

overcrowded dockets. An additional advantage is minimization of the combatant attitude engendered by an adversary proceeding. The arbitrator's decision can do much to relieve the strained feelings and discontent which will be the result of litigation, no matter which side is victorious. The strike provokes bitterness and rancor between employer and employee, both of whom feel themselves wronged. A time consuming, technical and costly court battle can only further this animosity.

INITIAL IMPRISONMENT FOR THE VIOLATION OF CITY ORDINANCES

Statutes in thirty-five states authorize municipal corporations to enforce their ordinances by the imposition of initial imprisonment upon convicted offenders as a part of the basic punishment, as well as to enforce the payment of a fine.¹ Although it is well settled that im-

1. *Alabama*: May enforce by fine not exceeding \$100 and by imprisonment or hard labor not exceeding six months, one or both. ALA. CODE tit. 37, § 455 (1940). *Arizona*: \$300 and 3 months limits. ARIZ. CODE ANN. c. 16, §1105 (1939). *California*: \$500 and 6 months limits. CAL. GOV. CODE ANN. §36900 (1951). *Florida*: \$500 and 60 days limits. FLA. STAT. § 165.19 (1955). *Georgia*: Georgia's cities and towns are governed by charters which are altered by special acts. Limitations on cities, etc., must be gleaned from these various charters. In *Calhoun v. Little*, 106 Ga. 336, 32 S.E. 86 (1898), the court declared that under the charter of the town of Waresboro there was no authority to impose initial imprisonment. However, in *Jones v. Langford*, 141 Ga. 336, 81 S.E. 885 (1914), Atlanta charter provisions were construed to allow for initial imprisonment, without any provision for discharge upon payment of a fine. *Idaho*: \$100 and 30 days limits. IDAHO CODE ANN. § 50-1109 (1949). *Indiana*: \$300 and 6 months limits. IND. ANN. STAT. § 48-1407 (Burns 1950). *Iowa*: \$100 and 30 days limits. IOWA CODE ANN. § 366.1 (1949). *Kansas*: No statutory limits on 1st class cities. KAN. GEN. STAT. § 13-424 (1949). \$100 and 3 months limits in 2d and 3d class cities. *Id.* at §§ 14-424, 15-440. *Kentucky*: \$100 and 50 days limits. KY. REV. STAT. §§ 83.010, 85.120, 86.110, 87.060, 88.107 (1955). *Louisiana*: \$100 and 30 days limits. LA. REV. STAT. ANN. § 33:401(32) (1950). But the penalties for driving under the influence of alcohol may be \$500 and 60 days. *Id.* at (Supp. 1956). *Maryland*: \$100 and 90 days limits. MD. ANN. CODE GEN. LAWS art. 23A, § 3 (1951). *Michigan*: \$500 and 6 months limits. MICH. COMP. LAWS § 89.2 (1948). But in home rule cities the limits are \$500 and 90 days. *Id.* at § 117.4i(19). *Minnesota*: \$100 and 3 months limits. MINN. STAT. ANN. § 412.231 (West Supp. 1954). *Mississippi*: \$100 and 30 days limits. MISS. CODE ANN. § 3374-137 (Supp. 1954). *Missouri*: Punishment may be by fine, imprisonment, or both. No limits are stated in the statute. MO. ANN. STAT. § 74.657 (Vernon 1952). *Montana*: \$300 and 90 days limits. MONT. REV. CODES ANN. § 11-950 (1947). *Nebraska*: Cities of the 1st and 2d classes and villages may only fine to enforce ordinances. NEB. REV. STAT. §§ 16-225, 17-505 (1943). Cities of the metropolitan class may impose both fines and imprisonment with no statutory limits. *Id.* at § 14-102(25). Cities of the primary class have limits of \$100 and 6 months. *Id.* at § 15-263 (Supp. 1955). The latter statute, which went into effect on September 18, 1955, for the first time allowed cities of the primary class to impose initial imprisonment. *Nevada*: \$300 and 6 months limits. NEV. COMP. LAWS § 1128 (1929). *New Jersey*: \$200 and 90 days limits. N. J. STAT. ANN. § 40:49-5 (1940). *New Mexico*: \$300 and 90 days limits. N.M. STAT. ANN. § 14:21-47 (1953). *New York*: No limitations stated by

prisonment may be imposed to enforce the payment of a fine,² imprison-

statute; may fine or imprison or both. N.Y. TOWN LAW § 135. *North Carolina*: \$50 and 30 days limits. N.C. GEN. STAT. § 14-4 (1951). *North Dakota*: \$100 and 3 months limits for cities. N.D. REV. CODE § 40-0506 (1943). For villages the limits are \$50 and 5 days. *Id.* at § 0507 (Supp. 1953). *Ohio*: \$500 and 6 months limits. OHIO REV. CODE ANN. § 715.67 (1953). *Oklahoma*: \$100 and 3 months limits. OKLA. STAT. tit. 11, § 672 (1951). *Oregon*: \$50 and 20 days limits. ORE. REV. STAT. § 221.916 (1955). *Rhode Island*: \$20 and 10 days limits, unless other penalties are specifically prescribed by statute. R.I. GEN. LAWS c. 333, § 23 (1938). *South Carolina*: \$100 or 30 days imprisonment in the alternative; the municipality may impose one or the other, but not both. S.C. CODE § 47-61 (1952). *South Dakota*: \$500 and 90 days limits. S.D. CODE § 45.9901 (1939). *Tennessee*: Cities incorporated under general city law may impose only fines. TENN. CODE ANN. § 6-202 (1955). However, under city manager plan, cities may impose fines and imprisonment, with \$50 and 30 days limits. *Id.* at 6-2120. *Utah*: \$300 and 3 months limits. UTAH CODE ANN. § 10-8-84 (1953). *Virginia*: Fines or other punishment for violations, with no statutory limits set. VA. CODE § 15-5 (1950). *Washington*: \$100 and 30 days limits. WASH. REV. CODE § 35.23.440(31) (1951). *West Virginia*: Reasonable fines and 30 days limits. W.VA. CODE ANN. § 507 (1955).

In those states where there is no authorization to enforce ordinances by initial imprisonment, there is usually a statutory limit upon the amount of fine which may be imposed. *Arkansas*: \$25 or double for repetition. ARK. STAT. § 19-2409 (1947). *Colorado*: \$300. COLO. REV. STAT. c. 139, § 32-1 (1953). *Connecticut*: \$100, unless specifically provided more by statute. CONN. GEN. STAT. § 619 (1949). *Delaware*: \$5 limit for unincorporated towns. DEL. CODE ANN. tit. 22, § 102 (1953). \$10 for town ordinances. *Id.* at tit. 11, § 5904. *Illinois*: \$200. ILL. REV. STAT. c. 24, § 23-106 (1955). *Maine*: Suitable penalties, ranging from \$5 to \$500 for specific offenses. ME. REV. STAT. c. 91, § 86 (1954). *Massachusetts*: Not to exceed \$20, unless specifically authorized more by statute. MASS. ANN. LAWS c. 40, § 21 (1944). *New Hampshire*: \$20. N.H. REV. STAT. ANN. § 47:17 (1955). *Pennsylvania*: \$100. PA. STAT. ANN. tit. 53, §§ 15198, 3451, 9686, 12198-1006 (1939). *Texas*: \$200. TEX. REV. CIV. STAT. ANN. § 1011 (Supp. 1950). *Vermont*: \$20. VT. REV. STAT. § 3738 (1947). *Wisconsin*: No limitation stated. WISC. STAT. § 66.115 (1953). *Wyoming*: \$100. WYO. COMP. STAT. ANN. § 29-338 (1945).

2. ALA. CODE tit. 37, § 586 (1940); ARK. STAT. § 19-2413 (1947); COLO. REV. STAT. c. 139, § 86-2 (1953); DEL. CODE ANN. tit. 11, § 5719 (1953); GA. CODE ANN. § 69-704 (Supp. 1955); IDAHO CODE ANN. § 50-1109 (1949); ILL. REV. STAT. c. 24, § 23-106 (1955); IND. ANN. STAT. § 4-2414 (Burns 1946); IOWA CODE ANN. § 367.10 (1949); KAN. GEN. STAT. § 13-424 (1949); KY. REV. STAT. § 26.450 (1955); LA. REV. STAT. ANN. § 15-529.3 (1950); ME. REV. STAT. c. 149, § 40 (1954); MD. ANN. CODE GEN. LAWS art. 38, § 4 (1951); MASS. ANN. LAWS c. 280, § 14 (1944); MINN. STAT. ANN. § 412.19(26) (West 1946); See MISS. CODE ANN. § 3374 (Supp. 1954); MO. STAT. ANN. § 74.657 (Vernon 1952); MONT. REV. CODES ANN. § 94-100-28 (1947); NEB. REV. STAT. § 14-102(25) (1943); NEV. COMP. LAWS § 1167 (1929); N. J. STAT. ANN. § 2A:8-30 (1952); N.M. STAT. ANN. § 38:1-3 (1953); N.Y. GEN. CITY LAW § 20(22); N.D. REV. CODE § 40-1112 (1943); OHIO REV. CODE ANN. § 2947.10-47.11 (1953); OKLA. STAT. tit. 11, § 672 (1951); ORE. REV. STAT. § 221.918 (1955); PA. STAT. ANN. tit. 53, § 15197 (1939); S.C. CODE § 15-908 (1952); TENN. CODE ANN. § 6-2120 (1955), in city manager plan cities; UTAH CODE ANN. § 10-8-85 (1953); VA. CODE § 15-5 (1950); WASH. REV. CODE § 10.04.110 (1951); WISC. STAT. § 66.115 (1953); WYO. COMP. STAT. ANN. § 291338 (1945). See Note, 1 VAND. L. REV. 262, 269 (1948).

Although it is not within the scope of this note to deal with the problems raised by the various courts' and legislatures' acceptance of the doctrine that imprisonment may be authorized to enforce the collection of a fine imposed in a summary or civil action, certain observations should be made in passing. If the action is civil to recover a penalty or forfeiture under a municipal ordinance, then the imprisonment for failure to pay the debt to the city logically should be considered imprisonment for debt. However, precedent and established authority is *contra* to this position. Lord Ellesmere felt that the decision by Coke in *Clarks Case*, 5 Co. Rep. 64a, 77 Eng. Rep. 152 (1596), should have been confined to limiting the power of the community to assess fines, but with the power to recover through imprisonment, since the "Statute of Magna Carta never

ment as an initial part of the penalty for the violation of a municipal ordinance posits grave legal questions. The sanction of imprisonment is clearly criminal in nature;³ yet the procedural safeguards afforded are, in prosecutions for violations of the ordinances, often inadequate and loosely applied. Such summary proceedings are an encroachment upon that right normally most closely guarded by both laymen and the legal profession, personal freedom.

It is clear that imprisonment is a sanction which should be initially imposed only upon conviction for a criminal offense;⁴ the Wisconsin

meant to protect such obstinate persons as should refuse to set forward" the payment of the fine ordered by the court. ELLESMERE, OBSERVATIONS ON THE REPORTS, 13. See note 8 *infra*. The courts in this country, when faced with the argument, have stated that imprisonment to enforce the payment of the fine is not imprisonment for debt. See, e.g., Kennedy v. People, 122 Ill. 649, 13 N.E. 213 (1887). Wisconsin (see note 5 *infra*) holds that in the civil action imprisonment may be used to enforce the payment of a fine. Indiana also allows a civil action to recover a penalty, and allows imprisonment to enforce it. See note 27 *infra* and accompanying text. Despite the seemingly unanimous rejection of the argument of imprisonment for debt, it is difficult to find any logical basis for the rejection. A practical legal problem is raised by the imprisonment for failure to pay arising out of a civil procedure. A solvent defendant's penalty is obviously less severe than the penalty which must be paid by the insolvent defendant, the loss of his personal liberty. It appears that the proper procedure in such cases should be to enforce the payment through an action of the court whereby the convicted defendant is called in to show cause, insolvency, for not paying the debt which accrued to the city from the civil action. If the defendant cannot show insolvency he may then be imprisoned for contempt of the court order to pay.

3. Courts in the various states have observed: ". . . [O]ur conclusion is that offenses for the violation of municipal ordinances, to which a penalty, such as fine or imprisonment, is attached as a punishment, are 'criminal offenses'. . . ." State *ex rel.* Erickson v. West, 42 Minn. 147, 43 N.W. 845 (1889). "Where the violation of an ordinance is punishable by fine only, the proceeding before a justice of the peace is a civil suit. . . . The justice having power to impose punishment by imprisonment alone, the case is not within the authorities cited above which apply to a civil suit. This is in the nature of a criminal proceeding before a justice of the peace, and not a civil suit in the justices court." Unger v. Inhabitants of Fanwood Tp., 69 N.J. L. 548, 55 A. 42 (1903). "The assumption that the proceedings are civil, and not criminal, is based on the form of the judgment, it being an ordinary judgment for money in the amount of a fine, which the court assessed. No imprisonment is imposed, nor is any provided as a means of collecting the judgment." Tucumcari v. Belmore, 18 N.M. 331, 137 Pac. 585 (1913). In *Ex parte* Bochman, 20 Okla. Crim. 78, 201 Pac. 537 (1921), it was held that any action where punishment may be initial imprisonment is criminal. "[W]here the court is empowered to inflict upon the accused . . . imprisonment aside from any pecuniary penalty or forfeiture, such proceeding becomes so far criminal in its nature . . . that a person acquitted thereof cannot be again put in jeopardy for the same offense." City of Portland v. Erickson, 39 Ore. 1, 62 Pac. 753 (1900). ". . . [T]here would seem to be some reason for holding an act criminal which is either by the general or local law directly punishable by imprisonment. . . ." City of Huron v. Carter, 5 S.D. 4, 57 N.W. 947 (1894).

4. The American Law Institute has been working for some three years to prepare a model code of penal and correctional law. In an April, 1956, article, Professor Herbert Wechsler remarked concerning the proposed code: "The solution that we offer involves the creation of a grade of offenses which does not constitute a 'crime' for purposes of any disability and which upon conviction carries no severer sentence than a fine or civil penalty or forfeiture. *We have, in short equated 'crime' and possibility of sentence of probation or imprisonment.* Only when the culpable violation of such penal statutes is

Supreme Court has held, moreover, that such a sanction may constitutionally be imposed only upon conviction for a crime.⁵ Although the constitutional argument has been summarily dismissed by other courts which have considered the problem,⁶ there is a growing acceptance of the thesis that initial imprisonment should not be imposed unless criminal procedural safeguards are afforded.⁷ Under the English common law, the courts established the precedent that a municipality may not impose initial imprisonment for the violation of a by-law, although imprisonment could be imposed to enforce the payment of a fine.⁸ Various authorities have observed that the English Parliament by statute authorized summary conviction, with initial imprisonment as a sanction, without criminal procedural safeguards, for the commission of "petty offenses."⁹ A few state courts have referred to this practice of Parliament in support of the imprisoning initially through a summary process by municipalities in this country.¹⁰ This analogy is obviously specious.

established may a sentence of probation or imprisonment be passed. We would impose this settlement on the entire corpus of the regulatory law, whether or not the statutes are included in the penal code." (emphasis added) Wechsler, *The American Law Institute: Some Observations on its Model Penal Code*, 42 A.B.A.J. 321 (1956). "Consequently, the question whether a violation of a particular police regulation is a public tort or a real crime depends on whether the legislative body intends the penalty provided to be compensation or punishment. Whenever imprisonment is prescribed or permitted it is clear that the latter is the case." Note, 35 HARV. L. REV. 462, 463 (1922). See Note, 15 HARV. L. REV. 660, 661 (1902) and the opinions of the various state courts cited note 3 *supra*.

5. State *ex rel.* Keefe v. Schmiede, 251 Wis. 79, 28 N.W.2d 345, 174 A.L.R. 1338 (1947). The court held that only a sovereign may create a crime, and, therefore, since a city is not a sovereign, it may not create and punish for a crime. Imprisonment may not be imposed initially, because such imprisonment would violate the constitutional provision that involuntary servitude may be exacted only as a punishment for a crime. The unprecedented holding of the Schmiede case inspired a flood of comment. See Notes, 2 OKLA. L. REV. 98 (1949); 34 VA. L. REV. 214 (1948); 96 U. PA. L. REV. 582 (1948); 27 NEV. L. REV. 473 (1948); 16 U. KAN. CITY L. REV. 42 (1948); 1948 WIS. L. REV. 96 (1948); 36 GEO. L. J. 432 (1948). For what seems the most able discussion of the problem see Note, 1 VAND. L. REV. 262 (1948).

6. See *Bray v. State*, 140 Ala. 172, 37 So. 250 (1904), *Pearson v. Wimbish*, 124 Ga. 701, 52 S.E. 751 (1906), *City of Chicago v. Coleman*, 254 Ill. 338, 98 N.E. 521 (1912).

7. See note 13 *infra*.

8. In *Clark's Case*, 5 Co. Rep. 64a, 77 Eng. Rep. 152 (1956), Lord Coke held that the violation of a municipal ordinance could not be punished by imprisonment. His reasoning was followed in *Hutchins v. Player*, Bridg. O. 272, 124 Eng. Rep. 585 (1663), where it was stated that "if a by-law or ordinance be made that upon doing or omitting such an act, the party should be imprisoned, it is naught. . . . [I]t cannot be done by a by-law." *Id.* at 587. The question also seemed settled in *Waggoner v. Fish*, 2 Brownl. 284, 123 Eng. Rep. 944 (1610), where the court stated that ". . . [T]hey could not inflict confiscation of goods nor imprisonment, but may inflict precuniary punishment. . . ." *Id.* at 947.

9. See *Frankfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926), and *District of Columbia v. Clawans*, 300 U.S. 617 (1936).

10. See *State ex rel. Sellars v. Parker*, 87 Fla. 181, 100 So. 260 (1924); *City of Fort Scott v. Arbuckle*, 165 Kan. 374, 196 P.2d 217 (1948).

There is a substantial difference between a locality authorizing initial imprisonment in a summary action and Parliament authorizing the procedure; this is clear from the variance in the English cases¹¹ noted above and the Parliamentary statutes.

Although many writers assert broadly that the weight of authority in the various states holds that prosecutions for the violation of municipal ordinances are "civil" actions,¹² a study of the pertinent statutes and cases shows that this assertion is fallacious; in a clear majority of states such actions are criminal, and not civil.¹³ Courts in various other states

11. See note 8 *supra*.

12. See 9 McQUILLEN, MUNICIPAL CORPORATIONS § 27.06 (3d ed. 1950); 2 DILLON, MUNICIPAL CORPORATIONS § 636 (5th ed. 1911).

13. *California*: The "violation of a city ordinance is a misdemeanor." CAL. GOV. CODE ANN. § 36900 (1951). Actions enforcing municipal ordinances are criminal and not civil actions. *People v. Pacific Gas & Electric Co.*, 168 Cal. 496, 143 Pac. 727 (1914). *Connecticut*: Statute gives municipal courts criminal jurisdiction over violations of municipal ordinances. CONN. GEN. STAT. § 7579 (1949). *Idaho*: Criminal procedure is followed in actions for violation of municipal ordinances. IDAHO CODE ANN. § 50-344 (1949). *Iowa*: Actions for violation of municipal ordinances are criminal actions. IOWA CODE ANN. § 602.28 (1949). See *City of Burlington v. Unterkircher*, 99 Iowa 401, 68 N.W. 795 (1896). *Kansas*: Criminal procedure for violation. KAN. GEN. STAT. § 13-615 (1949). *Kentucky*: Violation in 1st class cities is a misdemeanor. KY. REV. STAT. § 83.010 (1955); criminal jurisdiction over ordinance violations is in the police courts. *Id.* at § 26.010. *Louisiana*: Although tried summarily it is a criminal case. LA. REV. STAT. ANN. § 13:2016 (1950). *Maine*: Criminal jurisdiction covers violations in municipal courts. ME. REV. STAT. c.146, § 2 (1954). *Maryland*: When fine or penalty is imposed for an act, it "shall be deemed a criminal offense. . . ." MD. ANN. CODE GEN. LAWS art. 38, § 1 (1951). *Massachusetts*: Criminal offense recovered by indictment or complaint. MASS. ANN. LAWS c.40, § 21 (1944). Prosecutions are in the name of the commonwealth. See *Commonwealth v. Rawson*, 183 Mass. 491, 67 N.E. 605 (1903). *Michigan*: Criminal cases. MICH. COMP. LAWS § 90.5 (1948). *Mississippi*: Criminal offense. MISS. CODE ANN. § 3374-78 (Supp. 1950). See *Sykes v. City of Crystal Springs*, 216 Miss. 18, 61 So.2d 387 (1952). *Montana*: It is a crime or public offense wherever fine or imprisonment is annexed. MONT. REV. CODES ANN. § 94-112 (1947). See *State ex rel. Marquette v. Police Court of City of Deer Lodge*, 86 Mont. 297, 283 Pac. 430 (1929), where previous Montana decisions were rejected in holding that prosecutions for violations of ordinances are criminal and not civil actions. *New Hampshire*: Criminal prosecutions. N.H. REV. STAT. ANN. § 47:17 (1955). See *State v. Stearns*, 31 N.H. 106 (1855). *New Jersey*: Criminal case. N.J. STAT. ANN. § 2A:8-21 (1952). See *City of Absecon v. Vetesse*, 13 N.J. 581, 100 A.2d 750 (1953), where the court pointed out that since the adoption of the new court rules in 1948 it has become well established that for procedural purposes the prosecution for a violation of a municipal ordinance is to be treated as a criminal cause. *New York*: The violation brings a criminal action, although not so strictly regulated as where "more important" issues are involved. *City of Buffalo v. Newbeck*, 209 App. Div. 386, 204 N.Y.S. 851 (1924); *City of Buffalo v. Preston*, 81 App. Div. 480, 80 N.Y.S. 851 (1903). *North Carolina*: Violation of ordinance is made a misdemeanor. N.C. GEN. STAT. § 14-4 (1951). Violation of an ordinance is a criminal offense punishable in criminal prosecutions, although before this statute the city had to enforce through civil actions. *Board of Education v. Henderson*, 126 N.C. 689, 36 S.E. 158 (1900). See *State v. Wilks*, 233 N.C. 645, 65 S.E.2d 129 (1951). *Ohio*: Violation of ordinance is a misdemeanor. OHIO REV. CODE ANN. § 715.67 (1953). Criminal action is brought therefore. See *City of Toledo v. Kohlhofer*, 96 Ohio App. 355, 122 N.E.2d 20 (1954). *Oklahoma*: It is a criminal action whenever there may be initial imprisonment or a fine of over \$20. See *Ex parte, Daugherty*, 21 Okla. Crim. 78, 201 Pac. 537 (1921). *Oregon*: Criminal and not civil action. See *City of Salem v. Read*,

have used perplexing terminology. Such terms as "quasi-criminal,"¹⁴ "quasi-civil,"¹⁵ "civil with certain criminal aspects,"¹⁶ "not strictly criminal,"¹⁷ and "summary penal actions"¹⁸ have been used to describe the prosecutions. In only nine states are the actions distinctly called "civil" actions.¹⁹ In but eleven states, however, may the infliction of initial im-

187 Ore. 437, 211 P.2d 481 (1949). *Rhode Island*: Criminal jurisdiction of district courts includes offenses against town or city ordinances. R.I. GEN. LAWS c.501, § 2 (1938). *South Carolina*: Criminal cases. S.C. CODE § 15-901 (1952). *South Dakota*: Criminal cases. S.D. CODE § 34.3301 (Supp. 1952). Before the passage of this particular statute in 1949, the Supreme Court of South Dakota was divided into their views on whether the violation of a municipal ordinance was a criminal action. In *City of Souix Falls v. Famestad*, 71 S.D. 98, 21 N.W.2d 693 (1946), the Supreme Court of South Dakota held that violations resulted in civil and not criminal prosecutions. A year later the court was split in holding that criminal procedure was applicable to violations of municipal ordinances. *City of Souix Falls v. Fanebust*, 72 S.D. 54, 29 N.W.2d 472 (1947). The revision of § 34.3301 in 1949 settled the question beyond reasonable doubt. *Texas*: Criminal procedure applies. TEX. CODE CRIM. PROC. ANN. arts. 867, 874, 876 (1950). *Utah*: Prosecutions are criminal and not civil. See *Town of Ophir v. Jorgensen*, 63 Utah 288, 225 Pac. 342 (1924); *Salina City v. Freece*, 61 Utah 574, 216 Pac. 1078 (1923). *Virginia*: Criminal action must be brought, even when recovering only fine. VA. CODE §§ 19-298-342 (1950). See *Washington & Old Dominion R.R. v. City of Alexandria*, 191 Va. 184, 60 S.E.2d 40 (1950). *Washington*: Violation is misdemeanor or public offense. WASH. REV. CODE § 35.23.440(31) (1951). See *City of Seattle v. Bell*, 199 Wash. 441, 92 P.2d 197 (1939). *West Virginia*: Criminal actions. See *City of Charleston v. Beller*, 45 W.Va. 44, 30 S.E. 152 (1898), *Town of Phillipi v. Kittle*, 56 W.Va. 348, 49 S.E. 238 (1904). *Wyoming*: Criminal case. WYO. COMP. STAT. ANN. § 29-1805 (1945). See *State ex rel. Suchta v. District Court of Sheridan County*, 283 P.2d 1023 (1955). Before this case the courts of Wyoming had considered the action civil, *Jenkins v. City of Cheyenne*, 1 Wyo. 289 (1876), and then "quasi-criminal," *City of Sheridan v. Cadle*, 24 Wyo. 293, 157 Pac. 892 (1916). Thus, the Wyoming courts have run the gamut in relation to this question and have finally arrived at a definitive answer.

14. *Ex parte Hall*, 255 Ala. 98, 50 So.2d 264 (1951); *Noland v. People*, 33 Colo. 322, 80 Pac. 887 (1905); *Hawkinsville v. Etheridge*, 96 Ga. 326, 22 S.E. 985 (1895); *State v. Brown*, 50 Minn. 128, 52 N.W. 531 (1892); *City of St. Louis v. Ameln*, 235 Mo. 669, 139 S.W. 429 (1911).

15. *Ex parte Corvey*, 220 Mo. App. 602, 287 S.W. 879 (1926).

16. *Vitelli v. Mayor and Council of Wilmington*, 39 Del. 336, 199 A. 283 (1938).

17. *Village of Litchville v. Hanson*, 19 N.D. 672, 124 N.W. 1119 (1910).

18. See *State ex rel. Sellars v. Parker*, 87 Fla. 181, 100 So. 260 (1924); *Ex parte Sloan*, 47 Nev. 109, 217 Pac. 233 (1923); *Commonwealth v. Wesley*, 171 Pa. Super. 566, 91 A.2d 298 (1952).

19. *Arizona*: See ARIZ. CODE ANN. § 16-1105 (1939). *Arkansas*: Penalties recovered as in civil action. ARK. STAT. § 19-2419 (1947). *Illinois*: See *Village of Skokie v. Schramm*, 339 Ill. App. 143, 89 N.E.2d 73 (1949); *City of Chicago v. Moretti*, 347 Ill. App. 73, 105 N.E.2d 788 (1952). *Indiana*: When the action is to recover a fine. See *Smith v. City of New Albany*, 175 Ind. 279, 93 N.E. 73 (1910); *Miller v. O'Reilly*, 84 Ind. 168 (1882). *Nebraska*: See *Wells v. State*, 152 Neb. 668, 42 N.W.2d 363 (1950). In *State v. Novak*, 153 Neb. 596, 45 N.W.2d 625 (1951), the court hedged and admitted the action was criminal in form, but was still civil for the collection of a penalty. *New Mexico*: The New Mexico Supreme Court has held that when the municipal ordinance penalizes only by fine, the action is civil. *Tucumcari v. Belmore*, 18 N.M. 331, 137 Pac. 585 (1913). However, where initial imprisonment may be imposed the action is criminal and not civil, since it is form of the judgment which is crucial in the determination. See *City of Clovis v. Curry*, 33 N.M. 222, 264 Pac. 956 (1928). *Tennessee*: See *Guidi v. City of Memphis*, 196 Tenn. 13, 263 S.W.2d 532 (1953), *Deitch v. City of Chattanooga*, 195 Tenn. 245, 258 S.W.2d 776 (1953), *O'Haver v. Montgomery*, 120 Tenn. 448, 111 S.W. 449 (1908). However, in the latest Tennessee case the court has hedged in its termi-

prisonment for the violation of a municipal ordinance be secured through actions which are not termed "criminal;" in five of these the action is "civil" or summary,²⁰ while in the others the action is termed "quasi-criminal."²¹ Even in the thirteen states which authorize municipalities to inflict only a pecuniary penalty for ordinance violations, the bare majority designate the action to recover as "civil."²²

The Indiana rule is both complicated and interesting. The Indiana courts have consistently held that the action to recover a penalty imposed for the violation of a municipal ordinance is a civil action.²³ Although under Indiana statutes an ordinance may not prescribe punishment for an act made penal by the state,²⁴ and only statutes of the state may define

nology and has admitted that ordinances are "quasi-criminal" in nature, but that the actions are governed by rules of pleading applicable to civil actions. *Robinson v. City of Memphis*, 197 Tenn. 598, 277 S.W.2d 341 (1955). *Vermont*: By statute the fine must be recovered by an action of contract. VT. REV. STAT. § 3738 (1947). *Wisconsin*: See *City of So. Milwaukee v. Schantzen*, 258 Wis. 41, 44 N.W.2d 628 (1950).

20. Arizona, Florida, and Nevada, see notes 18 and 19 *supra*. Whether initial imprisonment may be imposed in a civil action is subject to question in Nebraska and Tennessee, see note 19 *supra*. The cases which hold that the action is civil in these states are phrased in the terms of recovery of a penalty and not in terms of imposing initial imprisonment. In both of these states only certain classes of cities, composing only a minority of the municipalities, may impose initial imprisonment, and the reported cases are obviously determining the nature of actions under ordinances of these cities. See note 1 *supra*. The rationale of these cases is certainly not adapted to apply to actions where initial imprisonment may be imposed, so it is hoped that when ordinances of cities which may impose initial imprisonment are the predicate of the action the courts will follow the reasoning of the New Mexico courts and hold the action criminal and not civil. See note 19 *supra*.

21. Alabama, Colorado, Georgia, Minnesota, Missouri, and North Dakota. See notes 14 and 17 *supra*. The rule in Minnesota is subject to question. Although in *City of Mankato v. Arnold*, 36 Minn. 62, 30 N.W. 305 (1886), the Minnesota Supreme Court held that violations of ordinances did not result in criminal prosecutions, the holding was expressly modified by the later case of *State ex rel. Erickson v. West*, 42 Minn. 147, 43 N.W. 845 (1889), where the court held that violations which involved a penalty of fine or imprisonment were criminal offenses. However, this distinction made by the court seems to have been lost, for the later cases have held the action civil and not criminal. See *State v. Jamieson*, 211 Minn. 262, 300 N.W. 809 (1941). For an analysis of the inconsistencies of the Minnesota courts on this matter, see Note, 36 MINN. L. REV. 143 (1952).

22. Arkansas, Colorado, Delaware, Illinois, Pennsylvania, Vermont, and Wisconsin. For limitations on the amount of fine in these states, see note 1 *supra*. See notes 16 and 19 *supra*, for the terminology of actions in these states.

The other six states require a criminal action: Connecticut, Maine, Massachusetts, New Hampshire, Texas, and Wyoming. See note 13 *supra*. There seem to be valid sociological, if not legal, arguments for questioning the rule in these states. It does not seem reasonable for a person prosecuted for the violation of an ordinance which may result in only a pecuniary penalty to be subjected to the stigma of a criminal action. See p. 500 *infra*.

23. *Jerzakowski v. City of South Bend*, 82 Ind. App. 132, 145 N.E. 520 (1924); *City of Indianapolis v. Woessner*, 54 Ind. App. 552, 103 N.E. 368 (1913); *Alles v. City of New Albany*, 175 Ind. 709, 93 N.E. 1080 (1911); *Smith v. City of New Albany*, 175 Ind. 279, 93 N.E. 73 (1910); *Ridge v. City of Crawfordsville*, 4 Ind. App. 513, 31 N.E. 207 (1892); *Miller v. O'Reilly*, 84 Ind. 168 (1882).

24. IND. ANN. STAT. § 9-2402 (Burns 1950).

and fix punishment for crimes or misdemeanors,²⁵ the Indiana legislature has stipulated that actions to impose initial imprisonment shall be prosecuted in the same manner as minor state criminal proceedings, by the municipal courts.²⁶ When the action is to recover a pecuniary penalty another statute provides for a civil action to be prosecuted in the name of the city;²⁷ it is this latter statute which has been the predicate of the cases in which the Indiana courts have held prosecutions under municipal ordinances to be civil actions.

The Constitution of the United States and the constitutions in the various states guarantee the defendant in criminal cases the right to a trial by jury.²⁸ When these provisions have been used as a defense in cases involving the violation of municipal ordinances, some courts have limited their applicability to actions where a jury trial was available before the adoption of the constitutions.²⁹ Several other bases have been used to determine whether an offense in violation of a municipal ordinance must be categorized as a criminal offense or as a "petty offense" which is not entitled to a trial by jury. Among these are the severity of the punishment and the nature of the offense itself, whether *malum prohibitum* or *malum in se*.³⁰

25. *Id.* at § 9-2401.

26. *Id.* at 4-203 (Burns 1946).

27. *Id.* at 4-2414. For the construction of these two separate statutory provisions, see *Indianapolis v. Woessner*, 54 Ind. App. 552, 103 N.E. 368 (1913).

28. U.S. CONST. amend. VI; *id.* at art. III, § 2, cl. 3; ALA. CONST. § 6; ARIZ. CONST. art. 2, § 23; ARK. CONST. art. 2, § 7; CAL. CONST. art. 1, § 7; COLO. CONST. art. II, § 16; CONN. CONST. art. 1, § 9; DEL. CONST. art. 1, § 2; FLA. CONST. art. 1, § 3; GA. CONST. art. 1, § 2-105; IDAHO CONST. art. 1, § 7; ILL. CONST. art. II, § 5; IND. CONST. art. 1, § 13; IOWA CONST. art. 1, § 9; KAN. CONST. Bill of Rights, § 5; KY. CONST. § 7; LA. CONST. art. 1, § 9; ME. CONST. art. 1, § 6; MD. CONST. Declaration of Rights, art. 21; MASS. CONST. Part 1, art. XII; MICH. CONST. art. II, § 12; MINN. CONST. art. 1, § 6; MISS. CONST. art. 3, § 26; MO. CONST. art. 1, §§ 18(a), 22(a); MONT. CONST. art. III, § 16; NEB. CONST. art. 1, §§ 10, 11; NEV. CONST. art. 1, § 24; N. H. CONST. part 1, art. 15; N.J. CONST. art. 1, § 10; N.M. CONST. art. II, § 14; N.Y. CONST. art. 1, § 2; N.C. CONST. art. 1, § 13; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 10; OKLA. CONST. art. II, § 20; ORE. CONST. art. I, § 11; PA. CONST. art. 1, § 9; R.I. CONST. art. 1, § 10; S.C. CONST. art. 1, § 18; S.D. CONST. art. VI, § 7; TENN. CONST. art. 1, § 9; TEX. CONST. art. 1, § 10; UTAH CONST. art. 1, § 12; VT. CONST. c.1, § 10; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 22; W. VA. CONST. art. III, § 14; WISC. CONST. art. 1, § 7; WYO. CONST. art. 1, § 10.

29. See *Costello v. Feagin*, 162 Ala. 191, 50 So. 134 (1909); *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 516 (1892); *State ex rel. Sellars v. Parker*, 87 Fla. 181, 100 So. 260 (1924); *Pearson v. Wimbish*, 124 Ga. 701, 52 S.E. 751 (1906); *City of Fort Scott v. Arbuckle*, 165 Kan. 374, 196 P.2d 217 (1948); *State v. Fourcade*, 45 La. Ann. 717, 13 So. 187 (1893); *Delaney v. Police Court of Kansas City*, 167 Mo. 667, 67 S.W. 589 (1902); *McLaughlin v. State*, 123 Neb. 861, 244 N.W. 799 (1932); *Ex parte Sloan*, 47 Nev. 109, 217 Pac. 233 (1923), *Commonwealth v. Wesley*, 171 Pa. Super. 566, 91 A.2d 298 (1952).

30. In this regard it is helpful to study a line of cases in the United States Supreme Court which deal with the problem. In *Callan v. Wilson*, 127 U.S. 340 (1888), where no initial imprisonment was involved, the Court observed as settled that there are certain

The latest Supreme Court pronouncement on the subject, *District of Columbia v. Clawans*,³¹ involved a statute for the District of Columbia which prescribed a penalty of not more than \$300 fine or imprisonment for not more than 90 days, or both, for dealing in second-hand personal property without a license.³² The majority of the Court held that no constitutional right to a jury trial had been violated since before the adoption of the Constitution a confinement for a period of ninety days or more was occasionally imposed for petty offenses tried without a jury.³³ It is strange indeed that the Court, therefore, relied upon the brittle reasoning which was directly refuted as erroneous two years before in the famous *Blaisdell* case.³⁴ The reasoning of Chief Justice Hughes seems directly applicable to the clauses in the various constitutions guaranteeing the right to trial by jury in criminal cases. In the eighteenth century the right to trial by jury in England was not fixed, but was evolving.³⁵ The summary convictions allowed by the statutes

minor offenses that may be proceeded against summarily. In *Natal v. Louisiana*, 139 U.S. 621 (1891), which again did not involve initial imprisonment, Justice Gray pointed out that trial by jury was unnecessary to punish for a petty violation against an ordinance. In *Schick v. United States*, 195 U.S. 65 (1904), where again no initial imprisonment was involved, the Court indicated that there is no constitutional requirement of a jury trial for petty offenses, and that the nature of the offense "and the amount of punishment prescribed" determine whether an offense is petty or serious. *Id.* at 68. In the first case in which initial imprisonment was involved, *District of Columbia v. Colts*, 282 U.S. 63 (1930), the Court, through Mr. Justice Sutherland, held that the trial by jury must be granted in this case, since the offense of reckless driving was *malum in se*, and not merely *malum prohibitum*. It may be surmised that the severity of the punishment criterion announced in the *Schick* case aided in determining whether the offense was one in which trial by jury should be granted.

31. 300 U.S. 617 (1936). The minority, in a vigorous and stimulating dissent, maintained that "constitutional guaranties ought not to be subordinated to convenience, nor denied upon questionable precedents or uncertain reasoning." *Id.* at 634.

32. The majority of the Court conceded that the question of whether a jury trial was guaranteed in such an action was "not free from doubt," and that the Court had "refused to foreclose consideration of the severity of the penalty as an element to be considered. . . ." *Id.* at 625.

33. *Id.* at 625-26.

34. "It is no answer to . . . insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is a Constitution we are expounding.' . . ." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43 (1934).

35. See FORSYTH, *HISTORY OF TRIAL BY JURY* 165-72 (1875); JENKS, *SHORT HISTORY OF ENGLISH LAW* 52 (1938); KEETON AND LLOYD, *THE UNITED KINGDOM, DEVELOPMENT OF ITS LAWS AND CONSTITUTIONS* 14 (1955). Indeed, the right to trial by jury in England has seemed to decline in favor with certain English legal scholars. *Ibid.* Keeton and Lloyd point out that in the present day "it is completely unknown in petty sessions courts which try 90 per cent of criminal cases, virtually unknown in the county courts and is becoming increasingly rare in the High Court." *Ibid.* Although the trend

of Parliament were caused, in essence, by the limited nature of the judicial system and the necessities of that time.³⁶ History shows that at other times in England the right to trial by jury was curtailed, even in relation to serious offenses, and that Parliament reconsidered and repealed the offensive statutes.³⁷ The grant of power to justices of the peace to hear and decide various actions for petty offenses was necessitated by the strain on the judicial system in England, and was not the product of any clearly defined formula for summary procedure.³⁸ It is reasonable to assume, that, had the widely diffused system of local courts, which this country has today, existed in England prior to the formation of this country, there would have been no necessity to devise a haphazard system of summary convictions, which one famous justice of the peace critically pointed out were in restraint of the common law.³⁹

The same reasoning is applicable to the argument that summary convictions were prevalent in the colonies and in the various states before the adoption of the state constitutions; these summary convictions were the spawn of a deficient judicial system, and not the product of intelligent and logical jurisprudence. To suggest that today the courts are bound by the practices and concepts, prevailing before the adoption of the constitutions, which permitted summary convictions without trial by jury when criminal sanctions could be applied, is clearly erroneous.⁴⁰

The clear majority of the states allow trial by jury for the violation of municipal ordinances,⁴¹ in only ten states may the penalty of initial

in England has been to diminish the role of the jury trial in criminal cases, this trend does not answer the argument that under American constitutions courts should not be bound by the practices and concepts which prevailed in England before the adoption of these constitutions. The change in attitude and practices in England should, rather, strengthen the proposition that when American constitutions were adopted the role of the right to trial by jury was not settled in England, and, therefore, to be bound by practices and concepts which were in flux almost two centuries ago is senseless.

36. Frankfurter and Corcoran, *op. cit. supra* note 9, at 923-24. Although the conclusion of this article seems erroneous, the historical documentation is excellent.

37. *Id.* at 924-25.

38. *Id.* at 927.

39. "The power of a justice of the peace is in restraint of the common law, and in abundance of instances is a tacit repeal of that famous clause in the great charter, that a man shall be tried by his equals." BURN, *JUSTICE OF THE PEACE* 159 (3d ed.).

40. It is submitted that the principle announced by Chief Justice Hughes in the mortgage moratorium case, note 34 *supra*, and the caveat of the minority in the Clawans case, note 31 *supra*, when combined, produce a forceful and irrefutable rebuttal to the various state court opinions and the majority opinion in the Clawans case which hold that there is no constitutional right to trial by jury even though initial imprisonment may be imposed.

41. Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688 (1891); IDAHO CODE ANN. 50-340 (1949); ILL. ANN. STAT. § 71.045 (1942); IND. ANN. STAT. § 4-2607 (Burns 1946); KY. REV. STAT. § 26.400 (1955); Commonwealth v. Rawson, 183 Mass. 491, 67 N.E. 605 (1903); MD. ANN. CODE GEN. LAWS art. 23A, § 3 (1951); MICH. COMP. LAWS § 90-11 (1948); MO. ANN. STAT. § 74.615 (Vernon 1952); MONT. REV. CODES ANN.

imprisonment be imposed without the right to trial by jury at some stage of the proceedings.⁴² In several of these ten states, however, the court opinions have construed statutes which authorize only pecuniary penalties, and their attitude in cases which involve initial imprisonment, therefore, may not be predicted with certainty.⁴³ In addition to adopting the *Clavans* view to justify denial of a jury trial to violators of municipal ordinances,⁴⁴ state courts have reasoned that a jury trial should not be granted because there are large numbers of violations, conduct in cities is strictly regulated, and the penalties are usually small in compari-

§ 94-100-11 (1947); N.J. STAT. ANN. § 2A:7-24 (1952); N.Y. CODE CRIM. PROC. § 702; in New Mexico, where initial imprisonment may be imposed the proceedings are criminal and trial by jury may therefore be had. See *City of Clovis v. Curry*, 33 N.M. 222, 264 Pac. 956 (1928); N.C. GEN. STAT. § 15-156 (1951); N.D. REV. CODE § 40-1815 (1943); OHIO REV. CODE ANN. § 2945.17 (1953); OKLA. STAT. tit. 39, § 57 (1951). See *Ex parte Daugherty*, 21 Okla. Crim. 56, 204 Pac. 937 (1922); ORE. REV. STAT. § 221.918 (1955); S.C. CODE § 15-901 (1952); S.D. CODE § 34.3304 (Supp. 1952). See *Salt Lake City v. Robinson*, 39 Utah 260, 116 Pac. 442 (1911), where the court held that rules of criminal procedure apply as in prosecutions for misdemeanors; TEX. CODE CRIM. PROC. art. 874 (1948); WASH. REV. CODE § 10.04.050 (1951).

Various other states grant the right to trial by jury in prosecutions for the violation of municipal ordinances on appeal. ALA. CODE tit. 37, § 464 (1940). See *Ex parte Hall*, 255 Ala. 98, 50 So.2d 264 (1951); ARK. STAT. §§ 44-115-116 (1947); See *Denver v. Bredwell*, 122 Colo. 520, 224 P.2d 217 (1950); IDAHO CODE ANN. § 50-121 (1949); *City of DeMoines v. Pugh*, 231 Iowa 1283, 2 N.W.2d 754 (1942); IOWA CODE ANN. § 367.8 (1949); *Sprague v. Adroscoggin Co.*, 104 Me. 352, 71 A. 1090 (1908); *City of Clayton v. Nemours*, 237 Mo. App. 167, 164 S.W.2d 935 (1942); N.C. GEN. STAT. § 15-177.1 (1951); *State ex rel. Suchta v. District Court of Sheridan County*, 283 P.2d 1023 (1955).

42. ARIZ. CODE ANN. § 16-1105 (1939); *State ex rel. Sellars v. Parker*, 87 Fla. 181, 100 So. 260 (1924); *Pearson v. Wimbish*, 124 Ga. 701, 52 S.E. 751 (1906); KAN. GEN. STAT. § 13-616 (1949); *State v. Fourcade*, 45 La. Ann. 717, 13 So. 189 (1893); *State v. Collins*, 107 Minn. 500, 120 N.W. 1081 (1909); MISS. CODE ANN. § 3374 (1942), however, if the act is an offense against the penal law of the state, it becomes a criminal offense against the city, and criminal procedure, etc., applies. See *Sykes v. City of Crystal Springs*, 216 Miss. 18, 61 So.2d 387 (1952); NEB. REV. STAT. § 18-205 (1943); NEV. COMP. LAWS § 1167 (1929); TENN. CODE ANN. § 6-217 (1955).

43. See *State v. Novak*, 153 Neb. 596, 45 N.W.2d 625 (1951); *Wells v. State*, 152 Neb. 668, 42 N.W.2d 363 (1950); *State v. Hauser*, 137 Neb. 138, 288 N.W. 518 (1939), upheld the validity of the statute authorizing proceedings without trial by jury. See note 41 *supra*. *Robinson v. City of Memphis*, 197 Tenn. 598, 277 S.W.2d 341 (1955); *Deitch v. City of Chattanooga*, 195 Tenn. 245, 258 S.W.2d 776 (1953).

44. In *State ex rel. Sellars v. Parker*, 87 Fla. 181, 100 So. 260 (1924), the Florida Supreme Court utilized the reasoning of the majority of the United States Supreme Court in the *Clavans* case. Note 31 *supra* and accompanying text. The Florida court held that the argument concerning the impropriety of imposing initial imprisonment for the violation of municipal ordinances without granting a trial by jury is met when it is considered that this practice was prevalent in England and in this country before the adoption of the Florida Constitution. The Georgia Supreme Court has held that to require a trial by jury for offenses not triable by jury before the adoption of the Georgia constitutional provision would attribute to the framers a purpose and intent never entertained by them. *Pearson v. Wimbish*, 124 Ga. 701, 52 S.E. 751 (1906). These arguments are amply refuted by the same reasoning which indicated that the holding of the *Clavans* majority was untenable. See note 34 *supra* and accompanying text.

son with the penalties under state law.⁴⁵ These assertions have little merit. If an offense is severe enough to enforce by a criminal sanction, the community must be prepared to stand the inconvenience and increased expense needed to grant the criminal procedural safeguards which should be present when such a sanction may be imposed. Moreover, a penalty which may infringe the personal freedom of the accused cannot be considered "small."⁴⁶

Reasoning in other state courts declares that a jury trial is not necessary in actions for the violation of municipal ordinances, because such actions are civil, and not criminal, in nature.⁴⁷ These cases completely ignore the fact that it is a criminal sanction which is being imposed and that a loss of personal liberty results. Such actions either should not result in the application of a criminal sanction, or if the sanction is applied the ordinary procedural safeguards which are present in criminal actions should apply. This reasoning is followed in a number of jurisdictions.⁴⁸

The right to trial by jury is not the only criminal procedural safeguard which, in certain states, is denied those accused of violations of municipal ordinances. Courts have held that there is no double jeopardy created when the city may appeal from a judgment of acquittal of the

45. See *City of Fort Scott v. Arbuckle*, 165 Kan. 374, 196 P.2d 217 (1948).

46. The history of this problem in the Supreme Court of Minnesota is unquestionably mysterious. In 1886, the court held that summary convictions for the violation of municipal ordinances, even though the penalty be a limited imprisonment were not only constitutional, but necessary. *City of Mankato v. Arnold*, 36 Minn. 62, 30 N.W. 305 (1886). The reasons the court gave were that such convictions, because of their number and nature, had to be summary to be effective and the prevalent practice before the adoption of the constitution was to dispense with jury trials in municipal prosecutions for ordinance violations. Three years later, these arguments were convincingly answered in a direct modification of the previous holding. *State ex rel. Erickson v. West*, 42 Minn. 147, 43 N.W. 845 (1889). The court held that if the nature of the punishment prescribed was imprisonment the offense was criminal within the meaning of the constitution of the state, and, not only was trial by jury necessary, but the accused could be held to answer only upon indictment or information of a grand jury. Nevertheless, in the series of cases in Minnesota which follow this case the rule which seemed settled has either been overlooked or abandoned. See *State v. Siporen*, 215 Minn. 438, 10 N.W.2d 353 (1943); *State v. Jamieson*, 211 Minn. 262, 300 N.W. 809 (1941); *State v. Collins*, 107 Minn. 500, 120 N.W. 1081 (1909); *State v. Brown*, 50 Minn. 128, 52 N.W. 531 (1892). See Note, 36 Minn. L. Rev 143 (1952), for a convincing discussion showing that the Minnesota courts are hopelessly lost in their attempts to treat this problem logically and rationally. The conclusion of the note is itself a condemning indictment of the Minnesota courts' reasoning: "Assuming that the right to trial by jury be preserved wherever possible, that right must nonetheless yield to practicalities." *Id.* at 154.

47. *State v. Hauser*, 137 Neb. 138, 288 N.W. 518 (1939); *McLaughlin v. State*, 123 Neb. 861, 244 N.W. 799 (1932).

48. See note 3 *supra*. New Mexico normally holds that the proceedings against the defendant are civil, but when the form of judgment is imprisonment the proceedings are then criminal. See *City of Clovis v. Curry*, 33 N.M. 222, 264 Pac. 956 (1928); *Tucumcari v. Belmore*, 18 N.W. 331, 137 Pac. 585 (1913).

defendant in prosecutions for the violation of municipal ordinances.⁴⁹ This harsh and untenable judicial position has been reversed by at least one legislature.⁵⁰ In the majority of the states the city is not allowed to appeal from an adverse judgment on the merits.⁵¹ Normally, where appeals by the city are allowed, the sanction which may be applied is pecuniary only;⁵² this is logically and historically sound, because the action may properly be deemed civil when no initial imprisonment is involved.

In some states the quantum of evidence required to convict an accused of a municipal ordinance violation is merely a preponderance, rather than proof of guilt beyond a reasonable doubt.⁵³ This does not seem improper when the proceeding is civil to recover a pecuniary penalty for the violation of an ordinance, and the greater weight of the evi-

49. See *Greeley v. Hamman*, 12 Colo. 94, 20 Pac. 1 (1888); *City of Ann Arbor v. Riskin*, 284 Mich. 284, 279 N.W. 513 (1938); *Ex parte Sloan*, 47 Nev. 109, 217 Pac. 233 (1923); *City of Centerville v. Olson*, 16 S.D. 526, 94 N.W. 414 (1903). An earleir Michigan case had held that an appeal could not be taken by a village after a judgment on the merits since initial imprisonment was authorized. *Village of Northville v. Westfall*, 75 Mich. 603, 42 N.W. 1068 (1889). Both Nevada and South Dakota, since the decisions in these cases have declared that the rule on appeals should conform to appeals from criminal actions, and Michigan, by statute, has decreed that criminal procedure shall apply. NEV. COMP. LAWS § 1172 (1929); *City of Wessington Springs v. Melbourn*, 61 S.D. 452, 249 N.W. 747 (1933); MICH. COMP. LAWS § 90.5 (1948).

50. The problems created by such rulings are well defined in an interesting Alabama case, *City of Birmingham v. Williams*, 26 Ala. App. 200, 155 So. 878 (1934), in which the Alabama Court of Appeals was forced to yield to the mandate of the Supreme Court of Alabama which stipulated that the appeal of the city from the judgment of acquittal would not put the defendant twice in jeopardy. It is interesting to note that after this case the Alabama legislature enacted a statute which denied the city the right to appeal from an adverse judgment unless the judgment was based on the invalidity of the ordinance. ALA. CODE tit. 37, § 587 (1940). See *Ex parte Hall*, 255 Ala. 98, 50 So.2d 264 (1951).

51. See note 55 *supra*. *Hawkinsville v. Etheridge*, 96 Ga. 326, 22 S.E. 985 (1895); *City of Creston v. Ressler*, 202 Iowa 372, 210 N.W. 464 (1926); *City of Salina v. Wait*, 56 Kan. 283, 43 Pac. 255 (1896); *City of St. Paul v. Stamm*, 106 Minn. 81, 118 N.W. 154 (1908); *City of Water Valley v. Davis*, 73 Miss. 521, 19 So. 235 (1896); *City of Miles City v. Drum*, 60 Mont. 451, 199 Pac. 719 (1921); *City of Newark v. Pulverman*, 12 N.J. 105, 95 A.2d 889 (1953); N.C. GEN. STAT. § 15-179 (1951); *Key v. City of Ardmore*, 36 Okla. Crim. 8, 234 Pac. 793 (1925); *City of Salem v. Read*, 187 Ore. 437, 211 P.2d 481 (1949); *Salina City v. Freece*, 61 Utah 574, 216 Pac. 1078 (1932); *City of Seattle v. Bell*, 199 Wash. 441, 92 P.2d 197 (1939).

52. See *Village of Skokie v. Schramm*, 339 Ill. App. 143, 89 N.E.2d 73 (1949).

53. "Competent evidence" is needed before the jury on appeal to prove the defendant's guilt. *Snyder v. City of Denver*, 123 Colo. 222, 227 P.2d 341 (1951); *City of Chicago v. Moretti*, 347 Ill. App. 73, 105 N.E.2d 788 (1952); *Smith v. City of New Albany*, 175 Ind. 279, 93 N.E. 73 (1910); *State v. Siporen*, 215 Minn. 438, 10 N.W.2d 353 (1943); "greater weight of the evidence" sufficient in *Wells v. State*, 152 Neb. 668, 42 N.W.2d 363 (1950); city needs only to make a "prima facie case," *Deitch v. City of Chattanooga*, 195 Tenn. 245, 258 S.W.2d 776 (1953); *City of So. Milwaukee v. Schantzen*, 258 Wis. 41, 44 N.W.2d 628 (1950). It is important to note that in all of these cases, except the Minnesota case, the action was to recover a pecuniary penalty. Since these cases do not involve initial imprisonment, they may be supported by logic and history.

dence is normally sufficient to sustain a decision in favor of the city.⁵⁴ However, in Minnesota, where initial imprisonment may be imposed, the conclusion that proof beyond a reasonable doubt is not necessary because municipal ordinances are not criminal statutes and are not governed by rules of criminal law, seems specious.⁵⁵ This position is contrary to the holdings of the courts in most of the other states.⁵⁶

Another problem is presented by certain state court decisions that a prosecution under a municipal ordinance does not bar an action by the state under state penal statutes for the same act. It is axiomatic that the authority for prosecuting the violation of a municipal ordinance must be delegated to the municipality by the state; the municipality thereby becomes an instrumentality of the state in the prevention of offenses against health, safety, and welfare. Logically, if both the state and the municipality may punish an offender for the commission of a single act, the state, in effect, is punishing the offender twice. Most state courts have completely rejected this "agency" argument,⁵⁷ stating that the act is made penal by two separate units of government, and, therefore, action by one is not a bar to prosecution by the other. A small minority of the states hold that a bar is created.⁵⁸

Any attempt to resolve the problems resulting from denial of the procedural safeguards to accused violators of municipal ordinances requires consideration of several interests. The most important interest

54. See *Wells v. State*, 152 Neb. 668, 42 N.W.2d 363 (1950). Although a minority of the cities in Nebraska are authorized to impose initial imprisonment this case involved the recovery of a pecuniary penalty. The result in the Nebraska courts when the penalty involves initial imprisonment is subject to question.

55. *State v. Siporen*, 215 Minn. 438, 10 N.W.2d 353 (1943); *State v. Glenney*, 230 Minn. 177, 6 N.W.2d 241 (1942); *State v. Jamieson*, 211 Minn. 262, 300 N.W. 809 (1941); *State v. Nelson*, 157 Minn. 506, 196 N.W. 279 (1923).

56. See, e.g., *People v. Tomasovich*, 56 Cal. App. 520, 206 Pac. 119 (1922); *City of Des Moines v. Rosenberg*, 243 Iowa 262, 51 N.W.2d 450 (1952); *State v. Cestone*, 38 N.J. 139, 118 A.2d 416 (1955); *City of Columbus v. Treadwell*, 65 N.E.2d 720 (1946); *Washington & Old Dominion R.R. v. City of Alexandria*, 191 Va. 184, 60 S.E.2d 40 (1950); *City of Seattle v. Bell*, 199 Wash. 441, 92 P.2d 197 (1939).

57. *Costello v. Feagin*, 162 Ala. 191, 50 So. 134 (1909); *Ex parte Knight*, 55 Cal. App. 511, 203 Pac. 777 (1921); *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 516 (1892); *State ex rel. Wilson v. Quigg*, 154 Fla. 348, 17 So.2d 697 (1944); *Hood v. Von Glahn*, 88 Ga. 405, 14 S.E. 564 (1892); *Town of Neola v. Reichart*, 131 Iowa 492, 109 N.W. 5 (1906); *City of Fort Scott v. Arbuckle*, 165 Kan. 374, 196 P.2d 217 (1948); *State v. Foureade*, 45 La. Ann. 717, 13 So. 187 (1893); *State v. Hughes*, 182 Minn. 144, 233 N.W. 874 (1930); *State v. Hauser*, 137 Neb. 138, 288 N.W. 518 (1939); *State v. O'Brien*, 106 Vt. 97, 170 Atl. 100 (1934).

58. KY. CONST. § 168; VA. CODE § 19-232 (1950). In *Owens v. Commonwealth*, 129 Va. 757, 105 S.E. 531 (1921), the Virginia Supreme Court observed that this statutory provision had removed the apparent hardship manifest in the earlier Virginia court rulings. Indiana, by statute, forbids municipalities to prescribe punishment for an act made a public offense by statute. IND. ANN. STAT. § 9-2402 (Burns 1950); there is a similar statute in Rhode Island. R.I. GEN. LAWS c.333, § 33 (1938). See *State v. Frederic*, 28 Idaho 709, 155 Pac. 977 (1916).

involved is the right of a person accused of an act which may result upon conviction in the imposition of initial imprisonment and the loss of personal freedom, to all the safeguards which apply in criminal prosecutions. The community, on the other hand, has an interest in disposing of prosecutions for minor infractions of municipal regulations with dispatch and without exorbitant expense. A third interest is the reputation of the accused. A violator of a municipal ordinance directed against improper parking, for example, should not be subjected to the notoriety of a criminal action. It is clear that if all prosecutions for the violation of a municipal ordinance are considered criminal actions, the stigma of criminality would improperly attach to the offender. There is also a community interest in having ordinances with sanctions harsh enough to dissuade the commission of serious offenses; certainly, in these cases, the severity of the penalty should not depend upon the financial worth of the offender.

Although these interests are divergent, they admit to a logical and just resolution. If the community determines that an offense is so grave that initial imprisonment should be set as the penalty, the community must bear the inconvenience and expense involved in assuring the accused all the procedural safeguards of a criminal action. In the case of less severe offenses, the community should prescribe only the imposition of pecuniary penalties, and these penalties should properly be recoverable in a summary or civil action.

The issues of the right to trial by jury, of not being put twice in jeopardy for the same offense, and of having guilt proved beyond a reasonable doubt are more serious than the mere sounding of academic and abstract theories. A person accused of violating a municipal ordinance which authorizes initial imprisonment as a sanction may lose his most cherished civil liberty of personal freedom. In view of a judicial reluctance to reject unsound precedent, it is incumbent upon the legislatures in the various states to review carefully the statutes relating to the imposition of fines and imprisonment and the procedures prescribed for prosecutions under municipal ordinances in order to harmonize the statutory provisions with the basic individual and community interests which should be protected.