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

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MUNICIPAL ENFORCEMENT OF TRAFFIC LAWS

Development of Wisconsin Doctrine

The first part of this article discussed the purely state problems. Attention is now focused on problems which arise from municipal enforcement of traffic laws. They are important because much of the total burden of enforcement of traffic laws is placed on local units of government. It must be assumed that no new financial arrangements will be forthcoming whereby the state will assist localities to carry the financial burden of enforcement; accordingly, municipalities will want the proceeds of conviction to flow into the local treasuries. The ultimate problem is: shall local governments use both criminal and civil sanctions to enforce their ordinances, or shall they be restricted to civil sanctions only?

Wisconsin procedure is unusual in that only the civil action is used for the enforcement of municipal and county ordinances.[155] To assess the validity of the Wisconsin procedure, we must look at the development of actions for enforcement of ordinance violations.

In *City of Boscobel v. Bugbee*,[156] an action involving a municipal ordinance prohibiting an act which was also a misdemeanor under state law, the court held that an action to recover a monetary pen-

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[155] Other states permit their municipalities to create crimes: Commonwealth v. Fahey, 59 Mass. 408 (1850). The legislation does not permit towns to ordain direct imprisonment. MASS. ANN. LAWS ch. 40 (1952); State v. Ketterer, 248 Minn. 173, 79 N.W.2d 136 (1956). Other states also permit direct imprisonment: COLO. CONST. art. XX, § 6; City of Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958); N.Y. CONST. art. IX, §§ 11, 12; N.Y. CITY HOME RULE LAW § 11.3(b); N.Y. VEHICLE & TRAFFIC LAW § 2.29.

English cities at common law did not have power to use direct imprisonment as a sanction because such imprisonment would violate 17 John, Magna Carta, § 39; Clark's Case, 5 Co. Rep. 64a, 77 Eng. Rep. 152 (1596); City of London v. Wood, 12 Mod. Rep. 669, 88 Eng. Rep. 1592 (1715). The early cases indicated that debt was a proper action to recover the penalty. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 425 (6th ed. rev. 1934); 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 88 (1926).

[156] 41 Wis. 59 (1876).

alty was quasi-criminal to the extent that appeal to the supreme court would not lie from an order dismissing the action. However, where an ordinance prohibited an act which was not a misdemeanor by state law, an action to enforce the ordinance was held to be a civil action, and appeal properly lay.[157] *Village of Platteville v. McKernan*[158] stated the rule: if an ordinance prohibited an act which was a crime at common law or by statute, the action to recover the penalty was quasi-criminal and could not be brought to the supreme court by appeal. This distinction was abandoned in *City of Milwaukee v. Johnson*[159] where the court said:

> The court is satisfied that a distinction which is based upon such technical and illogical grounds ought no longer to be given judicial sanction. The court therefore adopts the rule that all proceedings to collect penalties under municipal ordinances shall be treated as civil actions which may be brought to this court for review by appeal, regardless of whether the act complained of might also be the basis of a criminal prosecution.[160]

Another development in the use of a civil action for the enforcement of a violation of a municipal ordinance occurred in the area of the jury trial. In *Ogden v. City of Madison*,[161] it was held that an ordinance violation was not a misdemeanor, even though the act prohibited was a misdemeanor by state law, so that there was no right to a jury trial for the ordinance violation. This ruling was based on the theory that since there was a right to jury trial on appeal to circuit court, the constitutional guarantee of trial by jury was satisfied. The clear implication of this case was that since the offense was a petty crime, the guarantee of jury trial in criminal cases did not apply. *Ogden* is, however, ambiguous. On the one hand, it argues that double jeopardy does not prevent a second prosecution by the state or the city after the other has maintained a first action; and it quotes the case of *State ex rel. Hamilton v. Municipal Court*[162] to the effect that municipal ordinances are civil actions and within the summary jurisdiction. On the other hand, neither *Ogden* nor *Hamilton* refer to section five of article I (civil jury trial) but both constantly imply they are referring to section

[157] Platteville v. Bell, 43 Wis. 488 (1878).
[158] 54 Wis. 487, 11 N.W. 798 (1882).
[159] 192 Wis. 585, 213 N.W. 335 (1927).
[160] *Id.* at 590-91, 213 N.W. at 338.
[161] 111 Wis. 413, 87 N.W. 568 (1901). However, there is language to the contrary in State *ex rel.* Hamilton v. Municipal Court, 89 Wis. 358, 61 N.W. 1100 (1895).
[162] 89 Wis. 358, 61 N.W. 1100 (1895).

seven (criminal jury trial) of the Wisconsin constitution.

The court's lack of consistency in this area is also illustrated in the following cases: *Koch v. State*[163] held that violation of an ordinance is not a criminal offense within the meaning of a statute providing that conviction of a criminal offense may be proved to affect the credibility of a witness. *City of Milwaukee v. Beatty*[164] held that a successful prosecution of an ordinance violator resulted in a conviction and that the convicted person might appeal. *Kuder v. State*[165] held that the judgment in a municipal action could not read "State of Wisconsin against Kuder" because such a judgment would be proper only in a state criminal action.

A final development concerns the validity of direct imprisonment. This point might have been raised in *City of Milwaukee v. Johnson*[166] since the city ordinance provided such a penalty. The question did not come up because:

> Counsel for the city concedes that *Milwaukee* had no power to pass an ordinance prohibiting gambling which imposed imprisonment as a penalty for the violation of the ordinance. For the purpose of this appeal the court will assume, without deciding that question, that no such power was possessed by the city . . . .[167]

The point, however, did arise in *Hack v. City of Mineral Point.*[168] The court there held that the enactment of the general charter law in 1921[169] gave cities the power to ordain direct imprisonment as a penalty. The court gave this hint for the future: ". . . we find no limitation either by express language or implication upon that power [to ordain direct imprisonment] except such as may inhere in constitutional provisions."[170]

Hack was followed in *City of Janesville v. Heiser.*[171] The additional authority of the home rule amendment[172] was assumed but not discussed. The court said that before the enactment of section 62.11 it was generally held that actions to enforce municipal ordinances were civil actions; it *did not* say that in 1933 they were criminal actions. The court further implied that the home rule

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[163] 126 Wis. 470, 106 N.W. 531 (1906).
[164] 149 Wis. 349, 135 N.W. 873 (1912).
[165] 172 Wis. 141, 178 N.W. 249 (1920).
[166] 192 Wis. 585, 213 N.W. 335 (1927).
[167] *Id.* at 592, 213 N.W. at 338.
[168] 203 Wis. 215, 233 N.W. 82 (1931).
[169] Wis. Laws 1921, ch. 242. Note especially § 39 thereof.
[170] Hack v. City of Mineral Point, 203 Wis. 215, 221, 233 N.W. 82, 85 (1931).
[171] 210 Wis. 526, 246 N.W. 701 (1933).
[172] WIS. CONST. art. XI, § 3.

amendment would not prevent the legislature from repealing its grant of this "shocking" power given to cities.

In 1941, in *City of Waukesha v. Schessler*,[173] the court faced squarely the problem of the relationship of the penalty to the nature of the action, and decided that even though the city ordinance provided for direct imprisonment, the action to enforce the penalty was a civil action. This was on the theory that only the state could prosecute a criminal action, and since there were only two kinds of actions in Wisconsin, the municipal action must be civil.[174] The theory of a quasi-criminal action was rejected specifically.

The Effect of the Keefe Case

This was the setting when *State ex rel. Keefe v. Schmiege*[175] was decided in 1947. The county ordinance which attempted to create a misdemeanor and to provide direct imprisonment for violation thereof was voided on two grounds: first, the county is not a sovereign and only a sovereign can create a crime, so the act of the legislature[176] attempting to confer on counties the power to create misdemeanors was invalid; second, the act of the legislature, viewed as authorizing the county to prescribe direct imprisonment in a civil action violates the Wisconsin constitution.[177]

The last argument was applied, obiter, to municipalities as well as to counties, though there is a clear distinction between the powers of counties and towns on the one hand, and cities and villages on the other.[178] But in specifically overruling *Hack* and *Heiser* the possibility of using the home rule amendments as justification for delegation to cities was impliedly negated.

The decision in *Keefe* rests on three points:

(1) The legislature cannot delegate to municipal or county authorities the power to treat violation of an ordinance as a misdemeanor, and to impose penalties other than forfeitures and imprisonment necessary to enforce a forfeiture.[179]

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[173] 239 Wis. 82, 300 N.W. 498 (1941).

[174] This result was forecast in a dictum in the case of City of Neenah v. Krueger, 206 Wis. 473, 240 N.W. 402 (1932). In that case Justice Rosenberry, who also wrote the *Hack* decision, indicated that in Wisconsin actions were of two kinds only: civil and criminal. Thus, he discounted the idea of the quasi-criminal action.

[175] 251 Wis. 79, 28 N.W.2d 345 (1947).

[176] WIS. STAT. § 85.84 (1941); now WIS. STAT. § 349.06 (1957).

[177] WIS. CONST. art. I, § 2.

[178] State *ex rel.* Bare v. Schinz, 194 Wis. 397, 216 N.W. 509 (1927).

[179] This indirect imprisonment was held constitutional on the authority of Starry v. State, 115 Wis. 50, 90 N.W. 1014 (1902).

(2) The legislature cannot grant to municipalities or to counties the power to pass ordinances which award direct imprisonment as a penalty in a civil action.

(3) Cities have no home rule power to award direct imprisonment as a sanction for ordinance violation.

Justice Fowler's opinion in the *Schessler* case provided the basis for the first point. He noted that the Wisconsin constitution provides that: ". . . all criminal prosecutions shall be carried on in the name and by the authority of the [state of Wisconsin]."[180] He refused the argument that the provision permitted a quasi-criminal action, and concluded that actions were either civil or criminal. Since only the state could prosecute a criminal action, the municipalities must be limited to a civil action.[181]

Except for the constitutional provision quoted, there is nothing in the theory of state-local relations or in the theory of sovereignty which prevents delegation of the power to create a crime. The sovereignty argument comes not from *Schessler,* but from *Keefe,* where the statement was first made as follows:

> We shall not unduly extend this opinion by speculating whether this section [section twenty-two, article IV—legislature may delegate powers of local character to counties] authorizes the delegation by the legislature of essentially sovereign powers because the delegation of such powers is to the counties as state agencies and falls far short of making sovereign states out of counties. The sovereign alone can create a crime . . . since sec. 85.84, Stats., delegates to the counties power to create a crime, it is void as an attempt to confer sovereignty upon the counties.[182]

It is respectfully submitted that using the pattern of this argument, most delegation would be impossible. The sovereign is, in all cases of proper delegation, delegating his own powers, all of which can be spoken of as partaking of the attributes of sovereignty. How can it be said that delegation of the power to enforce traffic regulations is power of a "local character" when the regulations themselves must, as a matter of state-wide concern, be uniform; and,

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[180] WIS. CONST. art. VII, § 17.

[181] The court cannot mean the strict dichotomy between civil and criminal actions prevents the adoption, in certain civil actions, of some of the more adequate protections of criminal procedure for the accused. Such a position would be historically incorrect, as we saw in the analysis of constitutional safeguards, is not followed in practice, as paternity actions bear witness, and would be unfair to the civil violator, who deserves some of the criminal protections in actions where the state or a subdivision is prosecutor.

[182] State *ex rel.* Keefe v. Schmiege, 251 Wis. 79, 84-85, 28 N.W.2d 345, 348 (1947).

yet the power to use a certain kind of penalty to enforce the regulation cannot be delegated because it partakes of the nature of sovereignty?

The real question is: are there constitutional obstacles to the delegation of the power to use imprisonment to enforce an ordinance enacted in accordance with a proper delegation from the legislature? All section seventeen of article VII requires is that the prosecution be carried on in the name of the state "and by authority of the same." Do not these quoted words, on reasonable construction, give authority to delegate the power to create crimes? The New England States have long so held.[183]

The general rule as to limitations on the power of the legislature to delegate to local governments was stated in a recent case concerning one of the most limited of local units—a town. In *City of Milwaukee v. Sewage Comm'n*,[184] the court said: "It is a well-settled rule, supported with practical unanimity by the authorities, that the general doctrine prohibiting the delegation of legislative authority has no application to the vesting in political subdivisions of power of government matters which are local in scope."[185] The court had previously quoted with approval from Dillon's work, *Municipal Corporations:*

> Although the proposition that the legislature of a state is alone competent to make laws is trne, yet it is also settled that it is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances with appropriate sanctions, which, when authorized, have the force, in favor of the municipality and against persons bound thereby, of laws passed by the legislature of the state.[186]

We must not forget that the *Kuder*[187] case is the basis for the *Schessler* doctrine; but *Kuder* gave no reason for refusing to allow a county to bring an action in the name of the state except that a criminal judgment could only be entered in a criminal action brought by the state.

Keefe's second point is valid on its face. As we saw in the analysis of the powers of the state, the power to award direct imprisonment in a civil action ought to be denied to the state; equally, therefore, it ought to be denied to local governments.

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[183] State v. Keenan, 57 Conn. 286 (1889); Goddard, Petitioner, 33 Mass. 504 (1835); State v. Stearns, 31 N.H. 106 (1885).
[184] 268 Wis. 342, 67 N.W.2d 624 (1954).
[185] *Id.* at 354, 67 N.W.2d at 631.
[186] 1 DILLON, MUNICIPAL CORPORATIONS § 308 (4th ed. 1890) in State *ex rel.* Rose v. Superior Court, 105 Wis. 651, 673, 81 N.W. 1046, 1052 (1900).
[187] See p. 5 *supra*.

The third point, that cities have no home rule power to award direct imprisonment as a sanction for ordinance violations, can be justified on the ground that section three of article XI of the constitution in qualifying home rule powers by making them "subject . . . to this constitution" incorporates the no imprisonment except for conviction of crime provision of section two of article I. If the city cannot create a crime, it cannot, even under the home rule power, award direct imprisonment.

This reasoning overlooks a possibility which had the sanction of colonial, though not of English, practice: the use by municipalities of direct imprisonment as a punishment for petty offenses which were prosecuted by criminal procedure. To accommodate this position the early Wisconsin theory that misdemeanor did not include petty offense would have to be restated, and in addition, there would have to be recognized the colonial practice permitting municipalities to imprison for violation of their ordinances. With this interpretation the sovereignty problem would disappear, since there would be no delegation of the power to create a crime in the sense that a crime was a violation of state law.

The home rule power to award imprisonment for violation of municipal petty offenses could be similarly justified. Section two of article I[188] does not prevent imprisonment to enforce payment of a penalty or of a tort judgment, though literally such imprisonment is within its prohibition. This section could be construed to permit direct imprisonment for municipal petty offenses, since this practice was known in America at the time of the adoption of the Wisconsin constitution.

A final difficulty is that the court would have to permit municipalities to use a procedure which is essentially criminal, for in no other way could the interests of the accused be adequately protected. The court would have to provide, however, that even if essentially criminal procedure were used, and direct imprisonment could be awarded, the act is not a crime in the constitutional sense but only a petty offense.

Theories in Other States

In the traffic regulation field it must be admitted that the act penalized by the state and the city is the same. In Wisconsin it must be the same, since the city's ordinances must conform to the

[188] WIS. CONST. art. I, § 2 reads as follows:
"There shall be neither slavery, nor involuntary servitude in this state, otherwise than for the punishment of crime, whereof the party shall have been duly convicted."

state statute in everything except penalty.[189] It is not illogical to say, then, that a violation of the act made a crime by state law is a crime even if the prosecution is brought for the municipal form of the violation. This is the theory the court was developing up to the time the *Platteville* rule[190] was overruled in *City of Milwaukee v. Johnson*.[191] This rule protects the citizen both in requiring that criminal procedure be used on the trial and in preventing double punishment. It must be admitted that most of the municipal ordinances involved in these cases did not impose direct imprisonment but only a fine. No direct imprisonment was the rule in the New England states, and in Iowa which followed the New England theory. On the other hand, California, Colorado, Florida, and Minnesota, at least, allowed municipalities to impose direct imprisonment.[192]

Other theories which might be used by an antagonist of *Keefe* are the Connecticut theory that since the act is criminal "in nature" and there is public, rather than private prosecution, the act penalized by the city is a crime against the public, and therefore criminal prosecution in the name of the *state* is proper.[193] Or he may use the Arkansas-Iowa theory that the creation of crimes by a municipality is a proper exercise of municipal power.[194] Georgia developed the theory that a municipal ordinance violation was a crime, and used that proposition to reach a result contrary to *Keefe* —that direct imprisonment for a municipal ordinance was not in violation of a constitutional provision prohibiting servitude except as a punishment for crime.[195]

The foregoing discussion for foreign law is obviously not intended to be exhaustive nor a correct statement of present law. The presentation of theories and conclusions is simply to demonstrate the complexity of the problem of aligning all the historical

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[189] WIS. STAT. § 349.06 (1957).

[190] The writer of an L.R.A. note in 1896 saw the Platteville rule as the majority rule in the United States. Annot., 33 L.R.A. 1 (1896).

[191] See p. 4 *supra*.

[192] See also City of Minot v. Whitfield, 71 N.W.2d 766 (N.D. 1955); for an analysis of early theories, see Grant, *Penal Ordinances in California*, 24 CALIF. L. REV. 123 (1936).

[193] State v. Keenan, 57 Conn. 286 (1889); Goddard, Petitioner, 33 Mass. 504 (1835).

[194] DeQueen v. Fenton, 98 Ark. 521, 136 S.W. 945 (1911). Jaquith v. Royce, 42 Ia. 406 (1876).

[195] Pearson v. Winbisb, 124 Ga. 701, 52 S.E. 751 (1905). However, since the Georgia defendant was sentenced to imprisonment in a county chain gang, it was considered that the nature of the imprisonment violated the due process clause of the constitution. The fact that the trail was summary assisted in reaching the result.

and constitutional theories in this area of state-local relations. *Keefe,* while it disregards one era of early American practice, provides a foundation for a total solution on a consistent basis; the decision needs to be supplemented only by legislation which clarifies procedure for the municipal action, and which eliminates the possibility of double punishment.

On the basis of the history of *Keefe,* and on the basis of the analysis of the court's arguments, it seems unlikely to the writer that the court will overrule *Keefe,* though, as indicated, grounds could be found if the court could be persuaded. It seems even more unlikely that the case could be overruled by constitutional amendment, for to overrule the voters would have to be persuaded to vote for a proposition which would be widely advertised as a greater chance for the average motorist to go to jail.

Jury Trial for Ordinance Violations

Keefe was not concerned with a jury trial for minor offenses. This question came up in *City of Oshkosh v. Lloyd,*[196] decided only two years after *Keefe. Oshkosh* decided that there need be no jury trial in an ordinance violation action in justice court. *Ogden,*[197] it will be remembered, decided that there was no right to jury trial for violation of a municipal offense in justice court. The theory of this case is that there is no constitutional guarantee of trial by jury in such a situation. While the argument is not clear, it seems fair to say that the court in *Ogden* proceeded on the supposition that the offense was a petty offense, and therefore an exception to the *criminal* constitutional guarantee. Cases after *Ogden* in declaring municipal actions to be civil, made *Ogden* inapplicable as a precedent for civil cases. But the court in *Oshkosh* followed the *Ogden* ruling without noting the change in theory of the nature of the action.

This forced alignment is not a final solution; in a proper case the court will be required to hold that the denial of jury trial in a civil action in justice court is not prohibited by section five of article I of the Wisconsin constitution, though a literal reading of the words "right of trial by jury shall extend to all cases at law without regard to the amount in controversy" requires a different result. Fortunately, such a ruling is sustained by precedent.

Only by looking at practice in 1848 can the constitutional provision be understood.[198] Where technical terms were in use prior

[196] 255 Wis. 601, 39 N.W.2d 772 (1949).
[197] *Supra* at 4.
[198] Norval v. Rice, 2 Wis. 22 (1853); Gaston v. Babcock, 6 Wis. 503 (1857).

to the adoption of the constitution, such terms were used in the constitution in the sense in which they were understood at common law.[199] In *Norval v. Rice*[200] the plaintiff in county court asked for a jury of twelve and paid the statutory fee. The county judge followed the statutes which provided for a jury of six[201] and denied the request. On appeal, the supreme court said that it was clear that the jury trial which shall remain inviolate in actions at law was for courts of record, at least, a jury of twelve; hence the provision in the statutes of 1849 was unconstitutional.

The court left open the question whether the constitution guaranteed any jury trial in civil actions in justice court. The court said:

> 'The right of trial by shall shall remain inviolate;' that is, shall continue as it was at the time of the formation and adoption of the Constitution by the people of this State.
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> . . . .
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> Now it will be remembered, that at the time of the formation of our Constitution in 1848, the judicial system in existence in Wisconsin Territory was composed of . . . courts of justices of the peace, in which, in actions of forcible entry and detainer, a jury of twelve, and in all other cases of trial, of six only, was allowed. So far as the restriction of the jury before a justice of the peace is concerned, we do not feel at liberty to inquire at this time, but may remark that the party aggrieved by the decision before the justice, might, in certain cases, remove the case by appeal to the District Court, where a trial by a jury of twelve men would be available.[202]

The question of the constitutional right to jury trial in civil actions in justice court, left unanswered in *Norval* and not treated in *Oshkosh,* was answered "none" by the United States Supreme Court in construing the federal constitution, in the case of *Capital Traction Co. v. Hof.*[203] The court declared that the seventh federal amendment referred to the common law of England, and not to that law as modified by colonial usage. Accordingly, English legislation of 1750[204] giving no right to jury trial in a small claims action and no right of appeal was held to be no precedent because it was practice outside of the common law courts. Colonial use of

[199] State *ex rel.* Allis v. Wiesner, 187 Wis. 384, 204 N.W. 589 (1925).
[200] 2 Wis. 22 (1853).
[201] WIS. TERRIT. STAT., art. 6, § 2 (1839) at 327.
[202] Norval v. Rice, 2 Wis. 22, 29-30 (1853).
[203] 174 U.S. 1 (1899).
[204] 24 Geo. 2, ch. 33 (1750).

the six man jury in civil cases was likewise disposed of on the ground that the common law knew only the twelve man jury. The court indicated that under the seventh amendment a denial of appeal from justice court would be invalid, since a trial in justice court, where the justice does not have the power to take the case from the jury by nonsuit or directed verdict, or the duty to instruct the jury, is not a common law trial, even though a jury of twelve is used. Conversely, giving the right to a jury trial on appeal satisfied the Constitution. This was also the conclusion reached by the Wisconsin court in the *Oshkosh* case.

The Court in *Capital Traction* denied the argument that the double jury trial violated the Constitution because the second court was reviewing the jury verdict in the first. It reasoned that such review of jury trial was unknown to the common law; it arrived at this result from its holding that the first jury trial was not a constiutional jury trial.

Another argument—that there is a right to immediate removal of a case from a justice court to a court of record, if the moving party wants a constitutional jury trial—was answered "no." However, the jurisdiction of justice courts may be increased above that existing at the time of the adoption of the constitution.

Wisconsin practice has been in accord with *Capital Traction* since 1945.[205] Prior to that time the refusal of a constitutional jury, on appeal, to appellants in cases where the claim was under fifteen dollars would have been held unconstitutional on the *Capital Traction* theory.

Some Solutions to the Basic Problems

Wisconsin practice for the trial of municipal ordinance violations as civil actions seems to present no constitutional problems in its present form. Assuming that the *Keefe* decision will stand, how can the interests of the state, local governments, and the citizen receive the optimum protection of the law?

If we accept the *Keefe* decision as prohibiting direct imprisonment, and do not propose another constitutional amendment to repeal the "clear proceeds of fines to state treasury" provision, it would be possible by statute to abolish double punishment, leaving present statutes and ordinances as they are. Going further, some

[205] Wis. Laws 1945, ch. 441, § 213, repealed a provision in effect since 1849 that appeals, if less than $15 was involved, would be on the record only. The constitutionality of this provision was never questioned; on the contrary it was assumed from Carney v. Doyle, 14 Wis. 270 (1861).

of the more serious offenses could be designated crimes only and the municipalities prohibited from duplicating them. Or, an arbitrary division of offenses into two groups—more and less serious—could be made, and the cities allowed to pass duplicating ordinances only as to the less serious.

The last plan would require some financial assistance from the state to the cities. Unless the state would directly enforce the more serious offenses, it would have to rely on the cities to enforce them; and since the constitution now requires that all fines be paid into the school fund, the cities would not be compensated for the expense of enforcing these laws.

Under any of these plans, the state could decide to change some of its offenses from crimes to civil violations. This step would require a decision that direct imprisonment would not be needed as an ultimate sanction as to a particular offense, and especially as to one frequently violated. If the state converted some offenses to civil violations, a uniform modified civil procedure for the prosecution of both state and municipal civil offenses could be devised.

Another possibility is legislation allowing cities and counties to declare the facts which would create a crime. Hence, under legislation declaring speed in excess of that reasonable under conditions unlawful, cities might establish limits for particular streets.[206]

There are several difficulties in the plans so far mentioned: a state subsidy for local enforcement is not likely to be acceptable to the legislature; in some proposals we are adding two new procedures, a modified civil action for a penalty in justice court, and a similar action in circuit court; we have not determined any criteria for classifying those traffic offenses which should be enforced by civil, and those which should be enforced by criminal procedure.

However, in our discussion of the use of the civil action for a penalty[207] we arrived at a few bases for determining when to use civil and criminal actions for enforcement: (1) The civil action cannot be used if imprisonment is used as a sanction; (2) The criminal action should not be used where all defenses are taken away from the defendant unless the legislature thinks imprisonment as a sanction is absolutely necessary for enforcement of such

[206] A similar statute in the health field has been in effect since 1858. WIS. STAT. § 143.11 (1957). While this section may be an improper delegation because of indefiniteness, the validity of appropriate delegation is clear. See City of Milwaukee v. Sewerage Comm'n, 268 Wis. 342, 67 N.W.2d 624 (1954); State v. Wakeen, 263 Wis. 401, 57 N.W.2d 364 (1953); United States v. Sharpnack, 355 U.S. 286 (1957).

[207] See 1959 WIS. L. REV. 438.

a "strict liability" offense; (3) The criminal action should not be used for "minor" offenses.

To help define "minor," we must return briefly to the violator. The citizen violator is inclined to think, not in terms of stigma as it arises out of criminal actions only, but of the stigma that accrues from being prosecuted by the state or one of its agencies in either a civil or criminal action. He considers that any court contact in which the state or a municipality is prosecutor has some stigma about it, and the fact that one procedure rather than another is used does not impress him very much.[208] The citizen also thinks that if the state or a municipality arrests and prosecutes him, he is entitled to more protection than if a fellow citizen sues him. If the penalty is severe enough he feels he ought to have the maximum protection.

We can phrase the crucial question, keeping the stigma factor in mind, as: At what amount does a monetary penalty become so serious that the protection of criminal procedure is warranted?[209]

The answer to this question must be arbitrary, especially in an inflationary period. The monetary limit of justice court jurisdiction, two hundred dollars, is a common dividing line.[210] If this amount were used as a dividing line between civil actions, which the state can enforce in justice court, and criminal actions, which the state prosecutes in a court of record, municipalities could be restricted to duplicating those state traffic regulations which could be prosecuted in justice court. Such action would keep cities and counties out of crime enforcement, not only procedurally, as now, but in terms of substantive crimes. There would be procedural clarity since the state and cities would use civil procedure in justice court for the offenses under two hundred dollars, and the state alone would use criminal procedure in justice court or circuit court

[208] See SUTHERLAND, WHITE COLLAR CRIME 46 (1949). We see the same result in juvenile court where, despite the attempts to spell out no stigma in legislation relating to juvenile courts, the stigma attaches just the same. Employers, for example, have simply broadened their questions covering prospective employees' contacts with law enforcement agencies to cover contacts with juvenile court.

[209] A second question would be: what acts deserve a monetary penalty on the larger side of the dividing point? The answer to this question is entirely in legislative discretion, as we found in our discussion of the nature of crime.

[210] A 1955 study of Wisconsin criminal statutes, other than traffic, showed that of the 154 which specified only a money fine, 73% of the fines were $200 or less. The 165 statutes which specified money penalties were not analyzed as to amount. Remington, *Liability Without Fault Criminal Statutes—Their Relation to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin*, 1956 WIS. L. REV. 625, 633. In the traffic field only a dozen fines are over $200.

as appropriate for offenses carrying imprisonment, or fines over two hundred dollars. Relative procedural simplicity would be secured, since no new hybrid procedure would be created, but only a few procedural safeguards would be imported into the ordinary civil action.

Two variations of this solution are proposed. First, the cities could adopt all state traffic regulations, but recover only up to two hundred dollars for *any* violation; double punishment would be prohibited, except that the state might bring a second action for imprisonment, if that were a penalty for the act under state law. Cities would have to notify the district attorney of specified prosecutions to make the last possibility effective.

Second, the jurisdiction of justice courts could be increased so that all traffic violations for a monetary penalty could be brought there in the first instance; or in the alternative all monetary penalties could be reduced to two hundred dollars. The latter change would affect only a dozen traffic statutes.

While the main proposal is theoretically the best, the requirements of municipal revenue indicate that the first variation is more likely to be approved. As to the second variation, it is probably safe to assume that existing courts will continue unchanged with their existing jurisdictions and the present dollar amounts of state penalties. Let us apply this proposed solution to chapters 346-348 of the statutes.

The first step is to deny municipalities and counties the power to adopt by ordinance those statutes which penalize acts which are clearly so serious that the municipalities should not be allowed to prosecute. These are the two felonies, operating a motor vehicle while under the influence of an intoxicant or a narcotic drug,[211] and hit-run driving where injury is caused.[212]

The next step is to separate those acts for which imprisonment may presently be awarded[213] from those which carry only a fine.[214] The state, if it prosecutes a violation in the imprisonment group, must use criminal procedure in a court of record. It must use justice court procedure when it prosecutes a violation in justice court.

Municipalities could adopt those statutes which carry only a fine.

[211] WIS. STAT. §§ 346.63, .65 (2) (1957). Operation by a habitual user of narcotics or by a person subject to epilepsy who does not hold a special license are also prohibited.

[212] WIS. STAT. §§ 346.67, .74 (5) (1957).

[213] See Appendix A *infra* at 18.

[214] See Appendix B *infra* at 20.

However, section 349.06 would have to be amended so they could recover as a penalty only a forfeiture of less than two hundred dollars. This would cut down their recovery only as to present sections 346.26, 346.41, 346.57 (2) (3) and (4) (a) to (c) which now carry a five hundred dollar penalty, and section 348.21 on weight limitations. For their prosecutions, all of which could be brought in justice court, they would use civil procedure. If the city recovered a monetary penalty, the state could not recover a second, or further monetary penalty, but the state could bring a second action for imprisonment.

This solution is geared to the present court system and to present procedure, except that for the civil action for a penalty some extra procedural safeguards would be included. This plan preserves municipal revenues and municipal enforcement, and yet keeps direct imprisonment as an additional penalty which the state can use for serious offenses or repeated violations. It removes from the crime category the most common offenses and for these preserves summary procedures on the first trial, so that there can be no clogging of the courts. If the plan is successful, the state might consider removing the thirty day penalties, and changing this group from criminal to civil so that only really serious offenses remained criminal.

A final solution may be constitutional amendment. This solution is based on the idea that if the proceeds of fines derived from prosecution of state criminal actions could be diverted to the municipalities which prosecuted, there would be almost no good reason for using the civil action in the traffic field.

The proposed amendment would be to section two of article X of the constitution. It would consist of the removal of the phrases "forfeiture or" and "and the clear proceeds of all fines collected in the several counties for any breach of the penal laws." The amendment would permit the legislature to direct that fines received on conviction of state traffic laws might be retained by municipalities and counties. The amount retained would be based on comparative expenditures for enforcement and courts. The change would be minor. The municipalities and counties now retain all of the proceeds of conviction of ordinance violation,[215] and the counties retain one-half of the proceeds of traffic fines.[216] The diversion from the state treasury based on the 1957 figure of

[215] WIS. STAT. § 288.10 (1957).
[216] WIS. STAT. §§ 59.20 (8); 960.34 (1957).

$370,908.08[217] collected in fines would be about $186,000, plus one-half of the bail bond forfeitures on speeding charges. Assuming that $300,000 of the $343,354.37 1957 bail bond forfeitures on state charges were attributable to speeding, there would be an additional loss to the state of $150,000 or a total loss of $336,000 per year. If the people of the state could be persuaded that the loss of this amount to the state school fund was inconsequential, since as taxpayers they received the benefits of the gain in municipal revenues, it might be possible to get such an amendment passed.

The municipalities and counties could then enforce state traffic law in the name of the state but could retain the financial proceeds. Local modifications, as for speed limits on certain streets or arterial highways, would still be possible,[218] but the violation would be of state law. Then, as previously mentioned,[219] these traffic crimes could be divided into groups on the basis of the requirements of intent-recklessness, negligence, and no-defenses permitted. Once these classifications had general acceptance, the possibility of using them as a basis for grouping state crimes in such fields as agriculture and markets, conservation, and health might be considered.

As to traffic offenses, the answer to the question raised by the title is that the criminal law has enough variation and flexibility to be used for the enforcement of traffic regulations. If, however, there are legal or popular objections to its use, civil procedure supplemented by a few of the criminal protections may be a more acceptable method of regulation.

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[217] Memorandum from L. E. Beier, Director, Enforcement Division, Motor Vehicle Dep't, Feb. 26, 1958.
[218] Statute and cases cited note 206 *supra*.
[219] See 1959 WIS. L. REV. 444.

APPENDIX A

WIS. STAT. §	ACT	MAXIMUM PENALTY
346.05	Failure to drive on right side of roadway	§346.17(2) $200—30 da.
346.07(2)	Cutting in after passing	same
346.07(3)	Failure to give way to right and maintain speed while being passed	same
346.08	Passing on right (not within exceptions)	same
346.09	Overtaking where not safe	same
346.10	Passing at R.R. crossing or at intersection	same
346.11	Failure to stop on passing or meeting frightened animal	same

346.13(2)	Improper use of center lane on 3 lane road	same
346.14	Following too closely	same
346.15	Driving on wrong side of divided highway	same
346.16	Improper use of controlled access highway	same
346.19	Failure to stop for emergency vehicle	§346.22 $200—30 da.
346.20(1)(a)	Funeral or military convoy vehicle; failing to yield to emergency vehicle	same
346.24(1)	Failure to yield right of way to pedestrian on crosswalk	§346.30(2) $200—30 da.
346.24(3)	Passing vehicle stopped for pedestrian	same
346.27	Failure to yield right of way to workmen on highway	same
346.26	Failure to stop for blind pedestrian; imitation of blind pedestrian	§346.30(3) $500— 1 yr.
346.42	Interference with signs and signals	§346.43(2) $200—30 da.
346.41	Display of unauthorized signs and signals	§346.43(3) $500— 1 yr.
346.44	Failure to stop at signal indicating approach of train	§346.49(2) $200—30 da.
346.45	Failure of certain vehicles to stop at all R.R. crossings	same
346.48	Failure to stop for school bus	same
346.51	Stopping, standing or parking on highway	§346.56(2) $200—30 da.
346.55 (1), (2)	Parking on left side of highway or displaying vehicle for sale on highway	same
346.57(4)(d)-(h)	Speeding in a municipality or on the highway	§346.60(2) $200—30 da.
346.57(5)	Speeding in zoned or posted areas	same
346.57(2)	Exceeding the reasonable and prudent speed for the conditions	§346.60(3) $500— 1 yr.
346.57(3)	Exceeding the reduced speed of some places	same
346.57(4)(a)-(c)	Speeding in school and safety zones	same
346.58	Exceeding special speed restrictions for certain vehicles	§346.60(2) $200—30 da.
346.62(1)	High degree of negligence in the operation of a vehicle	§346.65(1) $500— 1 yr.
346.64	Employment of drunken operators	same
346.62(2)	Injury resulting from a high degree of negligence in the operation of a vehicle	§346.65(3) 30 da.—1 yr.
346.68	Failure to stop and leave name upon striking unattended vehicle	§346.74(3) $200—6 mo.
346.69	Failure to stop and leave name upon striking property on or adjacent to highway	same
346.70(4)	Submission of false accident report	§346.74(4)

		$50—60 da.
346.67	Failure to stop upon striking person or attended or occupied vehicle where no death or personal injury is involved	§346.74(5) $200—6 mo.
346.81(1)	Operation of bicycle at night without a light	§346.82(3) $220—30 da.
346.89(1)	Inattentive driving	§346.95(2) $200—30 da.
346.93	Having intoxicants in vehicle carrying a minor	same
346.94(2)-(4),(7),(8)	Miscellaneous prohibited acts	same
347.03	Violation of various equipment regulations	§347.30(2) $200—30 da.
347.06-.12	same	same
347.13(1)	same	same
347.14-.29	same	same
347.35-.49	same	§347.50 $200—30 da.
348.09-.10	Violation of weight load restrictions	§348.11(1) $200—30 da.
348.05-.08	same	§348.11(2) $200—30 da.
348.15(2)(a)	Violation of weight restrictions	§348.21(2) $200—30 da.
348.17(2)	same	same
348.19(3)	same	same
348.15(2)(b)(c)	same	same
348.17(1)	same	same

Appendix B

Wis. Stat. §	Act	Maximum Penalty
346.04	Failure to obey traffic officer or traffic signal	§346.17(1) $50
346.06	Failure to pass on right and give one-half of the roadway	same
346.07(1)	Failure to give audible warning before overtaking	same
346.12	Driving through a safety zone	same
346.13(1)	Deviating from lane of traffic	same
346.13(3)	Not driving in designated lane	same
346.18	Failure to yield right of way	§346.22(1) $50
346.20(1)(b)	Funeral procession or military convoy failing to yield right of way	same
346.20(2)	Driving between vehicles in a funeral procession or military convoy	same
346.20(3)	Improper joining of a funeral procession	same
346.21	Failure to yield right of way to livestock	same
346.23	Failure to yield right of way to a	§346.30(1) $50

	pedestrian	
346.24(2)	Pedestrian walking into path of vehicle	same
346.25	Jay-walking	same
346.28	Pedestrian failing to walk on left; failure to yield right of way to pedestrian on sidewalk	same
346.29	Pedestrian standing or loitering on the highway	same
346.31-.35	Improper turns or failure to signal	§346.36 $50
346.37	Failure to obey traffic signals	§346.43(1) $50
346.38	same	same
346.39	same	same
346.46	Failure to stop for stop sign	§346.49(1) $50
346.52	Violation of stopping regulations	§346.56(1) $50
346.53	Violation of parking regulations	same
346.53	Violation of parking regulations on street	same
346.55(3)	Violation of private parking regulations	same
346.59	Violation of minimum speed regulations	§346.60(1) $50
346.72	Failure by garage to keep record of repairs of accident damage	§346.74(1) $50
346.77	Parent allowing child to violate bicycle or play regulations	§346.82(1) $20
346.79(1)-(3)	Violation of bicycle regulations	same
346.80	same	same
346.81(2)	Violation of bicycle equipment regulations	same
346.78	Play vehicles used on roadway	§346.82(2) $50
346.79(4)	Attaching bicycle to vehicle	same
346.87	Improper backing	§346.95(1) $50
346.88	Driving with view obstructed	same
346.89(2)	Television in car	same
346.90-.92	Following emergency vehicle; crossing fire hose; illegal riding	same
346.94(1),(9),(10)	Driving on sidewalk; alighting from or boarding moving vehicle; clinging to moving vehicle	same
346.94(5),(6),(6m),(7)	Placing injurious substance on highway; debris on public or private property; permitting throwing of debris on highway; spilling loads of waste or foreign matter	§349.95(3) $25
347.13(3)	Failure to illuminate registration plate at night	§347.30(1) $50
348.185	Failure to indicate the empty weight on the side of certain vehicles	§348.21(1) $50