at 92, 167 N.E. at 162 (dissenting opinion).

47. See note 15 *supra*.

48. The court overlooked the argument that section 12603 of the General Code is not a "general law" as contemplated by article XVIII, section 3 of the Ohio Constitution and, therefore, is not a limitation on the municipalities' power to regulate traffic. Supporting this argument is *City of Fremont v. Keating*, 96 Ohio St. 468, 118 N.E. 114 (1917), which held that a statute, which provided that local authorities shall not regulate the speed of motor vehicles by ordinance, was not a general law. Moreover, in *City of Youngstown v. Evans*, 121 Ohio St. 342, 168 N.E. 844 (1929), where the statute in question limited the term of imprisonment a municipal ordinance could impose to six months, the court found this to be

Similar situations recently have evolved around section 4511.19 of the Revised Code, prohibiting driving while intoxicated; section 4511.99 (B), requiring a mandatory three-day jail sentence for driving while intoxicated; section 4511.06, prescribing uniform application of Chapter 4511 in all political subdivisions of the state;⁴⁹ section 2947.13, permitting suspension of a sentence in misdemeanors; and the Toledo driving-while-intoxicated ordinance, which has no mandatory three-day jail sentence. The only case to reach the Ohio Supreme Court resolving these laws was *City of Toledo v. Best*.⁵⁰ Using questionable statutory construction,⁵¹ the court refused to apply section 4511.99(B) on the grounds that the proper applicable statute was section 2947.13. Therefore, the Toledo ordinance was valid, and the mandatory three-day jail sentence was not observed.

Although there is no question that the *Best* decision represents the highest authority construing these statutes, Ohio's lower courts prior to the *Best* case were reluctant to follow this same line of reasoning. The first case in point was *City of Toledo v. Ransom*.⁵² In this case the court held section 4511.99(B) of the Revised Code valid and applicable.⁵³

an abuse of legislative discretion repugnant to the Ohio Constitution. On the basis of these decisions, it is difficult to justify a provision in a statute which attempts to control the police power of the municipal corporation by an express stipulation limiting that power. This is so especially in the light of modern constitutional interpretation which acknowledges that the grant of police power comes from the grant of "all powers of home rule." The limitation in the second half of article XVIII, section 3 is there to insure uniformity of law where the state wishes to promulgate a specific regulation of police power. But clearly, where the state has not adopted such a police regulation, the legislature is not justified in limiting the power of the municipality as conferred by the constitution. 3 FARRBELL-ELLIS, *op. cit. supra* note 7, § 1.30(a).

49. Section 4511.06 of the Ohio Revised Code states: "Sections 4511.01 to 4511.78, inclusive [and] 4511.99 . . . of the Revised Code shall be applicable and uniform throughout this state and in all political subdivisions and municipal corporations therein, and no local authority shall enact or enforce any rule or regulation in conflict with such sections." (Emphasis added). Is this statute a "general law" as contemplated by article XVIII, section 3 of the Ohio Constitution? See note 46 *supra*.

50. 172 Ohio St. 371, 176 N.E.2d 520 (1961).

51. Although the court "adopts" the court of appeals' decision, it makes the additional observation that section 2947.10 of the Ohio Revised Code, which is the authority for courts to impose a fine, imprisonment, or both, if the misdemeanor calls for punishment of a fine and imprisonment, and section 2947.13, which allows the courts to suspend such a sentence, must be read *in pari materia* with all other criminal statutes, specifically section 4511.99(B). Therefore, the three-day mandatory jail sentence did not apply. This author feels that the court failed to apply the apparent legislative intent expressed in a latter, specific statute, which accentuated a strong public policy to bolster the laws in regard to drunken driving. "A statute is not *in pari materia* if its scope and aim are distinct or where a legislative design to depart from the general purpose or policy of previous enactments may be apparent." LLEWBELLYN, THE COMMON LAW TRADITION — DECIDING APPEALS app. C., at 523 (1960).

52. 169 N.E.2d 657 (Toledo, Ohio Munic. Ct. 1960).

53. This case acknowledges one of the most important reasons for allowing municipal ordinances to exist where there is also a state statute. That is, "it is obvious that the ordinance is more beneficial to the municipality, at least for the purpose of raising funds rather than incurring expenses for imprisonments." *Id.* at 660 (dictum).

Moreover, in *Village of Hiram v. Conner*,⁵⁴ the court persuasively argued that it was the express intent of the legislature in section 4511.06 of the Revised Code to make the problem of traffic operating offenses and penalties uniform throughout the state.⁵⁵ Thus, the court invalidated an ordinance identical to Toledo's drunken driving ordinance.

In the *Best* case, the Ohio Supreme Court advocated the policy of local control of traffic regulation. Although this author believes in as much local control as is feasible, uniformity of motor vehicle laws is an end that will:

- 1) Enable motorists and pedestrians to know and obey the rules wherever they go, because the rules would be the same everywhere;
- 2) Make a more orderly and efficient flow of traffic;
- 3) Reduce the danger of accidents — with their toll of death and injury;
- 4) Improve the standards for driver licensing, lead to better enforcement, and yield extensive economic benefits.⁵⁶

These goals are noteworthy and should be considered by the supreme court when they next have the opportunity to choose between uniformity and local autonomy in moving traffic regulations.

Felonies

"In many jurisdictions the rule is that felonies . . . cannot be dealt with by ordinance under general power, since they are regarded as state-wide and not local concern."⁵⁷ The power to define and punish serious crimes, such as arson and murder, is, likewise, not a power of home rule in Ohio.⁵⁸ Because, historically, a felony conviction carried with it penalties of a severe and lasting character, and because these "serious" crimes were considered crimes against the sovereign and not against the municipality, it was unheard of for a municipality to legislate in the field of serious, felonious crimes.

But the distinction that courts make in prohibiting such action is, to say the least, puzzling. In *City of Dayton v. Miller*,⁵⁹ the court held that municipal corporations have the authority to define the offense of assault and battery, the ordinance in point having a possible one-year jail sentence as a punishment. If the possible penalty would have been impi-

54. 173 N.E.2d 408 (Ravenna, Ohio Munic. Ct. 1960).

55. "This consuming desire for uniformity of treatment of traffic offenders is in line with modern development and it is noteworthy that the cry of traffic safety authorities . . . is directed toward uniformity of punishment." *Id.* at 411.

56. PRESIDENT'S COMMITTEE FOR TRAFFIC SAFETY, LAWS AND ORDINANCES 5 (1961).

57. 6 McQUILLIN, *op. cit. supra* note 19, § 23.06, at 391.

58. Fordham & Asher, *Home Rule in Theory and Practice*, 9 OHIO ST. L.J. 18, 68 (1948).

59. 154 Ohio St. 500, 96 N.E.2d 780 (1951).

sonment for one year and a day,⁶⁰ there is no question that the ordinance would have been in conflict with the general laws of the state and, therefore, invalid.⁶¹ But, since it is for one day less, it is enforceable.⁶² Such a line of demarcation is both arbitrary and unjustifiable. This author suggests that there are crimes, peculiarly within the scope of home rule powers, which municipalities should be allowed to define and punish whether they are technically felonies or misdemeanors. The state legislature is not as sensitive to the needs and wants of the individual communities as are city councils.⁶³ It is hoped, therefore, that Ohio municipalities will be allowed to follow the trend of municipal corporations in other jurisdictions

in predicating municipal power to create and punish for offenses upon general municipal police power regardless of whether the offense is theoretically conceived as one against the state or one against the municipality.⁶⁴

It is true that there must be a line drawn in defining crimes due to the need for uniformity in the law. The location of this line should not be determined by how great the penalty is, but should be based on conscientious weighing of the equities of local control versus uniformity of state action. The fear of unruly and precarious abuses of discretion by the municipalities in the light of increased power, however, is eliminated when it is remembered that all legislation, whether by municipalities or state legislatures, is still subject to the safeguards provided by the constitutional prohibitions against unreasonableness and arbitrariness.⁶⁵

“Laws or ordinances passed by virtue of police power which limit or abrogate constitutionally guaranteed rights must not be arbitrary, dis-

60. Section 1.06 of the Ohio Revised Code defines, in part, a felony as an offense which may be punished by imprisonment in the penitentiary. Section 1.05 states that imprisonment in the penitentiary is for offenses with a maximum term of longer than one year.

61. In *City of Cleveland v. Jones*, 184 N.E.2d 494 (Ohio Ct. App. 1962), the court held an ordinance which made the possession of policy slips a misdemeanor valid, as the comparable state statute also made the possession of policy slips a misdemeanor. However, by way of dictum, the court clearly asserts that if this defendant were ever found guilty of the same crime in the future, the municipal ordinance then would be void since the state statute makes subsequent convictions a felony. The court, therefore, determines the *validity* of the municipal ordinance on the basis of whether this was a first or second offense. The court's "logic" clearly indicates the need for a new standard.

62. One argument presented for the position that municipalities should not be allowed to define crimes which are felonies is that "a strong historical argument can be made . . . [T]his power has never been delegated to cities anywhere else in the United States" so it probably was not intended to be delegated in Ohio. 13 OHIO ST. L.J. 111, 113 (1952).

63. Except in very serious offenses such as murder, rape, etc. many authors take the position that the state and city should have concurrent power "in some situations" to punish the same crime, although they should not be able to punish them separately. This is especially true when paradoxical situations exist, as in Ohio, where manpower of municipal police forces is so much greater than state highway patrolmen and sheriffs. Scott, *Municipal Penal Ordinances in Colorado*, 30 ROCKY MOUNTAIN L. REV. 267, 283 (1958).

64. 6 McQUILLIN, *op. cit. supra* note 19, § 23.02, 381-83.

65. *City of Cincinnati v. Correll*, 141 Ohio St. 535, 49 N.E.2d 412 (1943).

criminary, capricious, or unreasonable and must bear a real and substantial relation to the subject to be obtained, namely the health, safety, morals, or general welfare of the public."⁶⁶

CONCLUSION

There are many areas within the scope of the police power of Ohio municipalities neglected in this discussion. An attempt has been made, however, to inform the reader of the processes taken by the courts in determining the validity of municipal ordinances under the Home Rule Amendment.

The first criterion for ratification of municipal ordinances by the courts is that the ordinance must not conflict with "general laws" of the state. "General laws" are statutes which expressly define conduct to be followed throughout the state. Statutes which attempt to limit the power of the municipality to impose penal sanctions other than those imposed by the state are not "general laws."

A municipal ordinance is in "conflict" with a state statute when the ordinance creates a right prohibited by the statute, or vice versa. A minority of Ohio courts, however, hold that conduct not expressly prohibited by a statute impliedly creates a legal right which cannot be abrogated by a municipal ordinance.

The second criterion for ratification is that the penalty in the ordinance must be in harmony with the penalty in the statute. Penalties under municipal ordinances may be greater or lesser than those prescribed by statute so long as both penalties are misdemeanors. If punishment under a statute is a felony, however, the municipality cannot punish the same act as a misdemeanor. Moreover, Ohio municipalities have no power to enact a punishment for a felony.

Finally, and most important, the conduct of the municipality must be within the range of activity that the municipality, rather than the state, is best able to regulate. In determining this, courts must look to the equities embodied in uniformity of the law in comparison with the attributes of local home rule.

The trend seems to lead to an increasing amount of power in the municipal corporation. How far, and into what fields it will eventually go is beyond the imagination of this author. It is hoped, moreover, that the courts will take heed to the organic needs of municipalities as they undergo their inevitable change in today's urban age.

Because the police power is based on public necessity it is impossible to state in advance of knowing the particular circumstances relied on as the basis for the exercise of the police power whether the subject of a particular police regulation is a proper one. Precedents are not controlling because changes in social and economic need brought about

66. 3 FARRELL-ELLIS, OHIO MUNICIPAL CODE § 9.5, at 279-80.