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Stanley D. Rose

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THE VIOLATION OF A MUNICIPAL ORDINANCE AS A CRIME

There are few corners of the law that have so consistently defied any uniformity of analysis as that of the legal effects of violating a municipal ordinance. The Wisconsin Supreme Court recently handed down a decision¹ which certainly simplifies the issues, but which seems to require a close examination of the premises used by the court.

A Wisconsin statute² permitted any local authority to pass an ordinance making it a misdemeanor punishable by fine or imprisonment or both to operate a vehicle upon any highway of the state while under the influence of intoxicating liquor. A limitation was imposed that such ordinance "must be in strict conformity" with the similar statute of the state.³

The county of Winnebago passed such an ordinance and McDonald was charged with a violation of it. McDonald demanded a jury, and Judge Schmiede of the municipal court ordered it. Because no provision for a jury trial was in the ordinance, Keefe, the county district attorney, petitioned the circuit court for a writ of prohibition to prevent the enforcement of the municipal court's order for a jury trial. The circuit court denied the petition. On appeal, the supreme court reversed this denial. Judge Fairchild based his decision on the following chain of reasoning:

1. The power to define crimes is a sovereign power.
2. The legislature may not delegate such power to counties or municipalities.
3. The legislature may permit the counties and cities to collect fines as penalties for the violation of local ordinances or it may permit imprisonment to enforce the collection of a fine.
4. This power of collection is exercised through a civil action for the recovery of a fine.
5. Imprisonment may not be imposed for a violation of a local ordinance because
 - a. as an attempt to punish for a crime the ordinance is unauthorized, and
 - b. by the constitution, there may be imprisonment only for a crime.
6. Therefore, this ordinance was invalid because the county inherently cannot create crimes and the legislature cannot delegate to the county its own power to create crimes.

The premises of this opinion offer the basis for entering upon a consideration of the entire problem of the violation of a municipal ordinance.

1. *State ex rel. Keefe v. Schmiede*, 28 N. W. 2d 345 (Wis. 1947).

2. WIS. STAT. § 85.84 (1945).

3. WIS. STAT. § 85.13 (1945). Punishment provided for violation in § 85.91(3).

It should be common knowledge that practically every local community in the United States sends people to jail for the violations of some of its ordinances. The Wisconsin court would put an end to this. If the decision is correct, practically all states then face extensive alterations in the laws governing their local communities. There will be much debate before such steps are taken. It is submitted that such a fundamental overhauling of the codes is not entirely necessary. This comment will undertake to show:

1. that the legislature can delegate its police power to municipalities;
2. that violations of the police power can be criminal offenses, though perhaps they should not be because they are not "true crimes" as understood in criminal law;
3. that the prevailing view of a violation of the police power in the form of a municipal ordinance being a civil action has created both confusion and injustice and is in need of a re-analysis to reduce both;
4. that to determine whether a given municipal ordinance aims at punishment or remedy is a better test of the procedure to be adopted than the present fixed view that all such proceedings are civil regardless of the consequences.

THE CONSTITUTIONAL POWER

The first problem is that of delegation of power by the legislature. A basic maxim of representative government is that the sovereign powers may not be delegated.⁴ "[B]ut fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged. The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the state."⁵

While practically all decisions on the point agree with Judge Cooley that this delegation of the sovereign power is an exception to the maxim,⁶

4. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 224 (8th ed. 1927).

5. 1 COOLEY, *op. cit.*, 389, 390. The general subject of delegation of legislative power has been thoroughly covered with the general effect of destroying the absolutism of the maxim, *delegatus non potest delegare*. See Baesler, *A Suggested Classification of the Decisions on Delegation of Legislative Power*, 15 B. U. L. REV. 507 (1935); Duff & Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORN. L. Q. 168 (1929).

6. The authorities may well be classed as pre-Cooley and post-Cooley, for from shortly after 1868 on, Cooley is the standard authority for this holding. *The State v. Simonds*, 3 Mo. 414 (1834); *The State v. Noyes*, 30 N. H. 279 (1855); *Bliss v. Kraus*,

there are few attempts at analysis. The suggestion has been made⁷—which may explain the reason advanced by Cooley—that *devolution* is a more precise term than *delegation*. The function of the legislature is to allocate functions of government not exclusively legislative to the proper—on historical and analytical grounds—depositories. Since municipal corporations, both historically and analytically, should be the regulators of their own political life, the power devolves upon them. “By its very nature, a legislature is a duty-assigning body.”⁸ When the state legislature assigns the duty of creating local by-laws to a municipality, it is not delegating authority but is actually distributing or devolving a proper function upon these local groups. Whether the power to delegate authority to a local unit⁹ be an exception to the basic maxim or is explainable on other grounds, its universal exercise must be recognized.

As a preliminary, it should be understood that a municipal corporation is a creature of the state.¹⁰ It has only the powers given it by the state which are specifically enumerated in its charter. This is a general view and in this comment, space does not permit any consideration of the possible inherent powers of local government.¹¹ The problem here being considered goes to the very contention that whatever powers of self-regulation may be permitted, no imposition of criminal sanctions can be delegated by the state to its creatures.

What is the nature of this power delegated by the state legislatures to the local counties and municipalities? This is the police power. Precise definition has been elusive,¹² but the general aims of this power are well known. “[T]here seems to be no doubt that it does extend to the protection

16 Ohio St. 55 (1864); *Trigally v. Mayor and Aldermen of Memphis*, 6 Cold. 382 (Tenn. 1869); *Durach's Appeal*, 62 Pa. St. 491 (1869); *State v. Westmoreland*, 133 La. 1015, 63 So. 502 (1913); *Stoutenburgh v. Hennick*, 129 U. S. 141 (1889); *Stanfill v. Court of County Revenue*, 80 Ala. 287 (1885); *City of Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769 (1914); *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698 (1885).

7. Baesler, *A Suggested Classification of the Decisions on Delegation of Legislative Power*, 15 B. U. L. REV. 507, 509, 520 (1935); Walker, *The Delegation of Police Power to Counties*, 3 LA. L. REV. 522, 525-28 (1941).

8. Walker, *op. cit.*, 525.

9. To counties: Walker, *op. cit.*. To cities: McBain, *The Delegation of Legislative Power to Cities*, 32 POL. SCI. Q. 276, 391 (1917). See also, La Farge, *Delegability of Police Powers to Non-Municipal Public Corporations in Home Rule States*, 5 GEO. WASH. L. REV. 880 (1937).

10. 1 McQUILLAN, MUNICIPAL CORPORATIONS § 145 (2d ed., 1940 Revision).

11. For an entry into the Home Rule debate, see McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COL. L. REV. 190 (1916).

12. “The term ‘police power’ has been much employed in recent years, and many attempts have been made to define it, but it is said to be incapable of definition.” *Sanning v. City of Cincinnati*, 81 Ohio St 142, 90 N. E. 125, 127 (1909). Mr. Justice Holmes had this to say: “We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution . . . , judges should be slow to read into the latter a *nolumus mutare* as against the law-making power.” *Noble State Bank v. Haskell*, 219 U. S. 104, 110 (1911).

of the lives, health, and property of the citizens, and to the preservation of good order and public morals." 13

A more explicit statement of the point is in *Cook County v. City of Chicago*; 14 "Among the powers exercised by municipalities are what are known as the police powers of the state. These powers rest in the state, and may be delegated to municipal corporations created by the state, to be exercised for the welfare, safety, and the health of the public. Under the police power cities and villages may enact reasonable ordinances to preserve health, . . . The police power is not impaired by the Fourteenth Amendment . . . , but every citizen holds his property subject to the proper exercise of the police power, either by the state Legislature or by the public or municipal corporations, to which the Legislature has delegated that power." 15

The Wisconsin court in the principal case grants these propositions. "Nothing in this opinion is to be taken as in any way casting doubt upon the power of the legislature to vest in a county board or municipal council power to provide for the good order of the community by enacting ordinances regulating local affairs, provided there is not included the power in either to create crimes and impose criminal punishments." 16

The conclusion is that the legislature, without question, can delegate part of its power to municipalities. This delegable power includes the police power which is, in fact, very extensively exercised.

VIOLATIONS OF POLICE REGULATIONS AS CRIMES

The principal case admits the power to permit the municipal authorities to make police regulations but denies the right to create crimes or impose criminal punishments. The language used is interesting in raising the question of what kind of "punishments" are not criminal. This point will be discussed later. The point at issue here is, when given the power to enact local police regulations, what sanctions may be imposed to insure compliance with them. Very suggestively, an earlier Wisconsin court had said that, "We know of no better or more effective way of suppressing a disorderly house, or preventing or crushing them out, than to provide a penalty against the keeper." 17 Can the violation of a police regulation be a crime? This poses the further question which must be answered first of all, "What is a crime?"

"A crime is any wrong which the government deems injurious to the

13. *Beer Co. v. Massachusetts*, 97 U. S. 25, 33 (1877).

14. 311 Ill. 234, 142 N. E. 512 (1924).

15. *Id.* at 512, 513. See also *Baker City Mut. Irr. Co. v. Baker City*, 58 Ore. 306, 113 Pac. 9 (1911); *Tugman v. The City of Chicago*, 78 Ill. 405 (1875); *Commonwealth v. Bennett*, 108 Mass. 27 (1871); *Rosberg v. State*, 111 Md. 394, 74 Atl. 581 (1909); *Burckholter v. The Incorporated Village of McConnellsville*, 20 Ohio St. 308 (1870); *City of Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723 (1903).

16. 28 N. W. 2d 345, 349.

17. *Ogden v. City of Madison*, 111 Wis. 413, 87 N. W. 568, 570 (1901).

public at large, and punishes through a judicial proceeding in its own name. . . . Ordinarily a cause is not deemed criminal if the State is not the plaintiff."¹⁸ Such a definition would make a crime of almost any breach of a regulation, thus a further analysis must be made.

A "true crime" is one of the products of the matured common law. As the law came of age, "the rule was that there could be no conviction for the commission of a crime without criminal intent on the part of the offender."¹⁹ Every true crime has two parts; the physical element—the *actus reus*,—and the mental element—the *mens rea*.²⁰ But the ordinary regulatory enactment simply declares the wrong to be the act itself—going more than thirty-five miles per hour—and no use is made of the magic words "wilfully," "maliciously," or the like which would indicate the traditional mark of criminal intent. So we have a tremendous field of offenses that have none of the ancient requirement of the guilty mind. They have been variously called "public welfare offenses,"²¹ "public torts,"²² "police offenses,"²³ and "regulatory offenses."²⁴

These types of offenses are of relatively recent appearance.²⁵ They are due to the expanding complexity of our society in which "the legislatures found it necessary to increase tremendously the amount of regulatory enact-

18. BISHOP, *CRIMINAL LAW* § 32 (9th ed. 1923).

19. Comment: *Unburdening the Substantive Criminal Law in Wisconsin*, WIS. L. REV. [1946] 172, 173.

20. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939).

21. Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933). "The term 'public welfare offenses,' is used to denote the group of police offenses and criminal nuisances, punishable irrespective of the actor's state of mind, which have been developing in England and America within the past three-quarters of a century." *Id.* at 56, n. 5.

22. BEALE, *A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW*, 129 (4th ed. 1928). Hall fails to see any significance in Beale's use of the term in connection with the cases he cites. Hall, *Inter-relations of Criminal Law and Torts: II*, 43 COL. L. REV. 967, 994 (1943); Note, *Public Torts and Mens Rea*, 12 IOWA L. REV. 407 (1927) at 408 states, "The term 'public torts' refers to injuries to the state which are treated as analogous to civil injuries but which are actionable criminally either at common law or by statute." Also Note, *Public Torts*, 35 HARV. L. REV. 462 (1922). Also MAY, *LAW OF CRIMES* § 10 (4th ed. 1938). "Recently there has been advocated a new classification of criminal offenses into public torts and real crimes. Public torts would include all wrongs against the state actionable criminally, the penalties for which are not intended as punishment but as compensation . . . they would include injuries to public property, public nuisances, and police offenses."

23. FREUND, *THE POLICE POWER* 21-22 (1904). "The peculiar province of the criminal law is the punishment of acts intrinsically vicious, evil, and condemned by social sentiment; the province of the police power is the enforcement of merely conventional restraints, so that in the absence of positive legislative action, there would be no possible offense . . . It has been the common practice of legislation to punish police offenses as misdemeanors, i.e., by fine or commitment to the jail." Also Freund, *Classification and Definition of Crimes*, 5 J. OF CRIM. L. & CRIM. 807 (1915). "Police offenses are both in legislation and administration often distinguished from common crimes. Either the interest affected or the guilt involved, or both, are less serious or urgent. The power or even policy of repression is to a considerable degree delegated to local authorities." *Id.* at 824.

24. Note, *Reclassification of Certain Offenses as Civil Instead of Criminal*, 12 WIS. L. REV. 365 (1937).

25. Their history is traced in Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933).

ments; and for some reason the lawmakers turned to the criminal law for sanctions."²⁶

These offenses defy analysis in terms of the criminal law and their effect on the criminal law has been bitterly attacked. They have become so numerous in the statute books that to the layman the term "criminal" is beginning to lose its reprehensible character. That there is sound argument that violations of police regulations *should not* be classified as crimes is undeniable. The stumbling block seems to be the current conceptions of penology.²⁷ To the average layman, the most effective sanction is imprisonment. If a material change is made at this point, it may well be possible to make many of the violations of these police regulations mere civil offenses punishable by a pecuniary penalty.

This is not to be taken to mean that all of these public welfare offenses are not true crimes. Four rules were set forth²⁸ by Dean Gausewitz of the College of Law of the University of New Mexico that indicate a possible line of demarcation:

I. No act which imposes absolute liability should remain criminal.

II. If the only penalty imposed for a present crime is a fine, the act should be removed from the criminal code, for the penalty can as well be imposed by civil action.

III. If a present crime was not a crime at common law, if its commission does not *prima facie* indicate a dangerous personality, and if the act is not popularly regarded as reprehensible, the act should be removed from the criminal code.

IV. If the act is of a type that requires the interest and expertness of a specially designated and qualified official for its efficient enforcement, it should not be a crime unless it clearly does not come within class III.

The conclusions suggested are that violations of police regulations are

26. Comment, *Unburdening the Substantive Criminal Law in Wisconsin*, WIS. L. REV. [1946], 172, 175. The writer then continues, "This does not, of course, include the numerous local ordinances and by-laws adopted by counties, cities, villages, and towns. . . . [in Wisconsin, because of the specific definition of a criminal proceeding] . . . In many states, however, such violations are treated as crimes, and dealt with as such." WIS. STAT. § 260.05 (1945) states that "A criminal action is prosecuted by the state against a person charged with a public offense, for the punishment thereof. Every other is a civil action." WIS. CONST. ART. VII, § 17 declares that "all criminal prosecutions shall be carried on in the name and by the authority of the [State]." These two sections would give the basis for a less questionable opinion in the principal case by making the inability of municipalities to create crimes peculiar to states which have such constitutional provisions and even then not necessarily so if machinery is established by the state to prosecute violations of such ordinances. It appears that in Minnesota, there are such provisions in the city charters and the state is recognized as only a nominal party. *State v. Brown*, 50 Minn. 128, 52 N. W. 531 (1892); See also Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55, 67-70 (1933).

27. See ELLIOTT, *CONFLICTING PENAL THEORIES IN STATUTORY CRIMINAL LAW* C. II (1931).

28. Note, *Reclassification of Certain Offenses as Civil Instead of Criminal*, 12 WIS. L. REV. 365, 367 (1937).

in the criminal codes as criminal offenses; that there is a powerful theoretical basis for removing them from the criminal codes but that until this is done the violators of such police regulations are subject to criminal sanctions and should be protected always by the established safeguards of criminal procedure.

JUSTIFICATION OF IMPRISONMENT AS A PROPER PENALTY IN A CIVIL ACTION
FOR THE VIOLATION OF A MUNICIPAL ORDINANCE

The prevailing view appears very clearly to be that the proceedings on the violation of municipal ordinances are civil actions for the recovery of a debt.²⁹ The most explicit authority, so far as advancing a reason for this stand, is Blackstone.³⁰ ". . . [E]very person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. For it is a part of *the original contract, entered into by all mankind who partake the benefits of society*, to submit in all points to the municipal constitutions and local ordinances of that state, of which each individual is a member. Whatever, therefore, the law orders anyone to pay, *that becomes instantly a debt*, which he hath beforehand contracted to discharge." (Italics added)

It seems difficult to conceive that a part of our modern law should still be based upon the social contract theories of the Eighteenth Century. Yet the courts do say that at common law the proper action in these cases is in debt or assumpsit.³¹ A more modern view³² suggests the means for a complete break with this approach by examining the sanction intended rather than the procedure imposed by historical accident. This modern test for determining whether an action is civil or criminal by an examination of the intent of the legislature in imposing the sanction will be considered later in this comment. At this point, the matter of importance is the justification of imprisonment in an alleged civil action for the violation of a municipal ordinance.

It is interesting to note that in 1596 one Clark recovered a judgment against the mayor of a town for being falsely imprisoned. Clark had refused to pay a tax assessed by the town and in punishment had been put in jail. The court held that the violation of a municipal by-law could not be punished by imprisonment contrary to the twenty-ninth chapter of the Magna Carta,³³

29. 3 McQUILLAN, MUNICIPAL CORPORATIONS § 1136 (2d ed., 1943 Revision); City of Milwaukee v. Johnson, 192 Wis. 585, 213 N. W. 335 (1927); O'Haver v. Montgomery, 120 Tenn. 448, 111 S. W. 449 (1908).

30. 3 COMM. *158.

31. Ewbanks v. Town of Ashley, 36 Ill. 177 (1864); Coates v. Mayor of New York, 7 Cow. 585 (N. Y. 1827).

32. See Helvering v. Mitchell, 303 U. S. 391 (1938).

33. "Nullus liber homo capiatur, vel imprisonetur . . . Nisi per legale iudicium parium suorum, vel per legem terrae."

which forbade the imprisonment of any free man except by the judgment of his peers or according to the law of the land. The court further said that the town "might have inflicted a reasonable penalty, but not imprisonment, which penalty they might limit to be levied by distress, or for which an action of debt lay."³⁴

Imprisonment may be imposed at two points. First, to coerce the payment of a fine already levied for violation of the ordinance, and second, as the sole penalty (or in addition to a fine) for the violation of the ordinance. The basic question to be borne in mind is that if this proceeding is a civil action for debt, how is the constitutional provision against imprisonment for debt explained away?

The Wisconsin court in the instant case is in accord with the general view that imprisonment is proper to coerce the payment of a fine³⁵ and by so holding must be implicitly denying the contract propounded by the theory of Blackstone. The rationale for the coercion of a fine by imprisonment has been stated many times and now seems accepted beyond question.

An Illinois court³⁶ simply said, "The prohibition does extend to actions for torts, nor to fines or penalties arising from a violation of the penal laws of the state. It has reference to debts arising *ex contractu*." A Nebraska court³⁷ referred to it as "merely a means of compelling obedience to the judgment of the court."

A federal court³⁸ gave a very reasonable combination of these two views of why imprisonment was not prohibited in these cases. "It may be admitted that a penalty given by a statute is technically a debt. It does not, however, arise upon contract, but by operation of law. It is imposed as a quasi punishment for the violation of law or the neglect or refusal to perform some duty to the public or individuals enjoined by law. Penalties are imposed in furtherance of some public policy, and as a means of securing obedience to law. Persons who incur them are either in morals or law, wrong-doers, and not simply unfortunate debtors unable to perform their pecuniary obligations."

A pecuniary penalty seems obviously the proper forfeiture in this sort of case and if by judicial decision it is not within the pale of the forbidden contractual debts, imprisonment is permissible to coerce the payment of

34. Clark's Case, 5 Co. Rep. 64a, 77 Eng. Rep. 152 (1596).

35. *Supra* note 1, 28 N. W. 2d 345, 349.

36. Kennedy v. People, 122 Ill. 649, 13 N. E. 213, 214 (1887); *accord*, Bray v. State, 140 Ala. 172, 37 So. 250 (1904).

37. Peterson v. State, 79 Nebr. 132, 112 N. W. 306, 310 (1907). In Bregguglia v. Lord, 53 N. J. L. 168, 20 Atl. 1082 (1890) it was held that although the mayor had power to fine, imprison, or both, nevertheless, he did not have power to coerce the fine by imprisonment unless that power was expressly given. *Accord*, Brieswick v. Brunswick, 51 Ga. 639 (1874). *Contra*: City of Milwaukee v. Johnson, 192 Wis. 585, 213 N. W. 335 (1927). (*semble*, there is an inherent power to coerce a fine validly imposed by imprisonment).

38. United States v. Walsh, 28 Fed. Cas. 391, 393-4, No. 16,635 (D. Ore. 1867):

such a penalty. The truly fundamental question is, however, by what reasoning can it be justifiable to imprison a man as the sole punishment for the violation of a municipal ordinance? Imprisonment alone may only be imposed if expressly authorized by the state in a grant of power to the municipality,³⁹ and it is as a matter of fact extensively granted, but how can it be authorized as proper in an action on this civic debt?

An early Indiana court⁴⁰ declared the legislative intent to be "to require payment by the labor of the defendant . . ." It is sufficient to point out that the common law actions of debt and assumpsit lay for money only.⁴¹

It does not seem to be a question of justifying the use of imprisonment, but of simply showing that there are no constitutional barriers to its use.

First of all, the usual constitutional provisions against imprisonment for debt either expressly or by judicial decision exclude these technical debts. For example, Art. 1, Sec. 16 of the Wisconsin constitution forbids imprisonment "for debt arising out of or founded upon a contract, expressed or implied."

Secondly, constitutional provisions against slavery or involuntary servitude do not prohibit imprisonment alone. "Imprisonment is not servitude. Labor enforced as a punishment is 'involuntary servitude.'"⁴² The use by the Wisconsin court of this type of provision⁴³ to invalidate imprisonment alone as punishment for the violation of a municipal ordinance seems erroneous.

Unless, then, there is some other constitutional provision barring imprisonment except upon conviction for a crime, this is generally regarded as a permissible penalty. Admittedly this carries no weight as an argument and is hardly persuasive in supporting a contention that there is a primary intent to collect a debt. At the same time the courts are usually careful to avoid giving any expression to the punitive and supposed deterrent aspects of the imprisonment. There being little debate then, imprisonment continues as a proper civil penalty with such results as may now be considered.

The conclusion to be drawn at this point is that there does not appear to be any rationale for imprisonment as a civil penalty and at the same time, there does not seem to be any constitutional objection to its use. If the thought does arise that after all a man may be sent to jail without a trial by jury, the only answer is that these are civil actions and the personal liberties are not there the primary concern.

39. *The City of Burlington v. Kellar*, 18 Ia. 59 (1864); *City of Bozeman v. Merrell*, 81 Mont. 19, 261 Pac. 876 (1927); 2 McQUILLAN, MUNICIPAL CORPORATIONS § 752 (2d ed. 1939 Revision).

40. *Flora v. Sachs*, 64 Ind. 155, 160 (1878).

41. 3 BR. COMM. *154, *158.

42. *Flannagan v. Jepson*, 177 Iowa 393, 158 N. W. 641, 642 (1916). See *Ex Parte Wilson*, 114 U. S. 417, 429 (1885).

43. *Supra* note 1, 28 N. W. 2d 345, 348.

CRIMINAL SANCTIONS IN CIVIL ACTIONS

The results that flow from being able to imprison a man in a proceeding for the violation of a municipal ordinance present an interesting problem.

By some means or other, the great majority of the courts have declared that such proceedings are civil. When a Tennessee statute made it a misdemeanor to violate a particular ordinance, the court felt impelled to say that "the word 'misdemeanor,' as employed in statutes conferring power upon municipal corporations, is not wholly synonymous with the same term as used at common law, or in general statutes defining offenses against the State of a grade less than felony, but has a more restricted meaning, being limited to offenses against the smaller local government."⁴⁴ The "punishment is in the form of the assessment of a penalty."⁴⁵ . . . but at last the purpose of the action is punishment."⁴⁶ Such candor should lead to a realization that the personal liberties were at stake and that the rules of criminal procedure should govern. In the Tennessee case, the prisoner was told that the city quite properly had an appeal, that his release on habeas corpus was reversed; he was remanded to the custody of the jailer, and ordered to pay the costs of the appeal.

In a Minnesota case,⁴⁷ because violation of an ordinance is only a civil offense, the accused had no right to a jury trial, proof beyond a reasonable doubt was not needed for a conviction, and statutes which refused the uncorroborated evidence of an accomplice or which refused the defendant's confession without evidence that the offense charged had been committed, did not apply to her case.

A number of similar results lends much weight to the assertion of one writer that considering the proceeding on the violation of a municipal ordinance as a civil action "has proved a particularly handy theory in that it offers a convenient subterfuge by which to evade the constitutional rights of persons accused of crime."⁴⁸ A person accused of violating an ordinance may be punished and have no right to a trial by jury⁴⁹ and in many cases, if the state had tried him for the same acts he would have had such a right. It seems settled now that if by express grant from the legislature a city makes a prohibition by ordinance which is also a crime by state statute, conviction for violation of the ordinance does not bar prosecution for the

44. *O'Haver v. Montgomery*, 120 Tenn. 448, 456, 111 S. W. 449, 450 (1908).

45. *Id.* at 459.

46. *Id.* at 460.

47. *State v. Nelson*, 157 Minn. 506, 196 N. W. 279 (1923). See *City of Cape Girardeau v. Smith*, 61 S. W. 2d 231 (St. Louis Ct. App. 1933) (Rules of evidence in civil cases govern prosecutions for ordinance violations).

48. Grant, *Penal Ordinances in California*, 24 CALIF. L. REV. 123 (1936).

49. *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 564 (1892); *Ogden v. City of Madison*, 111 Wis. 413, 87 N. W. 568 (1901); *Hunt v. City of Jacksonville*, 34 Fla. 504, 16 So. 398 (1894) (these offenses "are generally trivial in character." \$500 fine); *City of Mankato v. Arnold*, 36 Minn. 62, 30 N. W. 305 (1886).

same offense as a state crime.⁵⁰ The *Lanza*⁵¹ case settled the law that the same acts may be punished by separate jurisdictions, as state and federal, without double jeopardy attaching. But a municipality is the creature of the state, and as such can punish only what the state permits it to punish.⁵² The argument that there are two jurisdictions simply is not true; if only one jurisdiction, the accused is being punished twice for the same acts, once criminally, and once civilly with criminal sanctions.

The matter cannot be discussed rationally on the level of a civil action for debt. All parties acknowledge that the plain intent is to punish. This returns such proceedings, squarely to the criminal law. The courts "... regard any proceedings as 'criminal' which may terminate in the infliction of punishment; even though it be merely a pecuniary fine."⁵³ "[I]f the legislature considers the act sufficiently dangerous to the state to require punishment, it is a crime."⁵⁴ And the test of punishment is found "wherever imprisonment is prescribed or permitted . . ."⁵⁵

It is submitted that when a violation of a municipal ordinance can be punished by imprisonment alone, that that public offense is being declared a crime, and that all the safeguards of constitutional law should attach. The Wisconsin court in the *Schniege* case stated that a municipal ordinance cannot create a crime and therefore that any imprisonment for the violation of such an ordinance is unauthorized. It has been indicated previously that municipalities clearly have the right to declare as crimes violations of their police regulations. That such violations became debts by mere historical accident has resulted in inadequate protection for defendants in such cases.

The point at which the courts were forced to make their major stand as to whether the prosecutions were civil or criminal came when the defendant was acquitted and the municipality wished to appeal.⁵⁶ The decisions cannot be reconciled, but are most instructive when the various attempts at rationalization are examined. The trouble stems from the basic premises. The courts recognized that the law was established that these were civil

50. *Greenwood v. The State*, 6 Baxt. 567 (Tenn. 1873); *State ex rel Karr v. Taxing District of Shelby County*, 16 Lea 240 (Tenn. 1886); *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 564 (1892); *Ogden v. City of Madison*, 111 Wis. 413, 87 N. W. 568 (1901). *Contra*: *Village of Northville v. Westfall*, 75 Mich. 603, 42 N. W. 1068 (1889) (a vigorous dissent to the very concept).

51. *United States v. Lanza*, 260 U. S. 377 (1922). See Grant, *The Lanza Rule of Successive Prosecutions*, 32 COL. L. REV. 1309 (1932).

52. See Kneier, *Prosecution Under State Law and Municipal Ordinance as Double Jeopardy*, 16 CORN. L. Q. 201 (1931).

53. KENNY, *OUTLINES OF CRIMINAL LAW* 19 (15th ed. 1946).

54. Note, *Public Torts*, 35 HARV. L. REV. 462 (1922).

55. *Id.* at 463. "The mere term 'fine' or 'punished by fine' in a penal statute does not necessarily imply a misdemeanor. It is otherwise as to the terms 'fine and imprisonment' and 'fine or imprisonment.'" *City of Milwaukee v. Ruplinger*, 155 Wis. 391, 145 N. W. 42, 43 (1914).

56. See Note, 116 A. L. R. 120 (1938).

actions, but it was also undeniable that the proceedings were usually criminal in form and led to sanctions that were peculiarly criminal and punitive. The language difficulties are intriguing, however regrettable the results may frequently appear to be.

A Tennessee court⁵⁷ said, "A municipality is a government within itself, and must have the power to punish for offenses against its laws, and must be able to bring that punishment to bear and to make it effective by its own agencies, that is, through its own courts and officers. However, the right of appeal may be given, and generally is given, and, if exercised, the municipality appears in another jurisdiction; that is, in the courts of the State, as a suitor to recover the penalty which it has assessed against the violator of its laws. But the larger court, while trying the controversy as a civil suit, will see to it that the municipality, if successful, shall have the same sanctions for the enforcement of its laws as if the trial had terminated in the municipal court. In truth, the action is in its various aspects a hybrid one, partly criminal and partly civil."

The Missouri courts had some verbal difficulties, as shown by the following: "A proceeding in the name of a city to recover a penalty for the breach of an ordinance is a criminal one from some points of view . . . but it is also a civil proceeding from other viewpoints. The best the law has been able to do is to call it civil or quasi criminal in character."⁵⁸

The same court several years later, when faced with the same type of violation, said, "We have differently defined the suit as civil or quasi civil."⁵⁹

A difference over the meaning of "quasi criminal" is seen in a series of Wisconsin cases.

*President of the Village of Platteville v. McKernan*⁶⁰ simply states "that where a city or village ordinance prohibits that which is a crime or misdemeanor, and punishable at common law or by statute, and prescribes a penalty for its violation by a fine, and, conditionally, imprisonment, the action to recover such penalty is quasi criminal, and cannot be brought to this court by appeal on behalf of the plaintiff."

In *Ogden v. City of Madison*,⁶¹ the court denied that the violation of a

57. *O'Haver v. Montgomery*, 120 Tenn. 448, 460-461, 111 S. W. 449 (1908).

58. *City of St. Louis v. Ameln*, 235 Mo. 669, 139 S. W. 429, 431 (1911). Other cases in which "quasi criminal" means civil are: *State v. Rouch*, 47 Ohio St. 478, 25 N. E. 29 (1890); *Davis v. City of Guntersville*, 27 Ala. App. 208, 169 So. 222 (1936).

59. *City of St. Louis v. Bender*, 248 Mo. 113, 154 S. W. 88, 89 (1913). Two other Missouri examples: "a civil action" in *City of St. Louis v. Stublely*, 154 S. W. 2d 407, 410 (St. Louis Ct. App. 1941); "in its nature a civil action" in *City of St. Louis v. Fitch*, 353 Mo. 706, 183 S. W. 2d 828 (1944).

60. 54 Wis. 487, 11 N. W. 798, 799 (1882). "Quasi criminal" appears to mean criminal in *State v. Brown*, 50 Minn. 128, 52 N. W. 531 (1892); *Bray v. State*, 140 Ala. 172, 37 So. 250 (1904).

61. 111 Wis. 413, 87 N. W. 568, 573 (1901).

city ordinance "arose to the grade of a misdemeanor for no other reason than that it was also forbidden by the state law."

The decision in *City of Milwaukee v. Johnson*⁶² that "all proceedings to collect penalties under municipal ordinances shall be treated as civil actions, . . ." was, therefore, not unexpected, in that "the nature of the relief sought, and not the possibility that some other proceeding may be brought . . . should be the test by which to determine whether the proceeding under the ordinance is civil or quasi criminal in its nature."⁶³ The ordinance in this case prohibited the owning or operating of a slot machine and the penalty for violation was fine, imprisonment, or both.

The Wisconsin statute⁶⁴ says that "A criminal action is prosecuted by the state against a person charged with a public offense, for the punishment thereof. Every other is a civil action."

In *City of Waukesha v. Schessler*,⁶⁵ the city claimed that the violation of a city ordinance resulted in a quasi criminal proceeding and therefore that the defendant's manner of appeal was erroneous. The court settled the matter with definite finality. "By no process of reasoning, nor any subterfuge, can there be created a third class of actions, nor can any action except one prosecuted by the state be considered a criminal action." This is a wholly admirable solution and should clarify many matters if adopted more widely.

All jurisdictions have not remained adamant on these questions. Many courts have reacted vigorously to the view that such proceedings are civil and have flatly declared them to be criminal. The reasoning is varied. Most frequently it is asserted that the character of the proceedings precludes any other view than that they are designedly criminal.⁶⁶ Whatever is done in the way of enforcement of ordinances is by permission of the state and in West Virginia that is criminal which "is a violation of any law or ordinance of man subjecting the offender to public punishment, including fine or imprisonment, and excluding redress for private injury, punitive or compensatory."⁶⁷

"The terms 'crime,' 'offense,' and 'criminal offense' are all synonymous, and ordinarily used interchangeably, and include any breach of law established for the protection of the public. . . . A municipal ordinance is as much a law for the protection of the public as is a criminal statute of the state. . . ." ⁶⁸ A strong factor in this matter is whether or not the ordinance

62. 192 Wis. 585, 213 N. W. 335, 338 (1927).

63. *Id.* at 337.

64. Wis. STAT. § 260.05 (1945).

65. 239 Wis. 82, 300 N. W. 498 (1941).

66. *City of Portland v. Erickson*, 39 Ore. 1, 62 Pac. 753 (1900).

67. *City of Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152 (1898).

68. *State ex rel. Erickson v. West*, 42 Minn. 147, 43 N. W. 845, 847 (1889). Sec. 610.01 (MINN. STATS. ANN. 1947) states that "A crime is an act or omission forbidden by law, and punishable upon conviction by death, imprisonment, fine, or other penal discipline. . . . Every crime punishable by fine not exceeding \$100, or by imprisonment in a jail for not more than 90 days, is a misdemeanor."

forbids an act which is declared a crime by state statute. If it does, the violation of the ordinance is usually considered a crime,⁶⁹ but this is clearly not entirely adequate.

Some courts make no effort to deny to the municipality the right to create crimes under its general delegated powers.⁷⁰ By specific statute, the city authorities may be given definite power to hold criminal proceedings.⁷¹ Most conclusively, a North Carolina statute simply says, "If any person shall violate an ordinance of a city or town, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days."⁷² The civic authorities are given jurisdiction in these cases.⁷³

The attempt has here been made to show the effects of holding proceedings on the violation of municipal ordinances to be civil actions. Whether the proceedings be civil or criminal, the defendant is being subjected to the criminal sanctions of imprisonment or fine and imprisonment. In any proceeding in which the accused is faced with the possibility of being subjected to these sanctions, it is submitted that he ought to be protected by the safeguards of the criminal procedure. His guilt should be established by evidence showing it beyond a reasonable doubt rather than by a mere preponderance of the evidence. His right to a trial by jury should be set by the requirements in criminal cases in the particular jurisdiction. If the state constitution makes the right to a trial by jury absolute in all criminal cases, anyone about to be subjected to criminal sanctions should have an absolute right to the benefit of this provision.

If, under certain circumstances, the state is allowed an appeal in criminal cases, the limitations on the state should attach in the same fashion to the municipality's right of appeal in these cases.

The courts seemed to have recognized some of these rights and in the attempt to reconcile the issues, were forced into the verbal and logical discrepancies indicated above. The basic premise which made *all* proceedings on the violation of municipal ordinances civil actions is too broad to be upheld with justice. Legislation will probably be necessary to attach these safeguards firmly to the accused in these cases. The suggestion is here made to re-examine the problem in terms of what is intended by the particular police regulation and what is intended by the sanction imposed for its violation.

69. See Note, 33 L. R. A. 33 (1896).

70. *Kohr Bros. v. Atlantic City*, 104, N. J. L. 468, 142 Atl. 34 (1928); *Bray v. State*, 140 Ala. 172, 37 So. 250 (1904); *City of Seattle v. Bell*, 199 Wash. 441, 92 P. 2d 197 (1939).

71. *City of Greenville v. Pridmore*, 162 S. C. 52, 160 S. E. 144 (1931); *Hayes v. City of Jasper*, 26 Ala. App. 401, 160 So. 775 (1935).

72. GEN. STAT. N. C. § 14-4 (1943).

73. GEN. STAT. N. C. § 160-13 (1943).

THE TEST OF INTENT AS TO SANCTIONS IMPOSED

As previously indicated, an attempt to consider a proceeding for the violation of a municipal ordinance as a civil action for debt creates difficulties in its rationale. One of the difficulties is verbal. The common expression used by the courts is that a civil action is begun to collect a penalty, whereas a criminal action exacts a punishment. Suppose the punishment in a criminal action is a fine of a sum of money. A New York court tried to make a distinction between a "fine" and a "penalty."⁷⁴ "Penalty" is a generic term, which includes fines as well as other kinds of punishment. . . . Strictly speaking, 'penalty' denotes punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime against its laws. . . . As generally understood in this state, . . . a fine is imposed in a criminal action or proceeding, but a penalty or forfeiture ordinarily is recoverable in a civil action." This quotation does indicate the difficulty, for according to common parlance, all punishments are penalties, but not all penalties are punishments. The trouble is that to determine which is which the courts have, according to Justice Brandeis, "usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced."⁷⁵ Thus it is first determined that proceedings on the violation of a municipal ordinance are civil actions and, therefore, it follows that only penalties ensue. It is submitted that a better approach is by way of distinguishing a remedial from a punitive sanction. This goes to the intent of the legislature in imposing the sanction. A suggestive method of handling this distinction was made by Justice Brandeis in *Helvering v. Mitchell*.⁷⁶

Mitchell was acquitted of a criminal charge of wilfully evading the income tax laws in the amount of \$728,709. The Commissioner of Internal Revenue then assessed the deficiency of \$728,709 and added to it the statutory penalty of 50%, or \$364,354, for fraud with intent to evade the tax. The court of appeals approved the deficiency assessed but denied the right to assess the penalty because it was clearly a punishment and not a preventive measure.⁷⁷ The Supreme Court granted certiorari on the penalty assessment issue. Justice Brandeis upheld the penalty assessment and reasoned;

1. Mitchell's acquittal could not be *res judicata* because of differences of proof required in criminal and civil cases. A civil suit, "remedial in nature" is not barred by a prior criminal acquittal. "Where the objective of the subsequent action likewise is punishment, the acquittal is a bar."⁷⁸ Mitchell naturally contended that this was "a

74. *City of Buffalo v. Neubeck*, 209 App. Div. 386, 204 N. Y. Supp. 737, 738-9 (1924).

75. *Helvering v. Mitchell*, 303 U. S. 391, 400 (1938).

76. *Ibid.*

77. *Mitchell v. Commissioner of Internal Revenue*, 89 F. 2d 873 (C. C. A. 2d 1937).

78. *Helvering v. Mitchell*, 303 U. S. 391, 398 (1938).

criminal penalty intended as punishment for allegedly fraudulent acts," and therefore that the proceeding was criminal.

2. This sanction was remedial. The provision of a civil procedure for collection of this penalty is evidence of that intent; the provision in another section for a distinctly punitive sanction points to this as a remedial sanction. The whole objective of such sanctions is to act "primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."⁷⁹

In a footnote, Justice Brandeis added that "The fact that a criminal procedure is prescribed for the enforcement of a sanction may be an indication that it is intended to be punitive, but cannot be deemed conclusive if alternative enforcement by a civil proceeding is sustained."⁸⁰

In the light of the issues that may arise, the wisdom is apparent of writing the statute in such a way as clearly to indicate the objective in mind. A New York statute⁸¹ gives the alternative of a punishment of a fine (\$150), imprisonment, or both; "or such ordinance may provide for a penalty, not exceeding five hundred dollars to be recovered by the city in a civil action."

CONCLUSION

In summary, it is submitted that violations of municipal ordinances can be and frequently are crimes; that any distinction should be based upon the intent of the sanction imposed; that if any intent to punish is evident, which intent is best manifested by imprisonment, the safeguards of criminal procedure should be at the disposal of the accused. A re-examination of the rationale of penalizing for the violation of municipal ordinances is necessary to the end that if a crime is being created, it should be clearly delineated, but that if an act is being forbidden which the municipality intends to result in a pecuniary penalty in the nature of civil damages, it may not be forced to justify its litigation by insupportable arguments based upon an obsolete philosophical concept.

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79. *Id.* at 401.

80. *Id.* at 402.

81. N. Y. SECOND CLASS CITIES LAW § 42.