Is Criminal or Civil Procedure Proper For Enforcement of Traffic Laws? – Part I*

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INTRODUCTION

Background

In 1947 the Wisconsin Supreme Court held in *State ex rel. Keefe v. Schmiege*[1] that counties and municipalities could not ordain direct imprisonment[2] as a sanction for violation of ordinances. The court reasoned that direct imprisonment under the Wisconsin constitution can be adjudged only after conviction of a crime and only the state as sovereign can create a crime. The *Keefe* decision intensified the uncertainty about the procedure to be followed by counties and cities in enforcing their ordinances. It also intensified the long-standing feeling that many traffic violators are improperly declared criminals and that the possibility of double prosecution by the state and a municipality is unfair. Although the statutes contain some procedural material,[3] no complete enforcement system is prescribed. Attempts to add additional procedure and to clarify the nature of the traffic violation action by specifying the municipality's burden of proof both failed in the 1957 legislature. Thereafter, the state Judicial Council undertook to prepare a complete procedure for actions in the field of traffic regulation.[4] This

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[1] 251 Wis. 79, 28 N.W.2d 345 (1947).

[2] "Direct" imprisonment is awarded in the judgment of conviction as punishment; it is contrasted with imprisonment to hold for trial, or for failure to pay a tort judgment or a money penalty.

[3] See, for example, WIS. STAT. §§ 288.10, 954.03, 960.34, 301.10 (4), 62.24 (2) (b), 66.12 (1957).

[4] Representatives of the American Automobile Ass'n, Ass'n of County Traffic Police, Chiefs of Police Ass'n, Justices of the Peace Ass'n, League of Wis. Municipalities, Sheriffs and Deputy Sheriffs Ass'n, State Bar, Attorney General's Office, and state Motor Vehicle Dep't also attended many of the sessions.

article studies some of the basic problems which underlie the preparation of a revised procedure, regardless of the form taken by any specific proposal.

The *Keefe* decision was part of the continuing process of balancing the relations between the state and its subdivisions and municipalities as each simultaneously tries to enforce its laws and protect alleged violators. In no area of control are contacts between the state as prosecutor and the citizen violator more frequent and critical than in the area of traffic regulation. We must be careful that the solutions and the legal theories on which these contacts are based are not too refined for popular understanding and acceptance. As the Minnesota Supreme Court said many years ago:

> A municipal ordinance is as much a law for the protection of the public as a criminal statute of the state, the only difference being that the one is designed for the protection of the municipality and the other for the protection of the whole state . . . . How can it make any difference, either in the intrinsic nature of the thing or in the consequences to the accused, whether the state does this [enforces] itself, or delegates the power to pass the law to the municipal authorities?[5]

In Wisconsin, as in the United States generally, the municipality has less power to exercise social control than does the state. In the field of traffic regulation Wisconsin has developed two policies: first, the state wants the local governments to carry the major burden of traffic law enforcement, and, second, while the state's Motor Vehicle Code prescribes an overall pattern for traffic enforcement, the Code explicitly allows municipalities to make some local variations. The integration of these two policies into constitutional and common law patterns of substantive and procedural law creates some serious conflicts. For an adequate understanding of the background of these conflicts, it is necessary to briefly review the structure and jurisdiction of the Wisconsin court system.

The state constitution provides, in addition to probate courts, for three kinds of trial courts below the supreme court: circuit courts, municipal and inferior courts, and justice of the peace courts. Justice courts use different procedure in both civil and criminal actions than that used by circuit courts. Justice courts are jurisdictionally limited to amounts of $200 in civil actions and fines of $200 or six months' imprisonment in the county jail in criminal cases. Inferior and municipal courts may use either circuit court procedure or justice court procedure, depending on their jurisdic-

[5] State *ex rel.* Erickson v. West, 42 Minn. 147, 152, 43 N.W. 845, 847 (1889).

tion. If their jurisdiction overlaps that of the circuit and justice courts, they may use both kinds of procedure; sometimes the legislature, in the special act setting up the inferior municipal court, may create a special procedure.

Supreme and circuit court judges are paid by the state; other judges (except justices of the peace who are on a fee basis) and court expenditures are paid by localities. Enforcement of traffic laws is primarily local, though the state has a 250-man highway patrol. The state constitution provides that clear proceeds from state fines must go into the state school fund.[6] Consequently local enforcement is usually under the provisions of local ordinances to insure that revenues go into the municipal treasury.

Outline of Problems and Conclusions

The main problems and the author's theses are stated here so that the reader can more readily follow the discussion and test the theses as he reads.

The Problems

Can criteria be found to determine when a state should, or should not, declare conduct criminal? If not, what civil penalties are so serious that the offender ought to be given the procedural safeguards of the criminal law? What safeguards are necessary? If a municipality in Wisconsin can neither create a crime nor use direct imprisonment as a sanction, how is its use of civil sanctions properly related to the state's use of criminal and civil sanctions in a situation where one act constitutes a violation of both local and state law?

The Theses

1. No absolute standard for distinguishing between criminal and civil offenses can be derived from a study of either legal history or the nature of crime.

2. If the government acts as prosecutor and seeks a judgment different from that which an individual can get, then the government ought to give the defendant some of the safeguards of criminal procedure even though a civil action is used.

3. If both a state and a municipality can prosecute a violator for the same act, then both should not be allowed to prosecute unless one of them, as in Wisconsin, is unable to impose certain sanctions, such as imprisonment. In the latter case, the government which can award the more severe penalty ought to be allowed to bring a

[6] WIS. CONST. art. X, § 2.

second action for that penalty only, but should not be allowed to duplicate the sanction awarded by the first prosecutor.

It is necessary to point out that even if these theses are accepted as valid there are many possible solutions to the problems posed; the solution chosen is properly a matter of legislative discretion. Although the number of solutions is reduced if constitutional amendment is thought impossible, several practical solutions may be attained without constitutional amendment.

To simplify the discussion, we shall first consider the state acting alone to regulate traffic and motor vehicles, and then consider municipal regulation in the same field and the proper relationship between the state and its municipalities. Considering the functions of the state, we must examine the distinctive characteristics of criminal procedure as opposed to civil procedure, inquire into the distinctive nature of criminality, and look at a durable hybrid, the civil action for a penalty.

Enforcement of State Traffic Laws

Present Penalties for State Traffic Law Violations

In Wisconsin, the state has created a complete set of traffic regulations[7] independent of local regulations.[8] The state statutes penalize by fine or imprisonment, or both, acts ranging in seriousness from violation of parking regulations[9] to operating a vehicle while under the influence of an intoxicant.[10] The latter, if a repeated offense, is a felony since a convicted offender may be sent to the state prison.[11]

All acts which violate state traffic statutes are crimes, for all violations are penalized by imprisonment or fine, and the statutes define crime in terms of these penalties.[12] No monetary forfeitures or penalties are provided; but if, as in the regulation of parking, imprisonment is not provided for as a penalty, the fine may be treated as a forfeiture and recovered in a civil action.[13]

Rights Under Criminal Procedure

Later in the discussion, we will consider whether or not all these

[7] Wis. Stat. chs. 340-48 (1957).
[8] Local authorities may enact and enforce regulations in strict conformity with chapters 340 to 348, but the penalty for violation shall be limited to a forfeiture. Wis. Stat. § 349.06 (1957).
[9] Wis. Stat. §§ 346.53, .56 (1957).
[10] Wis. Stat. §§ 346.63, .65 (2) (1957).
[11] Wis. Stat. § 939.60 (1957).
[12] Wis. Stat. §§ 939.12, .20 (1957).
[13] Wis. Stat. § 288.01 (1957).

regulations should be made crimes or would be better treated as civil violations. For the present, however, we shall accept the fact that if an act is declared by the legislature to be a crime, certain consequences, such as imprisonment in jail or prison, eligibility for probation[14] or pardon,[15] and treatment as a repeater,[16] may follow upon a judgment of conviction. These consequences do not follow if the act is not considered criminal.

If this were the only distinction between crimes and civil violations, we could go immediately to the second question—what acts deserve to be called criminal? But from the standpoint of the citizen there is another difference which is fundamental to the Anglo-American legal system, namely, that if an act is called a crime, the citizen is entitled to different, and from his standpoint, more adequate procedural protection. Although anticipating later arguments in this article, we may here state the present constitutional situation: if the legislature calls an act a crime, or affixes to any violation the penalty of direct imprisonment, the violator is entitled to all the procedural protections of the criminal law; if the penalty is not imprisonment, and the act is not called a crime, civil procedure may be used for prosecution. There is, however, no bar to the introduction of criminal procedure into civil actions. It is this last proposition which causes much of the confusion in court decisions, since it is a natural use of phraseology to call a civil action which has many of the attributes of a criminal action a quasi-criminal action.

There are two kinds of criminal procedure specified in the Wisconsin constitution: prosecutions by indictment or information, and other criminal prosecutions.[17] In legislation contemporary with the adoption of the constitution, these two kinds of procedure were related to the distinction between justice court and circuit court: "No person shall be held to answer for criminal offense, unless on the presentment or indictment of a grand jury, except . . . in cases cognizable by justices of the peace . . . ."[18] Present Wisconsin statutes have separate chapters for circuit court criminal procedure and for justice court criminal procedure. This distinction must be kept in mind, for the discussion of the particular constitutional guarantees in the paragraphs which follow will consider their applicability to circuit court and to justice court procedures.

[14] See notes 133-35 *infra*.
[15] WIS. CONST. art. V, § 6.
[16] WIS. STAT. § 959.12 (1957).
[17] WIS. CONST. art. I, § 7.
[18] WIS. REV. STAT. ch. 132, § 1, (1849).

Right to Speedy Public Trial[19]

This provision is designed to prevent the detention in jail of a person accused of crime and to prevent the accusation of crime from lingering over him. There is no counterpart in civil procedure. The right to speedy trial is limited to prosecutions by information or indictment, and does not apply to most traffic offenses which, being within the justice court criminal jurisdiction of six months' imprisonment or $200 fine,[20] may be commenced by complaint.[21] The value of this right to the accused is hard to assess unless he is unable to raise bail, at which time it becomes very important.

Right to Be Heard[22]

The right to be heard has two meanings. First, it means that an accused has the right to be represented by counsel of his own choosing. Although this is tremendously important, it is guaranteed by the constitution in civil actions as well.[23] In its second meaning an indigent defendant has the right to be represented by state-paid counsel and to be informed of such right. This right is restricted to criminal proceedings. The constitution would seem to extend the right to all criminal proceedings, but the Wisconsin Supreme Court has implied that the guarantee extends only to crimes prosecuted in courts of record.[24] With the aid of a statute it has been held that the right applies to appeals,[25] and that the court in felony cases must advise the prisoner of his right to counsel.[26] In state felony cases the right to be advised of right to counsel, and to be represented by counsel even in preliminary proceedings after arrest, is also protected by the fourteenth amendment of the federal constitution.[27]

Right to Know the Nature and Cause of the Accusation[28]

This provision, which is satisfied in criminal matters by reference to and the naming of the statute violated, gives no more protection

[19] WIS. CONST. art. I, § 7.
[20] WIS. STAT. § 960.01 (5) (a) (1957).
[21] WIS. STAT. §§ 960.09, .36 (1957).
[22] WIS. CONST. art. I, § 7.
[23] WIS. CONST. art. VII, § 20.
[24] Carpenter v. Dane County, 9 Wis. 274 (1859); Dane County v. Smith, 13 Wis. 585 (1861).
[25] WIS. STAT. § 957.26 (3) (1957); State v. Tyler, 238 Wis. 589, 300 N.W. 754 (1941).
[26] WIS. STAT. § 957.26 (2) (1957).
[27] Moore v. Michigan, 355 U.S. 155 (1957). For some limits on the right, see United States v. Murphy, 254 F.3d 438 (2d Cir. 1958).
[28] WIS. CONST. art. I, § 7.

than a motion in civil procedure to have the complaint made more definite and certain.

Right to Have Compulsory Process to Compel Attendance of Witnesses in His Behalf[29]

This is an important right, since it is available to an indigent defendant. In civil procedure, compulsory process is available to the defendant, but only if he can pay the fees.

Right to Confront the Witnesses[30]

The right to use depositions in criminal proceedings is more circumscribed than in civil procedure. The right to confrontation means that the accused cannot be tried in absentia.[31]

Right to Bail Before Conviction, Except for Capital Offenses[32]

This guarantee is important for, since there is no capital punishment in Wisconsin, it applies to all criminal cases. There is no counterpart in civil procedure. It must be noted in passing that violators of traffic laws can be arrested, even though the act is considered a civil violation.[33] The criminal procedure for bail has been considered applicable to arrests for civil violations, although the constitution does not require such application and the statutes do not specifically so provide.

Right to Jury Trial and Unanimous Verdict[34]

Jury trial in criminal cases at common law meant a jury of twelve.[35] The constitutional guarantee of jury trial in civil cases[36] does not apply to criminal cases, so the five-sixths verdict provision does not apply to criminal cases.[37] The unanimous jury, it should be pointed out, is not an unmitigated benefit for the defendant; it is not hard to imagine a case where only one juror held out for conviction, and where a new trial would be made unnecessary by the five-sixths provision.

The right to jury trial comes in question most frequently in connection with so-called "petty" offenses. In many American states

[29] *Ibid.*
[30] *Ibid.*
[31] French v. State, 85 Wis. 400, 55 N.W. 566 (1893).
[32] WIS. CONST. art. I, § 8.
[33] See WIS. STAT. § 954.03 (1) (1957).
[34] WIS. CONST. art. I, § 7.
[35] State v. Smith, 184 Wis. 664, 220 N.W. 638 (1924).
[36] WIS. CONST. art. I, § 5.
[37] State v. Smith, 184 Wis. 664, 220 N.W. 638 (1924).

these can be created either by local legislative bodies or by the state. Summary conviction (without a jury) in petty offense cases undoubtedly developed as part of the English justice of the peace's administrative duties. Blackstone cites the practice[38].

Where petty offenses are considered criminal, it is generally held that a jury trial for such offenses is not within either the federal[39] or the state constitutional guarantees.[40] The distinction between a petty offense and a crime creates some difficulty, since petty offenses are not limited to those known to the common law, like drunkenness or keeping a disorderly house, but now include motor vehicle offenses. The United States Supreme Court in *District of Columbia v. Colts*[41] suggested that a crime *malum in se* could not be a petty offense. In *District of Columbia v. Clawans*[42] the same court held that the imposition of a severe penalty would take a statute out of the petty offense category, but that ninety days imprisonment was not considered too severe.

The situation in Wisconsin is not perfectly clear due again to the effect of the *Keefe* case. Article I, section 7 of the Wisconsin constitution can be read, without gloss, to relate the right of jury trial in criminal cases to circuit court cases only: ". . . in prosecutions by indictment or information, to a speedy public trial by an impartial jury . . . ." As previously pointed out,[43] the legislature in 1849 held to the theory that there was no right to jury trial in a criminal case in justice court.

In *State v. Slowe*,[44] in 1939, the attorney general attempted to use this argument, but the supreme court brushed it aside on the basis that the offense under consideration (killing deer out of season—an offense within the jurisdiction of justice court) was a misdemeanor, that a misdemeanor was a crime, and that in *all* criminal prosecutions the right to jury trial was preserved. No consideration was given to the historical category of petty offense. Since the *Keefe* case, however, the court has, oddly enough, created a petty *civil* offense in which no jury trial is initially necessary. In *Oshkosh v. Lloyd*[45] the court decided that legislation denying a municipal

[38] 4 BLACKSTONE, COMMENTARIES ch. 20.
[39] District of Columbia v. Colts, 282 U.S. 63 (1930); District of Columbia v. Clawans, 300 U.S. 617 (1937); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1930).
[40] Annot., 75 L.Ed. 177 (1930).
[41] 282 U.S. 63 (1930).
[42] 300 U.S. 617 (1937).
[43] WIS. REV. STAT. ch. 132, § I (1849).
[44] 230 Wis. 406, 284 N.W. 4 (1939).
[45] 255 Wis. 601, 39 N.W.2d 772 (1949).

ordinance violator a jury trial in justice court was constitutional on the theory that the violation was a petty offense. *Oshkosh,* coming after *Keefe,* should have related the right to the guarantee of jury trial in *civil* cases,[46] and should have relied on the theory that the civil guarantee has always been interpreted as not applying to justice court trials so long as a constitutional jury trial is available on appeal to circuit court. This question will be discussed in more detail when municipal actions are considered. Now it should only be noted that *Slowe* does not accord with historical practice and that *Oshkosh* does not reinforce it.

The right to jury trial in criminal cases prevents the court on motion of the prosecution from taking the case from the jury either before judgment, or in granting judgment notwithstanding the verdict.[47]

Right to Due Process

The right to preliminary examination is not specifically guaranteed by the state constitution or by the due process clause of article I, section 8.[48] It was unknown at common law.[49] Due process of law requires that the terms of a penal statute be sufficiently clear to notify a possible violator that his conduct comes within the statute.[50]

The denial of the opportunity to show a mistake of fact which would negative a general criminal intent, which arises when the legislature creates a crime of absolute liability, is not a violation of federal due process of law.[51]

Freedom From Excessive Bail[52]

This is an important right which has no civil counterpart.

Freedom From Self-incrimination[53]

This right is particularly valuable; it prevents discovery of the defendant's case before trial and prevents his adverse examination at the trial.[54] Conversely, if an act is punished by a civil penalty

[46] WIS. CONST. art. I, § 5.
[47] See Oshkosh v. Lloyd, 255 Wis. 601, 39 N.W. 2d 772 (1949).
[48] Thies v. State, 178 Wis. 98, 189 N.W. 539 (1922).
[49] State v. Solomon, 158 Wis. 146, 147, N.W. 640 (1914).
[50] Frank v. Kluchesky, 237 Wis. 510, 297 N.W. 399 (1941); as to traffic offenses, see People v. Firth, 3 N.Y.2d 472, 168 N.Y.S.2d 949 (1957).
[51] Shelvin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910); United States v. Balint, 258 U.S. 250 (1922); Morissette v. United States, 342 U.S. 246 (1952).
[52] WIS. CONST. art. I, § 6.
[53] WIS. CONST. art. I, § 8.
[54] State *ex rel.* Schumacher v. Markham, 162 Wis. 55, 155 N.W. 917 (1916).

only, the door is open to discovery of the defendant's case.[55] It should be mentioned that the state, too, is protected against discovery if an act is made criminal.[56]

Freedom From Excessive Fines and Cruel and Unusual Punishment[57]

This provision does not provide much protection from terms of imprisonment or amount of fines. It does protect from cruel executions and corporal punishment. Imprisonment of thirty years for statutory rape was held constitutional in *Smits v. State;*[58] legislative discretion as to fines was discussed recently in *State v. Seraphine.*[59] In *Stierle v. Rohmeyer*[60] a statutory penalty accruing to an individual was held unconstitutionally excessive.

Freedom From Double Jeopardy[61]

To the extent that this provision is understood to be the equivalent of the civil res judicata principle, it is no more effective in criminal than in civil cases. It does, however, prevent successive prosecutions, or a second prosecution after the first terminated in an early stage. The jeopardy provision also prevents appeals by the state in criminal cases[62] after jeopardy has attached, except as to certain claimed errors of law.[63] In the field of traffic regulations, the principle is of most importance where local regulations are considered civil and state regulation criminal. Then, there is neither the protection of res judicata nor double jeopardy, and the citizen is subject to double prosecution and punishment. This matter will be discussed in more detail when we consider municipal regulation.

Venue

The public trial must be in the county or district where the crime was committed.[64] In present practice this provision, applicable only to prosecutions beyond justice court jurisdiction, is of little value to the accused except in those few cases where the state will have a difficult task in proving the county in which the crime was com-

[55] See Milwaukee v. Burns, 225 Wis. 296, 274 N.W. 273 (1937).
[56] State v. Herman, 219 Wis. 267, 262 N.W. 718 (1935).
[57] WIS. CONST. art. I, § 6.
[58] 145 Wis. 601, 130 N.W. 525 (1911).
[59] 266 Wis. 118, 62 N.W.2d 403 (1954).
[60] 218 Wis. 149, 260 N.W. 647 (1935).
[61] WIS. CONST. art. I, § 8.
[62] State *ex rel.* Steffes v. Risjord, 228 Wis. 535, 280 N.W. 680 (1938).
[63] WIS. STAT. § 958.12 (1957); State v. Biller, 262 Wis. 472, 55 N.W.2d 414 (1952); State v. Stang Tank Line, 264 Wis. 570, 59 N.W.2d 800 (1953).
[64] WIS. CONST. art. I, § 7.

mitted. This type of technical advantage should not be considered in determining whether a right should be retained.

Burden of Persuasion

Burden of proof has two ordinary meanings. When the term is taken to mean burden of proceeding, the state has the initial burden regardless of whether the action is civil or criminal. There is a difference, however, if the term is taken to mean burden of persuading the trier of fact. In the latter instance, there are two situations: the case may be tried to a jury, or to the court. The state's burden of persuading the trier of fact in a criminal case is theoretically higher than in a civil case. This difference is used as a basis for holding that a conviction of a civil offense is not res judicata in a similar criminal offense.[65] In a criminal case, the trier of fact must be persuaded that guilt is established "beyond a reasonable doubt"; in the civil case he must find guilt "by a preponderance of the evidence." The slight research done on the effect of the instructions to a jury on these matters indicates that the jury interprets both requirements, and both instructions, in the same way—did he do it? Judges sitting without a jury profess to be able to distinguish between the two burdens; even here, however, it seems that the judge is really talking about the comparative credibility of the witnesses or evidence, rather than the application of the particular burden to the evidence.

Consider a statistically common example in the traffic field: the arresting officer says the defendant was speeding; the defendant maintains that he was traveling under the speed limit. If the judge believes one, and not the other, his job is the same under either standard. Or, assume the charge is driving under the influence of liquor: if the judge believes that the alcohol test is properly reported, and believes the testimony of the officer appearing for the state, as against the testimony of the defendant, the case will come out the same under either standard. Suppose a variation on the last situation: the judge disbelieves the officer, and believes the defendant, but thinks that the test was properly reported, and its results show, according to the statute, that the defendant was under the influence of liquor.[66] Since the statute provides that the prima facie effect of the test is to be given effect only if there is corroborating evidence, and since there is no corroborating evidence in the case, because the judge does not believe the officer, can he find that the state has

[65] Helvering v. Mitchell, 303 U.S. 391 (1938).
[66] WIS. STAT. § 325.235 (1957).

not proved its case beyond a reasonable doubt, but has proved it by a preponderance? Again, the author would say no, for in this situation there would seem to be no preponderance in favor of the state. As stated previously, it is a question of credibility; the judge, as trier of the facts, has power to determine credibility, and if he determines it as in the example, the result is the same regardless of the description of the plaintiff's burden.

Wisconsin agrees that definition of the term "reasonable doubt" is difficult.[67] More important, the Wisconsin definition of preponderance of the evidence is very similar to the layman's concept of persuasion beyond a reasonable doubt. The following instruction was approved in *Speakes L. & C. Co. v. Duluth St. Ry.*:[68]

> [Y]ou must be satisfied by a preponderance of [credible] evidence that such fact does exist . . . . If . . . notwithstanding such preponderance, you are not satisfied of the existence of the fact in controversy, your finding should be against the party on whom the burden is cast.[69]

The court, speaking through Justice Jones, known for his work on evidence, approved again the rule of *Anderson v. Chicago Brass Co.*:[70]

> It is well settled by a long series of decisions in this court that the party upon whom rests the burden of proof does not lift that burden by merely producing a preponderance of the evidence. He may produce a preponderance, that is, he may produce evidence of slightly greater convincing power to the mind than that produced by his opponent, but still his evidence may be weak and leave the mind in doubt. In order to entitle himself to a finding in his favor his evidence must not only be of greater convincing power, but it must be such as to satisfy or convince the minds of the jury of the truth of his contention. This idea, in some definite and certain form, must be given to the jury or the instruction will be incomplete and erroneous.

In the federal system, the futility in the attempted distinction is shown by the rule in some circuits that the judge may submit the case to the jury if there is testimony from which the guilt of the accused may be inferred. The judge, in other words, need not be satisfied beyond a reasonable doubt in order to let the case go to the jury; he has done his job if in the instruction he tells the jury that they must be convinced beyond a reasonable doubt.[71]

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[67] Hoffman v. State, 97 Wis. 571, 73 N.W. 51 (1897).
[68] 172 Wis. 475, 179 N.W. 596 (1920).
[69] *Id.* at 484-85, 179 N.W. at 599.
[70] 127 Wis. 273, 280, 106 N.W. 1077, 1079-80 (1906).
[71] United States v. Castro, 228 F.2d 807 (2d Cir. 1956).

The impact on the jury is not limited to the instruction itself. The jury may have additional doubts about conviction planted in their minds by counsel's statements on voir dire examination and in closing argument. Here, again, even if the most favorable language under both standards is used, the final result is still dependent upon the jury's ability to comprehend the distinction between the two standards. It is the personal opinion of the author that, at least in Wisconsin, the legal distinction between the two standards is not meaningful to a jury.

Statutes of Limitation

Statutes of limitation do not operate to the complete disadvantage of the criminal offender. While the statute is three years for a misdemeanor,[72] as against two years for a municipal civil action,[73] the statute against state civil offenses is ten years.[74]

Criminal Versus Civil Protection

The defendant in an action brought by the state is better protected by criminal procedure than by civil procedure. If the act is beyond justice court jurisdiction, he gains the right to a speedy trial, to be represented by state-paid counsel, and to a twelve-man jury which can convict only on unanimous verdict. For all crimes, within either justice court jurisdiction or circuit court jurisdiction, the defendant gains the right to have compulsory process to compel the attendance of witnesses, not to be tried in his absence, to be released after arrest on reasonable bail, to freedom from discovery procedures, before or during the trial, and to have his case considered by the jury *(i.e.,* to be free of the judge's power to take the case from the jury on prosecution's motion).

Since there are no protections in civil procedure which outweigh the advantages of criminal procedure, we must conclude that it is to the advantage of the accused if a proscribed act is made a crime. However, there never has been any serious agitation for the change of civil offenses to criminal offenses. The reasons are well known. In return for the procedural advantages of the criminal law, the citizen assumes the stigma of criminality, the liability to direct imprisonment, and the loss of civil rights upon conviction of a felony.[75]

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[72] WIS. STAT. § 939.74 (1) (1957).
[73] WIS. STAT. § 330.21 (4) (1957).
[74] WIS. STAT. § 330.18 (6) (1957).
[75] WIS. CONST. art. III, § 2, art. XIII, § 3; Becker v. Green County, 176 Wis. 120, 184 N.W. 715 (1922); State *ex rel.* Isenring v. Polacheck, 101 Wis. 427, 77 N.W. 708 (1898).

What of the state as prosecutor? Is it hampered by criminal procedure? The provisions against trial in absentia, discovery of the defendant's case, inability to take the case from the jury on the strength of the prosecution's case, and inability to appeal except on a few prescribed errors are certainly detrimental to ease in prosecution. Still, where the power of the state, and especially its financial staying power, are cast into the scale against a defendant, who may be poor, these are not unreasonable limitations.

In short, where imprisonment or a heavy fine is a possible penalty, the citizen should have the advantages of, and it is not unreasonable to ask the state to assume the disadvantages of, criminal procedure.

The Nature of Crime: In General

The state system of penalties may be appraised by comparing each act which carries a criminal penalty of fine or imprisonment against some theoretical standard definition of crime, or by examining each to see whether the unique penalty of the criminal law—direct imprisonment— is necessary for enforcement. Conversely, if a civil penalty seems adequate, we must see whether ordinary civil procedure gives the alleged violator sufficient protection.

Crime has been defined in terms of the criminal act, the mental state of the actor, the consequences of the act, the procedure used for enforcement, the source of the prohibition, the purpose of the legislature, or the nature of the penalty.

Looking at the act alone is not helpful, since the act, such as the firing of a pistol, is criminal or non-criminal only in the context of the entire situation at the time of the firing. Similarly, consequences of the act, considered separately, do not take us far toward an answer. Homicide, as a consequence, may he clearly justifiable or negligent, as well as criminal; consequences, too, must be considered in context. Emphasis on procedure takes us around a circle. Criminal procedure must be used if an act is, for some reason, designated a crime; it is also true that if criminal procedure is used, the violation is technically a crime. Neither proposition gives us assistance in determining whether the violation enforced by criminal procedure should be a crime.

Blackstone, who was well known to our constitution framers, stated what is still the basic criterion of criminality—that the legislature has made an act a crime—in these words: "A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it."[76] His attempt,

[76] 4 BLACKSTONE, COMMENTARIES *5.

immediately thereafter, to derive some essential distinction between crimes and non-criminal remedies comes to the same result: ". . . to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquillity of the whole."[77] This definition is not helpful for our present purpose which is to discover whether criteria exist for determining when the state should use criminal penalties and procedure and when it should use civil penalties and procedure, since an act punished by a civil action for a penalty fits Blackstone's definition as well as does an act made a crime. Dean Pound viewed the functions of the criminal law in the conflict between society and the violator as follows:

> It is the province of criminal law to secure social interests regarded directly as such, that is, dissociated from any immediate individual interests with which they might be identified . . . . [The criminal law] must safeguard the general security and the individual life against abuse of criminal procedure, while at the same time making the procedure as effective as possible for the securing of the whole scheme of social interests.[78]

Bishop, who guided lawyers' thoughts on criminal matters for half-a-century, stated:

> [I]n determining whether or not a particular thing is, or should be made, cognizable by the criminal law, we are not simply to look at the morals of it, or even at the practical enormity of the evil to be remedied; but still more, and primarily, to the question, as one of sound governmental judgment, whether to punish the wrongdoer will as a judicial rule promote, on the whole, the public peace and good order.[79]

Definitions which attempt to find a basis for criminality other than in legislative discretion are usually constructed in an attempt to restrict the legislature in its use of criminal penalties to make effective the police power[80] and to further some view as to what is a crime on the basis of the mental state of the actor. Jerome Hall feels very strongly that a crime has in it the idea of bad morals, so that if a defendant, as in a case of a so-called absolute liability offense, is to be denied the right to prove facts which show that his

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[77] *Id.* at *7.

[78] POUND, CRIMINAL JUSTICE IN AMERICA 10 (1930).

[79] BISHOP, COMMENTARIES ON THE CRIMINAL LAW 125 (7th ed. 1882).

[80] See State v. Withrow, 228 Wis. 404, 280 N.W. 364 (1938).

mental condition was incompatible with immorality, then the act should not be made a crime.[81]

The Model Penal Code of the American Law Institute embodies a view similar to that of Hall: "The general purposes of the provisions governing the definition of offenses are . . . to safeguard conduct that is without fault from condemnation as criminal."[82] The non-fault offenses are made non-criminal "violations":

> An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.[83]

The comment on this last provision follows:

> There is, however, need for a public sanction calculated to secure enforcement in situations where it would be impolitic or unjust to condemn the conduct involved as criminal. In our view, the proper way to satisfy that need is to use a category of non-criminal offense, for which the sentence authorized upon conviction does not exceed a . . . civil penalty . . . . This plan, it is believed, will serve the legitimate needs of enforcement, without diluting the concept of crime or authorizing the abusive use of the sanctions of imprisonment. It should, moreover, prove of great assistance in dealing with the problem of strict liability, a phenomenon of such pervasive scope in modern regulatory legislation . . . .[84]

The United States Supreme Court has related mental state to procedural safeguards, talking at the same time as if the definition of crime were part of the solution:

> Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense . . . . To drive . . . [an auto] through the public streets of a city so recklessly 'as to endanger property and individuals' is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense.[85]

It seems wise not to call violators criminals if such a result can be avoided, although attempts in Wisconsin to alter public thinking

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[81] HALL, GENERAL PRINCIPLES OF CRIMINAL LAW ch. 10 (1947).
[82] MODEL PENAL CODE § 1.02 (1) (c) (Tent. Draft No. 4, 1955).
[83] *Id.* at § 1.04 (5).
[84] MODEL PENAL CODE § 105, comment (Tent. Draft No. 2, 1954).
[85] District of Columbia v. Colts, 282 U.S. 63, 73 (1930).

by changing names have not proved very successful. For example, public regard for illegitimate children has not been altered by the change in terminology from "bastards" to "illegitimates." Furthermore, the state should not have to assume the heavy burden of a prosecution resulting from the denomination of an act as criminal unless the defendant is being subjected to a possible severe penalty.

In summary, we can only say that a study of the nature of crime in gross is not very helpful.

The Nature of Crime: The Effect of Penalty

Does a study of the nature of criminal penalties help in determining what constitutes a crime? Punishments known to the American colonists are summarized by Blackstone: death by various methods, transportation overseas, imprisonment, forfeiture of real or personal property or of office, mutilation, dismembering, branding, fining, whipping, pillory, stock and ducking.[86] Capital punishment was abolished by the Wisconsin legislature in 1853;[87] further, it is nowhere used as a penalty in traffic offenses. The other punishments, except imprisonment, fines, forfeitures, and whipping in limited cases, would be considered cruel and unusual punishment today.[88]

If the state legislature decides that imprisonment is necessary, it can ordain imprisonment only if criminal procedure is used in the trial of the offender. This is the meaning of article I, section 2, of the Wisconsin constitution: "There shall be . . . [no] involuntary servitude in this state otherwise than for the punishment of crime whereof the party shall have been duly convicted." A person can be duly convicted of a crime only if criminal procedure is used. The Colorado Supreme Court stated the restriction succinctly: ". . . the power to imprison is a criminal sanction."[89] While the courts gave no reasons for linking imprisonment to criminality, historical reasons are not hard to find. Neither the common law courts nor courts of equity could, in civil actions, award such imprisonment; neither the forms of action nor equity knew of such civil relief. Moreover, if a regulation is within the state's police power, violation may be made criminal, and imprisonment may be awarded, even though the act results in a debt to a private individual.[90]

[86] 4 BLACKSTONE, COMMENTARIES *376-77.
[87] Wis. Laws 1853, ch. 103.
[88] WIS. CONST. art. I, § 6.
[89] City of Canon City v. Merris, 137 Colo. 169, 323 P.2d 614, 617 (1958).
[90] Pauly v. Keebler, 175 Wis. 428, 185 N.W. 554 (1921).

It can also be argued that direct imprisonment as a penalty in a civil action violates section 1 of article I of the constitution: "All men have certain inherent rights; among these are . . . liberty . . . ." It may also violate section 16 of article I: "No person shall be imprisoned for debt arising out of or founded on a contract, express or implied." The "liberty" section has never been construed in connection with civil imprisonment; section 16 was held not to be a restriction on the right to arrest to hold for trial in an action for a civil penalty,[91] and not to be a restriction on imprisonment to force payment of a civil penalty.[92]

May we then determine from the nature and effect of imprisonment what acts deserve imprisonment, or what actors should be imprisoned? Stated another way, if it were possible to restrict the power of the legislature to impose imprisonment, what standards would be used?

The functions of imprisonment which cannot be performed by other penalties are its use in prevention or for reformation by treatment. Since prevention, in the absence of actual life imprisonment, is only temporary, treatment must concern us most. Can treatment be related to the nature of the violation or to the nature of the offender? To ask this question, in the state of knowledge today, is to answer it, except in a case such as the operation of a motor vehicle by a habitual user of dangerous or narcotic drugs.[93] These cases are rare. Certainly, imprisonment as a penalty for speeding is not likely to be effective treatment for whatever makes the actor violate speed laws; if the imprisonment included a course in driver instruction, the treatment might be more effective. However, participation in such instruction can be achieved in lieu of imprisonment where the power to imprison exists.[94]

To the extent that the legislature thinks that imprisonment is needed as a punishment or a deterrent, its judgment, in the absence of scientific data, is unimpeachable. It is basic to present day criminal law that the severity of the penalty should be related to the seriousness of the act, though within permitted minimum and maximum penalties there is some opportunity to consider the individuality of the violator. The wholly indeterminate sentence has not gained a foothold anywhere, although Idaho and Iowa have neither minimum sentence nor restriction on eligibility for parole. Even

[91] Graham v. Chicago, M. & St. P. R.R., 53 Wis. 473, 10 N.W. 609 (1881).
[92] Starry v. State, 115 Wis. 50, 90 N.W. 1014 (1902).
[93] WIS. STAT. § 346.63 (1) (b) (1957).
[94] WIS. STAT. § 345.16 (1957).

in the handling of juvenile violators the idea of treatment of the individual, rather than penalty based on the nature of the violation, is limited to the period of minority, or to a very short time thereafter.[95]

We can only say to the legislature: while you can constitutionally use imprisonment as a penalty in any case where you think it is necessary to enforce a law, on any theory you choose as to the purpose of imprisonment, be restrictive in its use; avoid its use to penalize acts where no mens rea is involved, or where a money penalty will secure the effect you desire.

Once the validity of legislative discretion in using the crime-imprisonment-criminal-procedure complex is granted, legal problems in this area disappear, for the Wisconsin statutes have always provided that if imprisonment could be awarded, the act was a misdemeanor, and that as a misdemeanor was a crime, the use of criminal procedure followed.[96]

The Nature of Crime: The Mens Rea Problem

In a crowded and industrial society, legislatures deem the prevention of harm a legitimate and important function. Thus, protection of the consumer from impure food and drugs and protection of the pedestrian and motorist from physical harm, require prohibitions or limitations on the use and sale of certain goods, or on the use of motor vehicles. The use of the criminal law to penalize possession or sale of harmful products or to penalize conduct such as speeding, which has in the absence of statute no criminal consequences, without regard to the mental state of the actor, does not comport, of course, with the traditional analysis of crimes which requires a particular mental state. It is misleading, however, to regard such acts as crimes of "absolute liability," for defenses are allowed in appropriate cases. A motorist who could convince the trier of fact that he was ignorant of the fact that his turn signal was not working at the time of arrest, and that he knew it had been working and could show by witnesses that it had been working five minutes previously, would not be convicted of the offense of failing to signal a turn. The court would read the statute as permitting the defense of mistake of fact.[97]

[95] WIS. STAT. § 54.32 (1957) which indicates a possibility of holding a juvenile who has reached 21 for an indefinite period, is not, according to the Department of Public Welfare, being used.

[96] WIS. REV. STAT. ch. 122, § 9 (1849); WIS. STAT. §§ 288.01, 939.12 (1957).

[97] For a discussion of liability without fault in Wisconsin, see Remington, *Liability Without Fault Criminal Statutes*, 1956 WIS. L. REV. 625. See also Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

While the legislature is not constitutionally prevented from creating absolute liability crimes, the legislature, ordinarily, does not mean to create such liability and the courts knowing this allow defenses to be introduced.[98] The United States Supreme Court has often recognized the constitutional possibility of creating crimes which contain no requirement of intent. This was reiterated in 1951, though its application to a case of misappropriation was denied.[99]

There are really two problems in this area. The motorist with the presently defective turn signal is arguing, in effect, that the statute penalizes negligence and that he was not negligent. The problem here is: if due care is to be allowed as a defense, is it better to make a prohibition criminal or civil? The problem in connection with absolute liability offenses is much the same: if a defendant is not allowed to offer any defenses, should he be declared a criminal and should the action to enforce the penalty be civil? Historically, it has been customary to permit the state to use civil procedure to collect a fine if the fine is the only criminal penalty.[100]

This combination of difficulties and opportunities has led many people to suggest that the appropriate solution is to "unburden" the criminal law by changing to civil actions those actions involving the mental element of negligence, those actions in which no defenses are allowed, and those actions where the only penalty is a fine.

It has been argued that the creation of many new crimes[101] causes a breakdown in the administration of criminal justice.[102] Sayre, in his pioneering article, "Public Welfare Offenses," states the case:

> The old cumbrous machinery of the criminal law, designed to try the subjective blameworthiness of individual offenders, is not adapted for exercising petty regulation on a wholesale scale; and consequently a considerable amount of this developing regulation has been placed under administrative control. But unfortunately the criminal law . . . was seized upon as a convenient instrument for enforcing a substantial part of this petty regulation. As a result criminal courts are today swamped with great floods of cases which they were never designed to handle; the machinery creaks under the strain . . . . What is badly needed is some form of administrative control which

[98] Remington, *supra* note 97, shows that 62% of Wisconsin crimes studied are stated without any expression of mental state on the part of the actor.

[99] Morissette v. United States, 342 U.S. 246 (1952).

[100] WIS. STAT. § 288.01 (1957).

[101] 175 in New York in 6 years; see Publisher's Preface to N.Y. PEN. LAWS.

[102] Warner & Cabot, *Changes in the Administration of Criminal Justice in the Last Fifty Years*, 50 HARV. L. REV. 583 (1937).

will prove quick, objective and comprehensive.

. . . .

> The ready enforcement which is vital for effective petty regulation on an extended scale can be gained only by a total disregard of the state of mind. Thus, there has grown up within comparatively recent times a group of public welfare offenses, consisting of violations of police regulations which are punishable without proof of any individual blameworthiness and which form an exception to the general established doctrines of the criminal law.[103]

Jerome Hall also proposes control by administrative agencies, using methods such as revocation of licenses, as a substitute for control by criminal law, as far as this is possible. But as soon as administrative penalties become effective, there is an immediate demand that quasi-judicial procedures, with many of the safeguards of criminal law, be used in the administrative action.

The Civil Action for a Penalty

It will help our analysis if we look briefly at the nature of the most frequently suggested substitute for the criminal action—the civil action for a penalty. It is an old and interesting procedural hybrid; its use has been advocated by others as a method of reestablishing the criminal law.[104]

Wisconsin constitution framers and statute writers borrowed heavily from New York and Massachusetts. These draftsmen, in turn, wrote only fifty years later than Blackstone and were well acquainted with his *Commentaries*. Blackstone viewed the civil action for a penalty in the following manner:

> The same reason [an implied original contract to submit to the rules of the community] may with equal justice be applied to all penal statutes, that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires. The usual application of this forfeiture is either to the party grieved, or else to any of the king's subjects in general. Of the former sort is the forfeiture inflicted by the statute of Winchester . . . upon the hundred wherein a man is robbed, which is meant to oblige the hundredors to make hue and cry after

[103] Sayre, *supra* note 97, at 69-70.

[104] See reports of a project, and conclusions therefrom, in Note, 1937 WIS. L. REV. 365; Comment, 1946 WIS. L. REV. 172, and references listed in footnote one of the last reference, and in Perkins, *The Civil Offense*, 100 U. PA. L. REV. 832, 841 (1952).

> the felon; for, if they take him, they stand excused. But otherwise the party robbed is entitled to prosecute them, by a special action on the case, for damages equivalent to his loss. And of the same nature is the action given by statute 9 George I, c. 22 . . . commonly called the black act, against the inhabitants of any hundred, in order to make satisfaction in damages to all persons who have suffered by the offenses enumerated and made felony by that act. But, more usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action . . . .[105]

The first Wisconsin statutes—Revised Statutes of 1849—did not define crime by name. A felony was a crime carrying the penalty of death or of imprisonment in a state prison.[106] A misdemeanor was any offense carrying the penalty of imprisonment.[107] In 1878 the definition of misdemeanor was expanded to include offenses declared misdemeanors by the legislature,[108] but this provision was omitted from the procedural revision in 1935.[109] All criminal prosecutions were begun by indictment, except impeachment and offenses cognizable by justices of the peace.[110] There was no general description of justice court jurisdiction over crimes, but many specific statutes conferred jurisdiction over specific crimes.[111] Assault, battery, and affray were not only not indictable, and therefore within justice court jurisdiction, but, in addition, were prosecuted in a summary manner.[112] Since imprisonment was not specified as a penalty, they were not misdemeanors, but only petty offenses.

If a penalty or forfeiture was prescribed and the act was not also designated a misdemeanor, such penalty or forfeiture might be recovered by the proper common law civil action.[113] Conversely, forfeitures might be prosecuted by indictment in circuit court, or by complaint in justice court if the amount of the forfeiture did

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[105] 3 BLACKSTONE, COMMENTARIES *159-60.
[106] WIS. REV. STAT. ch. 141, § 14 (1849).
[107] WIS. REV. STAT. ch. 122, § 9 (1949).
[108] WIS. REV. STAT. § 3294 (1878); WIS. STAT. § 288.01 (1933).
[109] Wis. Laws 1935, ch. 483, § 74.
[110] WIS. REV. STAT. ch. 132, § 1 (1849).
[111] WIS. REV. STAT. ch. 134, § 16; ch. 139 §§ 5, 25 (1849).
[112] WIS. REV. STAT. ch. 89, § 28 (1849).
[113] WIS. REV. STAT. ch. 122, § 1 (1948). Early federal practice went further: "Almost every *fine* or forfeiture under a penal statute, may be recovered by an action of debt as well as by information . . . ." (Emphasis supplied.) Adams v. Woods, 1 U.S. (2 Cranch) 492 (1805).

not exceed $100[114]. Amounts collected as penalties or forfeitures were to be paid into the state treasury for the credit of the school fund[115] in accordance with the constitutional command.[116]

It seems fair to say that in 1848-1849 Wisconsin lawyers thought of the action for a penalty as a hybrid. This theory is in accord with Holdsworth's historical account:

> These statutes [of the XIV and XV centuries] show us that the boundary line between civil and criminal liability is as yet uncertain. The judges, it is true, can lay down certain differences between civil and criminal proceedings—a person cannot sue civilly unless he can show a special grievance, whereas the king can lay the charge generally; a suit by a private person sounds in damages, whereas a suit by the king ends in the punishment of the guilty party. But we see that many offenses the commission of which would in our times be repressed by a criminal prosecution were then remedied by either civil or criminal proceedings, and sometimes only by civil proceedings. Thus a favorite expedient was to give an action of debt for double or triple damages, or an action of trespass. The reason for this it is not difficult to find. There was . . . no organized police force in those days, nor were there armies of inspectors of different kinds. . . . Seeing that the criminal appeals were falling into disuse, it was necessary to enlist the injured man in the cause of law and order by holding out the prospect of obtaining heavy damages, or of using the speedy process available in the action of trespass. . . . It has become the favorite remedy provided by the legislature for those whose cause for action is on the borderland between crime and tort.[117]
>
> . . . .
>
> As monopolies and patents were used to raise revenue for the crown, and to encourage new industries, the informer was turned into machinery for the enforcement of the new commercial policy statutes.
>
> It might happen that no member of the public was willing to come forward and bring his action; and so, to meet those cases, it became customary to give commissions and patents to certain persons to sue for penalties, the whole or some part of which they were allowed to keep for their own use.
>
> The number of statutes, old and new, in which the public at large was encouraged to enforce obedience to statutes by the promise of a share of the penalty imposed for disobedience was very large.[118]

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[114] WIS. REV. STAT. ch. 141, § 12 (1849).
[115] WIS. REV. STAT. ch. 122, § 14 (1849).
[116] WIS. CONST. art. X, § 2.
[117] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 453-54 (1923).
[118] 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 355-56 (1924).

Goebel and Naughton, in their *Law Enforcement in Colonial New York,* agree with Holdsworth:

> The distinction between civil and criminal proceedings is blurred in the Duke's laws. . . . The prosecution of offenders by constables' presentment or individual complaint was a great deal closer to civil procedure than to the English procedure by indictment. This lack of distinction is patent in the section on "Actions" where rules of jurisdiction and proceedings for torts, debts and accounts as well as misdemeanors are scrambled together.[119]

The New York statutes, at the time they were consulted by draftsmen of the Wisconsin territorial statutes, and the Wisconsin Revised Statutes of 1849 provided a scheme for the collection of penalties by common law actions.[120] The New York provision was the basis for chapter 122 of the Wisconsin statutes of 1849. There was apparently no borrowing from the Michigan Revised Statutes of 1838. The provision in the criminal code allowing collection of statutory fines and forfeitures by indictment if the value were $100 and over, or by complaint in justice court if under $100,[121] was taken from the Massachusetts Revised Statutes of 1836.[122]

The historical accounts fail to give a clear reason for the legislative choice between criminal fine and civil penalty. Holdsworth's reasons would explain the creation of penalties, the proceeds of which went to local government. For example, see in the Wisconsin statutes of 1849 the penalty imposed on a town officer who refuses to deliver records to his successor.[123] This penalty was evidently not considered by the statute's draftsmen as money accruing to the state by forfeiture.[124] Early cases came to a different result. In 1871, in *Dutton v. Fowler,*[125] a statute of 1866, which gave to the informer all of a $10.00 per diem forfeiture for diseased sheep running at large, was declared unconstitutional because it diverted from the school fund "the clear proceeds of fines collected in the several counties for any breach of the penal laws." The court converted the

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[119] GOEBEL & NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 387 (1944). The "Duke's laws," were dated 1664, the year of the conquest of New York by the British. The Duke was the Duke of York. Many illustrations of prosecutions for penalties are cited *passim* (*e.g.*, a by-law of 1768 penalized the taking of oysters out of season by a fine of 20*s*. See *id.* at 267.).

[120] N.Y. REV. STAT. vol. III, ch. VIII, tit. VI, art. I (1829).

[121] WIS. REV. STAT. ch. 141, § 12 (1849).

[122] MASS. REV. STAT. pt. IV, tit. I, ch. 133, § 14 (1836) (in Massachusetts, the limit was $20).

[123] WIS. REV. STAT. ch. 12, §§ 45, 58 (1849).

[124] WIS. CONST. art. X, § 2.

[125] 27 Wis. 427 (1871); Wis. Laws 1866, ch. 16.

forfeiture accruing to the informer into a fine by the theory that the law was penal and the forfeiture was in the nature of a fine. A year earlier the court had decided[126] that a statute permitting an informer to collect one-half of a forfeiture in an action brought in his own name was valid, but the part of the statute giving the other half of the forfeiture to the county in which the offense was committed was invalid as diverting the clear proceeds of fines collected which should go to the school fund. *State ex rel. Guenther v. Miles*[127] cast a slight doubt on the latter statement by allowing the county to retain the cost of collecting forfeitures, as distinguished from fines, which under the statute was limited to two percent. Penalties assessed for violations of municipal ordinances were held, in *Plateville v. Bell,*[128] as not being within the constitutional provision, so that municipalities might retain them.

From this excursion we see that one valid reason for creating state civil actions for a penalty—stimulation of local enforcement with the inducement of local retention of penalties—was eliminated in Wisconsin at an early date by the court. Allowing counties and municipalities to create penalties by ordinance insured enforcement of local laws, which might parallel state statutes. At about the time the court reached the above conclusion, it also was deciding that the state action for a penalty was a civil action, at least to the extent that the state could appeal an aquittal.[129]

Since there is no prohibition on absolute liability crimes,[130] the conclusion that absolute liability may be enforced by civil penalties seems reasonable.[131]

There has been no decision in Wisconsin on the possibility of awarding direct imprisonment in a civil action brought by the state. The reason is obvious: if imprisonment were a possible penalty, everyone would assume that criminal procedure must be used. *Keefe* simply followed that reasoning, though it related imprisonment to sovereignty, rather than to procedural requirements. The implications of *Keefe* are clear, however.

An attempt to create restrictions on liberty less than imprisonment presents a more difficult question. For example: Is compulsory attendance at a driver training school[132] a proper penalty in a civil

[126] Lynch v. The Steamer "Economy," 27 Wis. 69 (1870).
[127] 52 Wis. 488, 9 N.W. 403 (1881).
[128] 43 Wis. 488 (1878).
[129] State v. Hayden, 32 Wis. 663 (1873); followed in State v. Smith, 52 Wis. 134, 8 N.W. 870 (1881).
[130] Morissette v. United States, 342 U.S. 246 (1952).
[131] Zarnott v. Timken-Detroit Axle Co., 244 Wis. 596, 13 N.W.2d 53 (1944).
[132] WIS. STAT. § 345.16 (1957).

action? Is probation after payment of fine has been suspended a proper penalty? Both federal statute and case law hold that probation is proper in a criminal action where the only penalty is a fine.[133]

While present Wisconsin statutes contemplate the use of probation in connection with civil penalties in Milwaukee County,[134] the question of their validity has never been raised in a court proceeding. It should be noted, too, that these statutes were enacted before the *Keefe* case, and, therefore, were originally enacted in connection with what was then a quasi-criminal penalty. The attorney general has held that the probation statute applies only to criminal cases.[135]

By analogy, it would seem that the restriction of liberty in enforced attendance at drivers' school is unconstitutional as a remedy which cannot be imposed in a civil action. Furthermore, an analogy from tax law is not useful here. In tax proceedings, if the court can find that the legislature intended the penalty to be remedial,[136] a civil action is proper to recover the penalty. But traffic school is not a remedy in this sense; the remedy accrues to the defendant and not to the plaintiff government.

The present situation in regard to the state-prosecuted action for a civil penalty, whether practically or historically considered, is that a decision as to its use can only be based on an answer to the following question: In the interest of both the state and the citizen is civil procedure more or less effective than criminal procedure?

Civil Action or Criminal Action?

On balance, then, where the state or one of its agencies is prosecutor and a penalty is to be exacted which is not compensatory or remedial, but in effect deterrent and punitive, is the civil action a better procedure than the criminal action?

People who attach importance to the stigma of criminality or who feel that the mere number of criminal actions somehow causes a breakdown of the criminal law answer the question "yes."

As to stigma, we operate in the field of public opinion, and he who makes a conclusion without the benefit of a survey is rash,

[133] United States v. Berger, 145 F.2d 888 (2d Cir. 1944); 18 U.S.C. § 3651 (1952).
[134] WIS. STAT. § 57.025 (1957).
[135] 34 OPS. WIS. ATT'Y GEN. 412 (1945).
[136] *I.e.*, that it was "a safeguard for the protection of the revenue and reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." Helvering v. Mitchell, 303 U.S. 391, 401 (1937). See also Note, 51 HARV. L. REV. 1092 (1938).

indeed. It may safely be said, however, that in Wisconsin, after eleven years of calling municipal traffic violations civil offenses instead of minor crimes, there has been no change in individual resentment on conviction of a municipal traffic charge or in public feeling toward the criminal law generally. Without much education the public will not differentiate between names, when the effects of the procedures (financial loss and awarding of points toward loss of driver's license) are the same.

Mere number of criminal prosecutions will not break down criminal enforcement if appropriate steps are taken to gear the number of judges to the volume of work. Further, to the extent that the criminal courts are separate from the civil courts, then as the criminal courts are unburdened the load is shifted to the already loaded civil courts. In terms of the total job of law enforcement, it makes no difference whether the prosecution is civil or criminal, since summary procedure may be used in each. The lawyer's unhappiness arises not from the type of procedure used, but rather from the fact that there are so many types (criminal for state violations; many kinds of civil for various minor courts) that need to be known.

More important, the change to civil action, regardless of the reason given, operates directly to deprive the citizen of the protection of criminal procedure. Should he give up valuable rights for the advantage of not being labeled a criminal? The shift to civil procedure will induce the citizen to demand more of the protection of criminal procedure in the civil action and the civil action for a penalty will grow to look more and more like a criminal action. If the two are procedurally almost indistinguishable, what will be the effect on stigma and on the attempt to maintain a separation? Fortunately, or not, these are, in 1959, problems of judgment or politics. Let us study the problems separately.

The Mens Rea Problem in the Civil Action

If the legislature declared that whoever violated a traffic regulation, such as speeding or illegal passing, *with intent to cause injury to person or property, or recklessly,* could be imprisoned up to *X* years, and fined not more than *X* dollars, it would be providing for a set of traffic crimes which would be crimes in the common law sense. It could then provide further that whoever violated such regulations without such intent, or without recklessness, was guilty of negligence, and could be penalized up to *X* dollars, to be recovered in a civil action.

This approach is based on the premise that the defendant's conduct in the preventive situation, where there has been no intent to cause harm or no recklessness, is like that of the civil defendant in a civil action for negligence. The difference, of course, is that while in the civil action injury and causation must be proved as well as negligence, negligence alone suffices in the state action, and the standard of the negligence is provided in the statute. It would not be possible to spell out by statute all possible defenses in such actions, but the courts, by common law methods, could do so in appropriate cases. The advantage of this system is that since the action is based on negligence instead of crime, the courts, in proper cases, would allow defenses to disprove negligence and the tendencies, such as they are, toward strict liability would be checked.

It seems reasonably clear today that the court in a prosecution for what appears to be a crime of strict liability, such as failure to stop after striking a person,[137] which has a severe penalty,[138] would permit the defense of ignorance of fact to be put forth. The hope would be that the courts would permit proper defenses to be made where the penalties were minor.

Note that the proposal made above does not require a particular mental state to accompany the prohibited act; it simply says that if the mental state is not intent or recklessness, mental state is immaterial (as it is in civil negligence). It may be inadvertence, or mistake; it may be a feeling (however unwarranted) that the regulation is unrealistic (such as the 65 mile-per-hour daytime rural speed limit in Wisconsin), or that the application of the rule to a particular situation is unwise (such as a stop sign, instead of a failure to yield sign, on a rural highway where there is an unobstructed view for a mile in either direction). The mental state would not need to be proved by the prosecution, but the court could develop certain defenses, such as mistake or ignorance of fact, which negative the negligence.

In civil law knowledge is a component of negligence[139] and is mentioned in instructions. In a case where the plaintiff alleges that the defendant was negligent in operating a car at night without a tail light burning, the defendant's proof that the lights went out minutes before the collision, and that he could not have known that they were not burning, will be resolved in the question: "Was the defendant negligent as to operating his vehicle without tail

[137] WIS. STAT. § 346.67 (1) (1957).
[138] WIS. STAT. § 346.74 (5) (1957).
[139] See PROSSER, TORTS § 29, p. 118 (2d ed. 1955).

lights"? The proposal set forth here is to let the courts in appropriate cases gradually allow the introduction of defenses under the general plea of not guilty.

A second proper use of the civil action is in cases where the legislature thoughtfully wishes to take away all defenses from the defendant. In this situation, it is more appropriate to call the offender a civil violator; if the penalty is not too severe, and if in the procedure used some of the safeguards of criminal procedure are imported, the public is possibly happier with this solution. On first consideration, it may seem odd that the civil action should be suggested as a method both to increase the possibilities of defense in some situations and as the more appropriate method where no defenses are to be allowed. A little reflection will show that the solutions are not inconsistent, and that they proceed from the same basis, viz., the nature of mental state in criminality. In the one case we say, ordinary negligence is not criminal; in the other we say, if the defendant is not to be permitted to prove that his mental state was non-criminal, he should not be considered a criminal.

Using the nature of the money penalty as a ground for removing an act from the criminal law is logically unsatisfactory. Even if a penalty is small, if the act is criminal by the nature of the act and the mental state, it should remain a crime. The logical shorthand used (and the present author will use it) is that small fines are imposed only where there is no criminal mental state, or where the legislature means to impose absolute liability, and, therefore, removing the acts penalized only by money fines is proper.

The foregoing suggestions are made with some hesitation, for if there were no artificial reasons for retaining the civil action, such as the Wisconsin rules that municipalities cannot create crimes and that fines must go to the state with the resultant feeling on the part of municipalities that since they must use the civil action they should not be bound by all the rules of criminal procedure, it would be simpler to create a degree of crime, below a misdemeanor, for handling of traffic cases. It could be called a petty offense, or an infraction, and criminal procedure would be used, but some of the consequences of crime might be removed *(e.g.,* no imprisonment, or no application of the repeater statute). Most important, in the light of the discussion in this section, stated defenses could be made applicable in these prosecutions to give the defendant the advantage of the theory of negligence, or, if more appropriate in a particular jurisdiction, the general part of its criminal law which includes

defenses might be made applicable, unless for a given act the legislature determined that defenses were not to be allowed.

If Civil Actions for Penalties Are Used, What Safeguards Should Be Given to the Defendant?

If we remember that where imprisonment is a sanction all the safeguards of criminal procedure must be retained, it can be asked whether it is fair and constitutional to work out a modified civil procedure, with less than the full kit of criminal safeguards, where the state wishes to use only a monetary penalty as a sanction. Put another way, should the civil offender have the protection of civil procedure, criminal procedure, or some of both?

The basic policy determination cannot be made correctly if we think in terms of the accused and the prosecutor in a particular case. Our concern, of course, is with the protection of the interests of society as a whole, as against fairness to an accused violator of one of society's legal commands. If this were not the question, we would be faced with a decision between a hypothetical prosecutor who would advocate all criminal sanctions with no criminal safeguards, and a hypothetical violator who would want no criminal sanctions and all criminal safeguards. The state may act as plaintiff in a civil action to enforce acts properly passed to exercise its police power. Money forfeitures may be obtained in a civil action;[140] revocation of license as a possible penalty does not change a civil into a criminal action.[141]

Now let us look at specific criminal safeguards, and their application to civil actions. In *Boyd v. United States*,[142] there is a statement that discovery should be denied the government in a civil action for a penalty. The case, it is true, can be distinguished on several grounds: it involved the United States, not a state; the act was penalized by both fine and forfeiture, so that the prosecutor might elect which procedure to follow. But the rule,

> as, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of that portion of the Fifth Amendment . . . and we are further of opinion that a compulsory production of the private books and papers of the

[140] WIS. STAT. § 288.01 (1957); Milwaukee v. Stanki, 262 Wis. 607, 55 N.W.2d 916 (1952).

[141] Oshkosh v. Lloyd, 255 Wis. 601, 39 N.W.2d 772 (1949).

[142] 116 U.S. 616 (1885).

> owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself . . .[143]

is sound, and in principle the legislature ought to state, in procedure to collect a civil penalty, that there is no right to discovery against the defendant. Conversely, the defendant has no right to discover the prosecution's case.

Boyd was not, on the facts, limited when the Court, in *Helvering v. Mitchell,*[144] distinguished between sanctions which have a punitive element and those "characteristically free of the punitive criminal element . . . [as] revocation of a privilege voluntarily granted." The Court continued:

> Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings since the original revenue law of 1789. [Citation.] In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions. [Citing cases.][145]

The last sentence was unnecessarily broad for the facts of the case, which required only a holding that judgment after a criminal prosecution was no bar to a later second civil proceeding for a civil penalty (50 percent additional income tax).

It would seem impractical to suggest that counsel be provided for an indigent defendent in a civil action until the legislature sees fit to extend this benefit to indigent misdemeanants. The right to jury trial, as we have seen, is as well guaranteed by civil procedure as by criminal procedure. The Wisconsin court has said that in actions for civil penalties within justice court jurisdiction, the right to jury trial may be denied in justice court if there is a right to trial by constitutional jury on appeal.[146] The civil five-sixths verdict has advantages for both defendant and the prosecution. By our analysis, the statement of burden of persuasion is unimportant.

The lack of safeguards against double punishment is the worst defect of the civil action. It seems dubious that a court would let the state fine the defendant in one action and then recover a civil penalty against him in a second. But, in the absence of a clear holding to the contrary, the possibility is there. The legislature should close this door.

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[143] *Id.* at 634.
[144] 303 U.S. 391 (1938).
[145] *Id.* at 399-400.
[146] Oshkosh v. Lloyd, 255 Wis. 601, 39 N.W.2d 772 (1949).

There seems to be no valid objection either to the prosecution's motion to take the case from the jury[147] (since, if the defendant has presented credible evidence the case will go to the jury), or to the state's right to appeal,[148] so that no restriction of these rights in favor of the defendant is necessary.

Perhaps there is a point at which the civil action would become a hybrid and unconstitutional as violating due process of law. The Wisconsin court has said several times in the last few years, notably in *Keefe* and in *State ex rel. McStroul v. Lucas,*[149] that there are only two kinds of action in Wisconsin, civil and criminal. Existing procedural statutes were relied on in these cases, however, and these could be amended if necessary. In this connection it should be noted that the Wisconsin Supreme Court said in a comparable situation—a prosecution to establish paternity—that there may be a civil action with variations taken from criminal procedure.[150] In applying section 260.05 (the same section which the court used in *Keefe),* which says that actions are either civil or criminal, the court indicated that it is the judgment sought which determines the kind of action and not the procedure used. Thus, the use of procedure similar to criminal procedure does not make the action a criminal action. A few years later the court said that even though an illegitimacy proceeding was a civil action, the state must prove its case by the criminal burden—proof beyond a reasonable doubt.[151]

The answer to the question put at the beginning of this section is, then, that in the interests of fairness to the accused, ordinary civil procedure must be modified in some respect, and should be modified in others, if it is to be used for the collection of civil penalties. Conversely, the rule should remain that conviction of civil violation is not a criminal conviction which can be used later to impeach a witness.[152]

It must be noted that as long as the civil penalty has the deterrent effect desired, especially when the penalty includes loss of a driver's license or the awarding of points toward loss, there will be constant agitation for importing into the civil action all the criminal protections. This has happened to New York's procedure for enforcement of non-criminal traffic infractions. In a 1957 case, the New

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[147] *Ibid.*
[148] State v. Hayden, 32 Wis. 663 (1873).
[149] 251 Wis. 285, 29 N.W.2d 73 (1947).
[150] State *ex rel.* Zimmerman v. Euclide, 227 Wis. 279, 278 N.W. 535 (1938).
[151] Schuh v. State, 221 Wis. 180, 266 N.W. 234 (1936).
[152] Koch v. State, 126 Wis. 470, 106 N.W. 531 (1906); McClaim v. United States, 224 F.2d 522 (D.C. Cir. 1958).

York Court of Appeals, in holding a traffic statute too vague and indefinite, said: "There are applicable to such prosecutions the rules of the criminal law."[153] It took several years and many decisions to reach this result.[154] The procedure and effects of the civil action should be spelled out by statute, to avoid the necessity for litigation to determine applicable safeguards and effects.

[To Be Concluded]

[153] People v. Firth, 3 N.Y.2d 472, 474, 168 N.Y.S.2d 949, 950 (1957).

[154] See Note, 42 Cornell L. Q. 262 (1957); People v. Hildebrandt, 308 N.Y. 397, 126 N.Y.S.2d 377 (1955).