**Marquette Law Review**

Volume 50
Issue 2 *November 1966*

Article 2

# The Classification of Crimes in Wisconsin

Paul P. Lipton

# THE CLASSIFICATION OF CRIMES IN WISCONSIN

PAUL P. LIPTON*

This study is prompted by the Wisconsin Supreme Court's recent holding that a violation of the Wisconsin income tax law constitutes a misdemeanor rather than a felony.[1] In a case of first impression, the court held that income tax offenses were not upgraded to felonies merely because they became punishable by imprisonment in the state prison by the enactment of the "place of imprisonment" statute[2] in 1945. The decision has important implications with respect to the grade of other criminal offenses, particularly crimes not contained in the Criminal Code.[3]

## WISCONSIN STATUTES

Section 939.60 of the Wisconsin statutes provides that "a crime punishable by imprisonment in the state prison is a felony" and that "every other crime is a misdemeanor."[4] Though the precise wording

---

* Attorney (Wisconsin; Massachusetts); formerly, Special Attorney and Trial Counsel, Office of Chief Counsel, Internal Revenue Service.

[1] State *ex rel.* Gaynon v. Krueger, 31 Wis.2d 609, 143 N.W.2d 437 (1966), rehearing denied September 12, 1966. This article is based mostly upon research undertaken by the author as counsel for the taxpayer in the *Gaynon* case. The views expressed herein undoubtedly reflect the results of such advocacy.

[2] WIS. STAT. §959.044 (1965).

[3] WIS. STAT. chs. 939-947 (1965).

[4] The present definition was enacted by Wis. Laws 1949, ch. 631, §27. Previously, the statute read: "Any offense punishable by imprisonment in the state prison is a felony." WIS. STAT. §353.31 (1945), as created by Wis. Laws 1945, ch. 241.

From 1849 to 1945, the statutes provided that "the term 'felony', when used in any statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by imprisonment in a state prison." WIS. STAT. §353.31 (1943); Revised Statutes, 1849, ch. 141, §14.

Under this definition the Attorney General had ruled that a crime not expressly designated as a felony, which was not a felony at common law, was not a felony even though punishable by imprisonment in the state prison. 21 OPS. WIS. ATT'Y GEN. 506 (1932). In 1935, making a slightly different interpretation, the Attorney General ruled that a crime not expressly designated as a felony, and for which no place of imprisonment was designated, constituted only a misdemeanor. 24 OPS. WIS. ATT'Y GEN. 451 (1935). There were no Wisconsin cases clearly in point. In State v. Fackler, 91 Wis. 418, 64 N.W. 1029 (1895), the court held that an offense punishable by unspecified imprisonment for a *minimum* term of six months was not a felony.

In other states there were and are numerous cases holding that failure to designate the place of confinement raises a conclusive presumption that confinement shall be in the county jail and that the offense is a misdemeanor. "In all our penal legislation, when the word imprisonment only is used, it is understood to mean imprisonment in a county jail or local prison, and when the legislature has intended imprisonment in the penitentiary, it has been so expressed." Allgood v. State, 206 Ark. 699, 177 S.W.2d 928, 929 (1944). See also People v. Hightower, 414 Ill. 537, 112 N.E. 126 (1953); Union Ice Co. v. Rose, 11 Cal. App. 348, 104 Pac. 1006 (1909). For a statement of the rule and the citation of additional cases, see 24B C.J.S. *Criminal Law* §2000(b) (1962).

may differ somewhat,[5] this is the statutory definition found in the vast majority of states.[6] Under federal law and in some states, a felony is a crime punishable by death or imprisonment for more than one year.[7] Several states have laws which provide that any crime shall be deemed a misdemeanor,[8] from the time of sentence, if the judgment actually imposed is other than death or imprisonment in the state prison.[9]

Although the issue has not been squarely decided in Wisconsin, remarks in *Pruitt v. State* indicate that the *maximum* statutory punishment will determine the grade of the offense.[10] A crime that *may be* punished by imprisonment in the state prison normally will constitute a felony, even though the court is authorized to, and does in fact, impose a lesser sentence. The same rule apparently prevails in almost every jurisdiction having a similar statutory definition.[11] In Illinois, however, a crime is not a felony unless the offense is "absolutely punishable" by death or imprisonment in the state prison.[12]

If the legislature designates a crime as a "misdemeanor" or "felony," the *Pruitt* case[13] indicates that this shall be controlling rather than the place of punishment authorized by the statute.[14] The same rule prevails in many other jurisdictions.[15] There is, perhaps, an equal number

---

In State v. Di Paglia, 247 Iowa 79, 71 N.W.2d 601 (1955), the Iowa Supreme Court held that a crime punishable by imprisonment not to exceed ten years was a misdemeanor because the statute specified neither the grade of the offense nor the place of imprisonment. However, in State v. Newton, 247 Iowa 550, 74 N.W.2d 687 (1956), the court held that the general rule was not applicable to an offense punishable by life imprisonment because the quantum of punishment bore no natural or reasonable relation to misdemeanor punishment.

[5] The New York statute provides that a felony is a crime which "is or may be" punishable by death or imprisonment in the state prison. N.Y. PENAL LAW, §2.

[6] See generally, 22 C.J.S. *Criminal Law* §§5-7 (1961); 14 AM. JUR. 2d *Criminal Law* §§19-21 (1965).

[7] See 18 U.S.C. §1 (1964), CONN. GEN. STAT. §1-1 (1958); REV. LAWS OF HAWAII, §247-2 (1965); MINN. STAT. ANN., §609.02 (1964). The Delaware statute provides that "any crime or offense not specifically designated by law to be a felony is a misdemeanor." 11 DEL. CODE ANN. §101(b) (1953).

[8] See *e.g.*, CAL. PENAL CODE §17; ORE. REV. STAT. §161.030(2) (1966).

[9] A crime punishable by imprisonment in the state prison continues to be a felony for all purposes until judgment is pronounced. State v. Johnson, 164 Cal.App. 2d 470, 330 P.2d 894 (1958). The felony statute of limitations continues to apply even though the crime becomes a misdemeanor upon imposition of a fine or county jail imprisonment. Doble v. Superior Court, 197 Cal. 556, 241 Pac. 852 (1925).

[10] 16 Wis.2d 169, 173, 114 N.W.2d 148, 151 (1962).

[11] See cases cited 22 C.J.S. *Criminal Law* §6, n. 22-24 (1961), also, Annot., 95 A.L.R. 1115 (1935).

[12] "Where the punishment prescribed for an offense is punishment by imprisonment in the penitentiary, or by imprisonment in the county jail, or by fine, the offense is not a felony but is a misdemeanor." People v. Anderson, 342 Ill. 290, 174 N.E. 391, 393 (1930). *Accord:* Lamkin v. People, 94 Ill. 501 (1880); People v. Stavrakas, 335 Ill. 570, 167 N.E. 852 (1929). See Annot. 95 A.L.R. 1115, 1120-21 (1935).

[13] Pruitt v. State, 16 Wis.2d 169, 174, 114 N.W.2d 148, 151 (1962).

[14] The pertinent cases are collected in 22 C.J.S. *Criminal Law* §5, (1961).

[15] See *e.g.*, Nation v. State, 154 Fla. 337, 17 So.2d 521, 522 (1944). ". . . the legis-

of jurisdictions with cases holding that the nature and extent of the prescribed punishment determine the grade of the crime irrespective of a "felony" or "misdemeanor" label.[16]

In 1945, the Wisconsin legislature adopted a statute prescribing rules for determining the place of imprisonment when the statute defining the offense failed to so specify. Section 959.044, which was enacted as Chapter 154 of the 1945 Session Laws, provides as follows:

> When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, (a) a sentence of less than one year shall be to the county jail, (b) a sentence of more than one year shall be to the state prison and the minimum under the indeterminate sentence law shall be one year, and (c) a sentence of one year may be to either the state prison or the county jail.

The legislature described chapter 154 as an act "relating to the place of imprisonment when none is expressed." The preamble to the act did not recite any other purpose, and the statute is simply captioned: "Place of imprisonment when none expressed." The legislative drafting file discloses only that the measure was sponsored by the District Attorney's Association and that it came to the legislature in the form of a draft prepared by an Assistant Attorney General.

EFFECT OF THE "PLACE OF IMPRISONMENT" STATUTE

It is reasonably certain that the "place of imprisonment" statute was enacted for the sole purpose of providing rules which made the *length of the sentence* controlling in determining the place of confinement. The statute applied indiscriminately to both felonies and misdemeanors, and overruled supreme court cases[17] holding that the *grade* of the offense was controlling if the statute did not specify the place of confinement. Although the 1945 legislature also changed the "felony" definition, the change was consistent with, if not required by, the legislature's objective to render the grade of the offense immaterial. The "place of imprisonment" statute plainly authorized the courts to commit a felon to the county jail for a term not exceeding one year, whereas the old definition implied mandatory commitment to the state prison.[18]

---

lative classification will control without regard to the punishment imposed as . . . the Legislature has the power to denounce any act as a crime and to fix the grade of the offense and prescribe the punishment therefor."

[16] "Calling an offense a misdemeanor does not make it so when the punishment imposed makes it a felony." State v. Harwood, 206 N.C. 87, 173 S.E. 24, 25 (1934).

[17] Veley v. State, 194 Wis. 408, 216 N.W. 522 (1927); Grimes v. State, 236 Wis. 31, 293 N.W. 925 (1940). In the cited cases, the supreme court vacated one year sentences to the state prison under a statute designating the crime as a misdemeanor, but not specifying the place of imprisonment. The court held that the old §353.27 was applicable to fix the place of punishment.

[18] See note 4, *supra*. In Boehm v. State, 190 Wis. 609, 209 N.W. 730 (1926), the court had held that designation of an offense as a "felony" implied that imprisonment should be in the state prison. This construction of the former

In *Pruitt v. State*,[19] the court confirmed that section 959.044 made it possible to sentence a misdemeanant to the state prison for not less than one year and to sentence a felon to the county jail for a term not exceeding one year. In this case, the court held that a defendant had been lawfully sentenced to the state prison for one year under a statute which described the crime as a misdemeanor, but which was silent as to the place of imprisonment. The case implicitly holds that an offense described as a "misdemeanor" was not raised to a felony even though it became punishable by imprisonment in the state prison upon the enactment of the predecessor of section 959.044 in 1945. Although not necessary to the decision, language in the *Pruitt* case clearly indicated that an offense of unspecified grade, punishable by imprisonment for a term of one year, constituted a felony by resort to section 959.044.[20] In *State ex rel. Gaynon v. Krueger*, however, the court said that its comment in the *Pruitt* case should be confined to offenses created by the Criminal Code.[21]

In *Gaynon*, the supreme court held that a violation of section 71.11(42), punishing income tax offenses by individuals, did not constitute a felony, even though the offense was punishable by imprisonment in the state prison by virtue of section 959.044. In subtance, the court held that an unlabelled offense found outside the Code was not upgraded from a misdemeanor to a felony by reason of the enactment of the "place of imprisonment" statute. The court concluded that section 959.044 was not enacted for the purpose of changing the grade of crimes. Accordingly, the court refused to use the statute "retroactively as a whiplash to change the grade of an offense by reference" to the felony definition of section 939.60.[22]

Inasmuch as a clear expression of legislative intention is required to upgrade a misdemeanor to a felony, the supreme court refused to give section 959.044 such an effect by indirection.[23] Mindful of the significance of the distinction between a felony and a misdemeanor,[24]

---

felony definition created a conflict with old §359.07, which provided that a sentence to state prison should be for a term not less than one year.

[19] 16 Wis.2d 169, 114 N.W.2d 148 (1962).

[20] *Id.* at 173, 114 N.W.2d at 151.

[21] 31 Wis.2d 609, 623-24, 143 N.W.2d 437, 444 (1966).

[22] *Id.* at 618, 143 N.W.2d at 442. See also Archer v. State, 165 Md. 155, 125 A.774 (1924), where it was held that the statute of limitations was not affected by a provision authorizing sentence to either jail or penitentiary.

[23] In Brooks v. People, 14 Colo. 413, 24 Pac. 553 (1890), the court assumed that some misdemeanors were raised to felonies by a statute directing imprisonment in the state prison for all terms exceeding six months. The court held, however, that the statute had not been constitutionally enacted because the title of the act disclosed no such purpose. The constitutional question could have been avoided by holding that the statute did not have the indirect, undisclosed purpose of raising the grade of any crime.

[24] "In most cases the place of imprisonment is different; the statute of limitations is twice as long for a felony as a misdemeanor; one charged with a felony is entitled to a preliminary hearing; the stigma of a felony

the court also gave due cognizance to the following basic rules of statutory construction: 1) penal statutes must be construed strictly in favor of the accused;[25] and 2) a construction which would create a new felony should be avoided whenever possible.[26]

### INCOME TAX VIOLATIONS

In *State ex rel. Gaynon v. Krueger*,[27] a criminal complaint had been filed against Irwin E. Gaynon on April 5, 1965, charging that the defendant filed false income tax returns for the years 1958, 1959, and 1960. The defendant moved to dismiss the complaint on the ground that the violation was a misdemeanor barred by the three-year statute of limitations.[28] After a complicated legal battle, the issue reached the supreme court on appeal from an order denying the defendant's application for a writ of prohibition to prevent the county court from proceeding in the case. The supreme court held that the offense constituted a misdemeanor, that the county court had no jurisdiction to conduct a preliminary examination, and that an absolute writ of prohibition should be issued.

> Section 71.11(42) of the Wisconsin Statutes reads as follows: Any person, other than a corporation, who fails or refuses to make a return at the time hereinbefore specified in each year or shall render a false or fraudulent return shall upon conviction be fined not to exceed $500, or be imprisoned not to exceed one year or both, at the discretion of the court, together with the cost of prosecution.

Except for the deletion in 1927 of the words "joint stock company or association," the statute reads precisely the same as when it was adopted in 1911.[29] At that time, the legislature unquestionably intended

---

is greater; and under the repeater statute, more severe penalties are authorized for felonies than for misdemeanors."

State *ex rel.* Gaynon v. Krueger, 31 Wis. 2d 609, 620, 143 N.W.2d 437, 443 (1966). See also BURDICK, LAW OF CRIME §81 (1946); State v. Masteller, 232 Minn. 196, 45 N.W. 2d 109 (1950).

In Wisconsin, prosecution for a felony must be commenced within six years, whereas prosecution for a misdemeanor must be commenced within three years of commission of the offense, WIS. STAT. §939.74 (1965). The holding in the *Gaynon* case that income tax violations constitute misdemeanors meant that all counts were barred by the statute of limitations.

[25] State v. Wrobel, 24 Wis.2d 270, 275, 128 N.W.2d 629, 631 (1964); 21 AM. JUR. 2d *Criminal Law* §19 (1965).

[26] Wilson v. State, 1 Wis. 184 (1853); State v. Columbian Nat. Life Ins. Co., 141 Wis. 557, 124 N.W. 502 (1910). See also, Commonwealth v. Barlow, 1 Mass. 439 (1808); Commonwealth v. Macomber, 3 Mass. 254 (1807).

In the *Wilson* case, the court held that a crime punishable by imprisonment in the state prison did not become a statutory felony when Wisconsin became a state. The statutory definition did not make a felony out of an offense which "before the statute was a mere misdemeanor."

[27] 31 Wis.2d 609, 143 N.W.2d 437 (1966).

[28] WIS. STAT. §939.74 (1965).

[29] Wis. Laws 1911, ch. 658, §1087m-12(3). Most sections of the income tax act were renumbered by Wis. Laws 1947, ch. 318. §2 of the 1947 enactment specifically states that no substantive change was made in the law.

to create a misdemeanor,[30] and the supreme court so held in the *Gaynon* case.

Prior to the formation of an Intelligence Division in 1961, the criminal sanctions of the Wisconsin income tax laws were rarely enforced.[31] At most, there had been only a handful of prosecutions, and it is virtually certain that there never had been a prosecution for tax evasion in Wisconsin prior to the enactment of the "place of imprisonment" statute. It would be difficult to believe that the 1945 legislature intended to upgrade income tax violations when criminal tax statutes were of academic interest only.

The punishment provided by the legislature is that commonly prescribed for misdemeanors. The same punishment was—and still is—applicable both to the relatively minor offense of failure or refusal to make a return and to the more serious offense of rendering a false or fraudulent return. If the legislature had intended to raise income tax offenses from misdemeanors to felonies, the punishment undoubtedly would have been increased and made commensurate with other felonies.[32] Moreover, a distinction probably would have been made between the offense of filing a fraudulent return and the mere failure to file a return.[33]

### The "Plain Meaning" Rule

Because section 71.11(42) authorizes confiinement not exceeding one year and does not specify the place of imprisonment, imposition

---

[30] See discussion and cases cited in note 4, *supra*. The Attorney General applied the misdemeanor statute of limitations in construing income tax offenses. 25 Ops. Wis. Att'y. Gen. 237 (1936). Although a preliminary examination had been held with respect to the 1948 tax violation involved in State *ex rel.* Marachowsky v. Kerl, 258 Wis. 309, 45 N.W.2d 668 (1951), this fact was not significant. The statutes at that time authorized a preliminary examination with respect to any offense punishable by more than six months in prison, and the case was prosecuted within the three year limitation period applicable to misdemeanors. §954.038, prohibiting a preliminary examination on a misdemeanor charge, was first enacted in 1961. Wis. Laws 1961, ch. 643.

[31] See Lipton and Petrie, *Wisconsin Criminal Tax Fraud Problems*, 48 Marq. L. Rev. 1, 5 (1964).

[32] See *e.g.*, Wis. Laws 1947, ch. 446, which was an act "increasing the penalty" for producing a miscarriage. Previously, the offense was punishable by maximum fine of $500 or imprisonment in the county jail for not more than one year. Wis. Stat. §351.22 (1945). As amended, the offense became punishable by maximum fine of $5,000 or by imprisonment "in the state prison not less than one year nor more than 3 years. . . ." Wis. Stat. §351.22 (1947).

[33] Under federal law, failure to file a return is a misdemeanor, whereas filing a false return is a felony. Int. Rev. Code of 1954, §§7201, 7203. Income tax offenses are misdemeanors under the laws of most states, including New York. N.Y. Tax Laws, §376(5).

The Wisconsin statute punishing filing of fraudulent gift tax returns provides that violators shall be deemed guilty of a "misdemeanor." Wis. Stat. §72.81(8) (1965). Sales tax violations also are punishable as misdemeanors. Wis. Stat. §77.60(6) (1965). Because the statute specifies no penalty or place of imprisonment, the punishment is a fine not exceeding $250 or imprisonment in the county jail for not more than one year in accordance with the provisions of §939.61.

of the maximum sentence presumably permits imprisonment in the state prison under section 959.044. Accordingly, the State contended in the *Gaynon* case that a violation of section 71.11(42) constituted a felony under section 939.60, which provides that "a crime punishable by imprisonment in the state prison is a felony" and that "every other crime is a misdemeanor."

Three justices of the supreme court agreed with the State's contention that section 71.11(42) must be construed by reference to both sections 939.60 and 959.044, and that a "plain reading" of the statutes required the conclusion that a violation constitutes a felony.[34] The majority of the court apparently did not find the statutes plain and unambiguous, particularly in the "twilight zone of 'not more than one year.'" In any event, the court implicitly rejected the "plain meaning" rule with the observation that "the judging process requires more than a mechanical application of the statutes to facts."[35] This observation is supported by weighty authority in federal case law.[36]

Even though a superficial examination of the statutory language reveals no uncertainty of expression, it has been held that aids to construction may still be utilized.[37] The rule generally applied is that

---

[34] State *ex rel.* Gaynon v. Krueger, 31 Wis.2d 609, 624, 143 N.W.2d 437, 445 (1966). This conclusion rested on the assumption that the provision for alternative county jail or state prison imprisonment applied to a statute authorizing imprisonment for a term not exceeding one year. Interestingly, a New York court found similar statutory provisions "somewhat conflicting" and held that the provision for alternative one year sentences applied only to a crime punishable by imprisonment for one year or more, not to a crime punishable by a term of one year or less. The court of appeals agreed with the lower court's conclusion that the offense was only a misdemeanor. People *ex rel.* Devoe v. Kelly, 32 Hun 536 (3rd Dept. 1884), *aff'd*, 97 N.Y. 212 (1884).

The Revised New York Penal Law, §10.00(4), effective September 1, 1967, changes the felony definition to cover offenses punishable by imprisonment in excess of one year. No change was made in the "place of imprisonment" statutes.

[35] *Id.* at 623, 143 N.W.2d at 444.

[36] The United States Supreme Court has repeatedly warned against the dangers of an approach which "confines itself to the bare words of a statute. . . ." Lynch v. Overholser, 369 U.S. 705, 710 (1962). In Local 1976 v. NLRB, 357 U.S. 93, 100 (1958), the Court said that ascertainment of the legislative intention is "nothing like a mechanical endeavor." Justice Frankfurter continued, "[I]nevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials."

For additional cases rejecting the "mechanical application" of statutes, see United States v. Witkovich, 353 U.S. 194, 199 (1957); Lawson v. Suwannee Fruit & Steamship Co., 336 U.S. 198, 201 (1949); Eck v. United Arab Airlines, Inc., 360 F.2d 804, 812 (2d Cir. 1966); Cappadora v. Celebrezze, 356 F.2d 1, 4 (2d Cir. 1966).

[37] No matter how clear the words of a statute may be, there is "no rule of law forbidding resort to explanatory legislative history. . . ." Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943); *accord*, United States v. Dickerson, 310 U.S. 554, 562 (1940).

In United States v. Shirey, 359 U.S. 255, 260 (1959), the Court observed that statutes are "not inert exercises in literary composition" and held that the "general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."

"an ambiguity calling for construction may arise when the consequence of a literal interpretation of the language is an unjust, absurd, unreasonable, or mischievous result, or one at variance with the policy of the legislation as a whole."[38]

In determining whether a crime is a felony or misdemeanor, a literal interpretation of sections 939.60 and 959.044 could lead to unreasonable results. With respect to crimes punishable by imprisonment for a maximum term of one year or more, it would be unreasonable, if not absurd, to hold that patent misdemeanors not described as such were raised to felonies, but that similar offenses labeled "misdemeanor" were not upgraded.[39] The purely fortuitous circumstance of a draftsman having chosen to omit the label, and having failed to designate county jail as the place of imprisonment, should not justify the conclusion that some patent misdemeanors were raised to felonies by the "place of imprisonment" statute.[40]

Section 959.044 applies with equal force to both misdemeanors and felonies and makes the length of the sentence the controlling factor in determining the place of imprisonment. An interpretation that section 959.044 raised the grade of some misdemeanors would not be consistent with the legislative purpose of rendering the grade of the crime immaterial in determining the place of imprisonment. It is not essential

---

[38] 82 C.J.S. *Statutes* §322b(3) (1953). For Wisconsin cases rejecting blind application of the "plain meaning" rule, see Isaksen v. Chesapeake Instrument Corp., 19 Wis.2d 282, 289-90, 120 N.W.2d 151, 155-56 (1963); Connell v. Luck, 264 Wis. 282, 284-85, 58 N.W.2d 633, 634 (1953); Pfingsten v. Pfingsten, 164 Wis. 308, 313, 159 N.W. 921, 923 (1916); State *ex rel.* Husting v. Board of State Canvassers, 159 Wis. 216, 227, 150 N.W. 542, 546 (1914).

In State *ex rel.* Husting v. Board of State Canvassers, 159 Wis. 216, 227, 150 N.W. 542, 546 (1914), the Wisconsin Supreme Court noted that the "plain meaning" rule had received "elucidation which is a vital feature" of the rule, and observed that the "literal sense" of words is not controlling in determining "whether words are plain or not."

The admonition of the *Husting* case may not have received adequate recognition in the following recent cases: Miller v. Wadkins, 31 Wis.2d 281, 284-85 n. 7, 142 N.W.2d 855, 856 (1966); Alexander v. Farmers Mut. Automobile Ins. Co., 25 Wis.2d 623, 626, 131 N.W.2d 373, 375 (1964); Estate of Ries, 259 Wis. 453, 459, 49 N.W.2d 483, 486 (1951). Nevertheless, the opinions in these cases generally conceded that the same result would have been reached if the suggested aids to construction had been employed.

[39] "An intent to discriminate unjustly between different cases of the same kind is not to be ascribed to the legislature. It is not to be presumed that the legislature intended to make a distinction which would convict it of an unaccountable capriciousness on the subject." 50 AM. JUR. *Statutes* §372 (1944).

Constitutional doubts would be raised by a construction that §959.044 raised the grade of some offenses. Although the legislature has great latitude in classifying crimes and fixing punishment, classifications "must be natural, not arbitrary, and must be made with reference to the heinousness or gravity of the act, and not matters disconnected therefrom." 24B C.J.S. *Criminal Law* §1975 (1962).

[40] It would have been incongruous to hold that income tax violations were raised to felonies, whereas gift tax offenses, punishable by fine of $5,000 or imprisonment not exceeding one year under §72.81(8), remained misdemeanors.

to the accomplishment of that purpose to construe the statute as changing the grade of any offense.[41]

### CRIMINAL CODE OFFENSES

The Criminal Code was enacted in 1955 after a meticulous survey and analysis of the chapters on crimes and criminal procedure. Many sections were completely rewritten or newly created in the Criminal Code. Moreover, every section of the Code was drafted in the light of section 959.044, which had been in existence since 1945.

Prior to the enactment of the Code, the criminal statutes almost invariably specified the place of imprisonment, and frequently designated the grade of the crime. Although the Code defines "felony" as a crime punishable by imprisonment in the state prison, there is not a single section in the Criminal Code that specifically designates "state prison" as the place of imprisonment. In fact, the place of confinement was eliminated from all Code provisions except certain offenses punishable by a maximum term of one year. The description of offenses as "misdemeanor" or "felony" was discontinued in the Code. There is only one instance in the Code where the grade of the crime is specified.[42] This radically different drafting approach makes it essential to refer to section 959.044 in determining the grade of almost all Criminal Code offenses, as well as the place of imprisonment.

Many Code offenses punishable by a term not exceeding one year specify county jail as the place of confinement, thereby preserving the misdemeanor classification of the original enactment.[43] Some relatively important "one-year" offenses not specifying the place of imprisonment are found in sections that were newly created or radically revised in the Code.[44] The legislative history of these provisions clearly shows that some of the rewritten offenses were misdemeanors when the Code was adopted.[45] Although it seems doubtful that the legislature actually

---

[41] A statute should be limited to its general purpose in the absence of a specific expression of intent to extend its operation to other matters. Abramson v. Hard, 229 Ala. 2, 155 So. 590, 594 (1934). Statutes will not be presumed "to make any changes in prior existing law beyond that which is necessary to carry out the purposes of the new legislation." Heaney v. Borough of Mauch Chunk, 322 Pa. 487, 185 A. 732, 733 (1936). *Accord.* Will of Johnson, 175 Wis. 1, 9, 183 N.W. 888, 891 (1921).

[42] WIS. STAT. §943.24(1) (1965). This is the "worthless check" offense involved in Pruitt v. State, 16 Wis. 2d 169, 114 N.W.2d 148 (1962).

[43] See, *e.g.*, WIS. STATS. §§940.08, 940.29, 941.13, 941.22(1), 941.23, 941.24(1), 942.02(1), 943.11, 944.20, 944.22, 946.41, 946.46, 946.69, and 947.15(1) (1965).

[44] See WIS. STAT. §§942.01(1), 943.21, 943.31, 945.03, 945.05, 946.12, 946.13, 946.14, 946.47, and 946.61 (1965).

[45] WIS. STAT. §942.01 (1965), punishing "defamation," combines criminal slander and libel. Previously, "libel" was punishable by fine not exceeding $250 or imprisonment in the "county jail" for not more than one year. WIS. STAT. §348.41 (1) (1953). Criminal slander was described in the following subsection as a "misdemeanor," punishable in the same manner as libel. However, §348.411 punished "slandering commercial or financial standing" by fine not exceeding $1,000 or imprisonment not exceeding one year, without specifying the place of

intended to upgrade the offenses to felonies, the *Gaynon* case indicates that the Supreme Court nevertheless will utilize the "place of imprisonment" statute for the purpose of determining the grade of all Code offenses.

In some of the sections which punish offenses by a term not exceeding one year, it seems likely that "county jail" was omitted inadvertently in the Code version.[46] There is at least one instance where the place of imprisonment must have been omitted through oversight. Section 940.08 punishes anyone who causes "death" to another by a high degree of negligence in the operation or handling of a vehicle or weapon. Section 940.24 punishes anyone who causes "bodily harm" to another by a high degree of negligence in the operation or handling of a weapon. Both sections impose a fine of not more than $1,000 or imprisonment not exceeding one year. The statute punishing the offense involving "bodily harm" fails to specify the place of imprisonment, whereas the "death" section does designate "county jail" as the place of imprisonment.

---

imprisonment. The Code section incorporating these offenses utilizes the penalty clause of old §348.411. Curiously, conspiracy to injure another in his reputation or business is still a misdemeanor under WIS. STAT. §134.01 (1965), which specifies "county jail."

WIS. STAT. §943.21 (1965) punishes "fraud on hotel or restaurant keeper" by imprisonment not more than one year. This is a greatly simplified version of the predecessor statute. WIS. STAT. §343.402(1)(a) (1953), pertaining to fraud on innkeepers, had designated the offense as a "felony" and prescribed unspecified imprisonment not exceeding one year. Fraud at a restuarant, however, had been punishable by fine not exceeding $250 or imprisonment in the "county jail" not exceeding one year. WIS. STAT. §343.402(3) (1953).

WIS. STAT. §943.31 (1965) creates "a new crime," covering extortion "by threats to defame, whether the information is true or false." Platz, *The Criminal Code* 1956 WIS. L. REV. 350, 375-76. The offense was subjected to the same punishment as "defamation."

WIS. STAT. §944.30 (1965) punishes "prostitution" by unspecified imprisonment not exceeding one year. Previously, prostitution was a "misdemeanor," punishable by fine not exceeding $500 or imprisonment in the "county jail" for not more than one year. WIS. STAT. §351.19 (1953). Recently, the District Attorney for Milwaukee County purportedly described prostitution as a "serious misdemeanor." (Milwaukee Journal, April 4, 1966, Part 1, p. 23, col. 3).

WIS. STAT. §945.03 (1965) punishes "commercial gambling" by a fine not more than $5,000 or imprisonment not exceeding one year. The same penalty applies to "dealing in gambling devices" under §945.05. Previously, most gambling statutes provided increased penalties for second and subsequent offenses with felony punishment applicable only to the third offense. WIS. STAT. §§348.01, 348.07(1), 348.08, 348.09, 348.173 (1953).

WIS. STAT. §§946.12, 946.13 and 946.14 (1965) punishing misconduct in public office, consolidate and revise 13 predecessor sections. Most of the offenses had been misdemeanors.

WIS. STAT. §946.47 (1965), harboring or aiding felons, is a radical revision of the "accessory after the fact" statute, formerly WIS. STAT. §353.08 (1953). WIS. STAT. §946.61 (1965) is a new offense which punishes bribery of witnesses *not* to testify.

[46] See WIS. STAT. §§946.63 and 946.71 (1965). §946.63 punishes concealing the death of a child, which had been a misdemeanor under WIS. STAT. §351.24 (1953). WIS. STAT. §946.71 (1965) dealing with interference with custody of child, incorporates offenses formerly punishable as misdemeanors under WIS. STAT. §§340. 54(2) and 351.29 (1953).

EFFECT OF CRIMINAL CODE BILL

In the *Gaynon* case the state contended unsuccessfully upon motion for rehearing that income tax violations were upgraded to felonies upon enactment of the Criminal Code. If income tax offenses were not upgraded from misdemeanors upon enactment of the "place of imprisonment" statute, no change in grade was effected by the Code. The Code made no change whatsoever in the pertinent statutes,[47] and nothing in the Code directly or indirectly manifested an intention to raise the grade of any offense outside the Code.

Section 939.20 provides in substance that the general provisions of chapter 939 should apply to offenses defined in other chapters of the statutes. There is no reason to believe, however, that any change in the law was intended by enactment of section 939.20. This provision merely made it clear that the felony definition, statute of limitations, and other general provisions of chapter 939 should *continue* to apply outside the Code. The chief purpose of section 939.20, it would seem, was to guard against the application of new Code definitions to crimes created by legislatures which did not have those definitions in mind.

A 1951 report of the Legislative Council[48] contained a comment to the effect that a prescribed maximum imprisonment of one year or more generally means that a crime is a felony. Although the report recommended continuation of the existing statutory definition, it noted that the meaning of the statute "would be clarified considerably by defining felony and misdemeanor in terms of prescribed maximum penalties." No change was recommended even though the statutes were not considered to be "plain and unambiguous."[49] It was concluded that a new definition would require an examination of every crime in the statute book, and that such an undertaking was "not feasible."[50]

---

[47] The present WIS. STAT. §959.044 (1965) was merely renumbered and placed in the non-Code chapter on "Judgment and Execution." Wis. Laws, 1955, ch. 696, §311. The felony definition was repealed and recreated, but the wording was not changed. Hence, the old provision continued "in force without interruption." Fullerton v. Spring, 3 Wis. 667, 671-72 (1854); *accord:* Wisconsin Trust Co. v. Munday, 168 Wis. 31, 45, 168 N.W. 393, 398 (1918); Guse v. A. O. Smith Corp., 260 Wis. 403, 406, 51 N.W.2d 24, 26 (1952). See, also WIS. STAT. §990.001(7), (1963) and 82 C.J.S. *Statutes* §276 (1953), covering codifications.

[48] See report accompanying 1951 Bill No. 784, S. (Wis. Legis. Council, 1950 Report, Vol. VII).

[49] No specific recognition of ambiguity is manifested in reports pertaining to the 1953 and 1955 Criminal Code Bills. However, at a meeting held July 22, 1955, the advisory committee concluded that the "question of redefining felony and misdemeanor" was not a "proper matter" for the committee.

[50] A proposal to adopt the California and Oregon rule (see note 8, *supra)* was rejected "on the ground that it was too great a policy change for this bill...." Platz, *The Criminal Code,* 1956 WIS. L. REV. 350, 368. A subcommittee report opposing the suggested change emphasized its possible dislocating effect in various areas of statutory law. In a persuasive, unpublished report favoring the change, Mr. Platz stated: "To lay down by statute an inflexible distinction between misdemeanors and felonies leads to many absurdities which can best be alleviated in practice by letting the sentence actually imposed determine the

A comment accompanying the 1953 Criminal Code bill[51] opens with the statement that the felony definition applies to all crimes, not only to those in the Criminal Code. Whether or not a crime is punishable in the state prison, the comment then states, depends in general on the maximum penalty prescribed for the crime. After referring to the "place of imprisonment" statute, the comment concludes: "The result is that a crime having a prescribed maximum penalty of imprisonment for one year or more is a felony, since such a crime is punishable by imprisonment in state prison. . . ." A separate paragraph indicates that the statutory definition is inapplicable where a crime is specifically denominated "felony" or "misdemeanor."

At most, the foregoing comment has its significance only in interpreting crimes defined in the Criminal Code. The statement that the maximum penalty generally determines whether or not a crime is punishable by imprisonment in the state prison obviously applies only to Code offenses, which were rewritten to eliminate the place of imprisonment. Outside the Code, most criminal statutes specify the place of imprisonment, thus precluding application of section 959.044. It is apparent that the comment cannot be applied in the interpretation of unchanged provisions outside the Code which were created prior to the enactment of the "place of imprisonment" statute.

Because the 1953 legislature specifically rejected and deleted all comments,[52] they are of doubtful materiality in interpreting the Criminal Code. In any event, the comments do not provide a substitute for the legislative action required to raise the grade of an offense. Moreover, there is language in some comments which evidences a clear intention not to effect substantive changes in non-Code offenses created in reliance upon previous laws.[53] This stated concern with the intention of prior legislatures would be mere mockery if the Code could be interpreted as raising the grade of misdemeanors found outside the Code.

Cursory examination of the Criminal Code bill may give the impression that the legislature attempted a wholesale revision of the criminal statutes both within and without the Code. Actually, the drafters of the Code made no attempt to examine all of the countless

---

grade of the crime." Reply to Subcommittee Report on Definition of Felony and Misdemeanor, p. 4.

[51] See Bill No. 100, A, p. 48.

[52] Amendment No. 3, A, to Bill No. 100, A. The advisory committee concluded that there should be no comments in the 1955 bill. Platz, *The Criminal Code,* 1956 WIS. L. REV. 350, 353.

[53] In a comment accompanying proposed §339.20 it was said that "definitions cannot apply to sections outside the criminal code . . . not drafted with those definitions in mind." 1953 Criminal Code, Bill No. 100, A, p. 11.

A comment accompanying the proposed §339.61 includes the folowing statement: "Since prior legislatures may have passed statutes in reliance on the penalty provided by this section, the penalty is retained unchanged in the new section." 1953 Criminal Code, Bill No. 100, A, p. 49.

criminal provisions scattered throughout the stautes. A prominent member of the advisory committee has conceded that the revision of the criminal statutes outside the Code was far beyond the scope of the project.[54]

The Criminal Code bill transferred approximately 180 sections from Title XXXII, "Crimes and the Punishment Thereof," to regulatory chapters of the statutes.[55] Although the mechanics of accomplishing this task may give the illusion that extensive consideration was given to crimes outside the Code, substantive changes were not attempted even in the numerous statutes transferred to regulatory chapters.[56] In contrast to the provisions retained in the Criminal Code, 172 sections were transferred verbatim out of chapters 340 to 352, inclusive, without employing the Code technique of deleting "misdemeanor," "felony," "county jail" or "state prison." There is no indication that the legislature considered the substance of any non-Code offenses other than those dealing with theft and related crimes. The latter offenses were amended to conform to the important new Code technique of combining various related crimes "into a single offense labeled 'theft.' "[57]

### UNCHANGED NON-CODE OFFENSES

In the *Gaynon* case, the Court noted that the construction applicable to Code offenses did not apply to offenses outside the Code which had been created under different rules of draftsmanship. Although failure to specify the place of imprisonment in a Code statute imposing imprisonment for one year or more probably means that the offense constitutes a felony, failure to specify the place of imprisonment outside the Code normally means that county jail was intended and that the offense constitutes a misdemeanor. The latter interpretation, at the very least, must be accorded to statutes enacted prior to the place of imprisonment statute, which have been unchanged since that time.

As mentioned above, numerous criminal offenses were transferred verbatim to regulatory chapters of the statutes when the Criminal Code was enacted. The legislature made no attempt to amend these statutes by the technique employed in drafting Criminal Code offenses. Inas-

[54] "It requires no argument to demonstrate that such laws, however much they may stand in need of revision, are not a proper subject for a project like the one here under consideration. Not only would it require an unconscionable amount of time; it would require intimate knowledge of the details of more fields of human activity than could be comprehended by any group of people. . . ." Platz, *The Criminal Code,* 1956 WIS. L. REV. 350, 357.

[55] See Wis. Laws 1955, ch. 696, §§62-307 inclusive.

[56] Changes of an elementary, technical nature were made in a few instances. For example, when §346.29 was transferred to §13.70(3), it was necessary to delete the obsolete reference to "section 346.27." Wis. Laws 1955, ch. 696, §174. For similar reasons, the Code bill made a few changes in provisions not previously found in Title XXXII.

[57] Platz, *The Criminal Code,* 1956 WIS. L. REV. 350, 374. See Wis. Laws 1955, ch. 696, §§49-59, inclusive.

much as these statutes were merely renumbered by the Criminal Code bill, they should be construed the same as they would have been prior to the transfers effected by the Code.[58]

Only one instance has been noted where a transferred statute failed to specify the place of imprisonment. The old provision punishing "commercial bribery" was transferred verbatim and became section 134.05.[59] Under well-established rules of construction, the offense originally was a misdemeanor. The offense still constitutes a misdemeanor under the rationale of the *Gaynon* case.

The *Gaynon* case undoubtedly will be controlling in determining the grade of all untouched non-Code offenses containing a penalty provision substantially identical to the income tax statute. Chief among these are the provisions punishing unlawful practice of medicine and dentistry.[60] Another identical penalty clause is found in section 49.35. This section provides a "general penalty" for violations of sections 49.21 to 49.38 for which no penalty is otherwise provided. Obviously, the legislature had no intention of raising the punishment from misdemeanor to felony for the relatively insignificant violations covered by the catch-all provisions of section 49.35.

### Newly Created and Amended Statutes

There is no specific indication in the *Gaynon* case of the construction that will be given to offenses created after the enactment of the place of imprisonment statute in 1945.[61] The opinion does imply, though,

[58] See cases cited note 47, *supra*.

[59] Wis. Stat. §348.486 (1953), was renumbered §134.05 by Wis. Laws 1955, ch. 696, §280. The penalty is a fine not exceeding $500, or imprisonment not exceeding one year.

[60] Wis. Stat. §147.21 (1965) (medicine); Wis. Stat. §152.09 (1965) (dentistry). The statute punishing unlawful practice of law prescribes a maximum fine of $500 or imprisonment not exceeding one year, but the offense is designated a "misdemeanor" and county jail is prescribed as the place of confinement. Wis. Stat. §256.30 (1965). The penalty clause of the statute punishing unlawful practice of accountancy is the same. Wis. Stat. §135.11 (1965).

In State *ex rel.* Fieldhack v. Gregorski, 272 Wis. 570, 76 N.W.2d 382 (1956), the State's brief flatly characterized unlawful practice of medicine as a "misdemeanor." (Respondent's Brief, p. 4.) The respondent's return to the petition for a writ of prohibition alleged that the crime was a misdemeanor and Circuit Judge Drechsler agreed. (Appendix to Fieldhack's Brief, pp. 103, 120-21.) The Supreme Court did not decide whether the offense constituted a misdemeanor or a felony.

[61] See, *e.g.*, Wis. Stat. §77.64(4) (1965), punishing taxpayers who file false reports of livestock or stock in trade. Wis. Laws 1961, ch. 620, §50. The maximum penalty for any official aiding or abetting filing any such report is imprisonment for six months. In the same chapter, an older statute punishes making of false forest crop reports to the conservation commission as a "misdemeanor" and prescribes imprisonment in the county jail for not more than one year. Wis. Stat. §77.09 (1965).

Criminal statutes in Title XLIV, the "Vehicle Code" created by Wis. Laws 1957, ch. 260, seems to follow the technique employed in the Criminal Code. Most sections imposing imprisonment not exceeding one year specify "county jail." See §§343.16(5), 346.30(3), 346.43(3), 346.60(3).

Two provisions in the Vehicle Code imposing such punishment do not spec-

that section 959.044 should not be applied mechanically to any offense that is outside the Code.

It is clear that the court will not attach any significance to amendments *deleting* "misdemeanor" and "county jail" from non-Code sections punishable by imprisonment not exceeding one year. Such deletions frequently were made merely for the purpose of removing supposedly obsolete terminology, pursuant to instructions set forth in drafting manuals prepared by the Legislative Reference Bureau.[62]

The earliest manual available in the Legislative Reference Library was published in 1941. An appendix added in 1943 stated that the penalty clause previously recommended was cumbersome and contained unnecessary language. A simplified penalty clause, omitting "misdemeanor" and "county jail," was suggested. The same simplified penalty clause was recommended in the manual published after enactment of the "place of imprisonment" statute and has been recommended in all manuals issued since enactment of the Code in 1955.[63]

The 1958 manual contains an historical note to the effect that the 1951 legislature began shortening penalty clauses with the approval of the revisor of statutes.[64] The manuals, giving examples taken from revisor's correction bills, instruct the draftsmen to make similar changes when amending statutes containing such "obsolete" terminology. The examples show the deletion of terminology which would be essential to the continuation of misdemeanor punishment under the interpretation advanced by the State in the *Gaynon* case.[65]

Legislation passed less than four months after the "place of imprisonment" statute indicated that the statute should not be utilized to determine the grade of any crime. Chapter 585 of the Laws of 1945 completely revised the relief statutes and greatly simplified sections

ify the place of imprisonment. WIS. STAT. §344.48 (1965), is a new provision punishing "forged proof" of financial responsibility. WIS. STAT. §346.74(5) (1965) is a partial revision of the "hit and run" statute, formerly §85.141, created by Wis. Laws 1935, ch. 427. Originally, the statute created a felony. WIS. STAT. §343.181 (1933). After it was amended in 1935 to eliminate the "felony" label and "state prison," the Attorney General ruled that the offense was a misdemeanor. See 25 OPS. WIS. ATT'Y. GEN. 456 (1936). In 1950, however, the Attorney General ruled that a violation of §85.141 constituted a felony. 39 OPS. WIS. ATT'Y. GEN. 321 (1950). The cryptic ruling makes no mention of the legislative history or the prior ruling.

[62] Excerpts from manuals published in 1941, 1950, 1954, 1958 and 1964 were submitted to the court in the *Gaynon* case at the time of oral argument. The manuals were "uncovered" upon inquiry at the Legislative Drafting Office.

[63] See "Drafting Room Instructions and Suggestions," Revised 1941, p. 20, containing the old penalty clause, and Appendix E, January, 1943, setting forth the simplified clause.

[64] See "Rules for Draftsmen," Revised—1958, p. 36, setting forth the historical note under the simplified penalty clause.

[65] The opinion in the *Gaynon* case details these examples. State *ex rel.* Gaynon v. Krueger, 31 Wis.2d 609, 622-23, 143 N.W.2d 437, 443-44 (1966). Particular note should be taken of the "revisor's correction" deleting "imprisonment in the county jail" and substituting "imprisoned not more than one year." "Rules for Draftsmen," D-64-2 (Revised October, 1964).

49.34 and 49.53. In the process of amending these sections, the legislature deleted "misdemeanor" and "county jail" from penalty clauses imposing imprisonment for a term not exceeding one year. Inasmuch as the punishment remained the same, there is no reason to believe that the legislature intended to raise the grade of offenses punishable under sections 49.34 and 49.53.

One of the chief objectives in revising the relief statutes was the elimination of "obsolete provisions" in order to effect a saving in the biennial cost of printing the statutes.[66] There is concrete evidence in the legislative drafting file that no substantive change was intended with respect to the cited sections. An "explanatory note" in the drafting file contains the following comment: "Old 49.34 with only formal changes." The comment accompanying revised section 49.53 merely states: "Old 49.53."[67]

A 1947 enactment provides another instance of an amendment that might be misinterpreted as raising a misdemeanor to a felony. Section 29.134(11), imposing imprisonment not exceeding one year, previously had specified "county jail" for any violation of the many subsections regulating fur dealers.[68] In 1947, the legislature added a new subsection requiring a record to be kept of raw furs bought and sold.[69] At the same time, the legislature added an exception to the general penalty provision, whereby violations of the record-keeping provision were made punishable by a lesser fine and maximum imprisonment of six months.[70]

The legislative drafting file discloses that the amendment submitted by the proponent of the bill specified imprisonment in the "county jail." A legislative draftsman, however, made pencilled corrections to the draft deleting "county jail" from the old language and from the new provision providing the lesser penalty.

### Beverage, Tobacco and Oleomargarine Taxes

The statutes punishing violations of the beverage, tobacco and oleomargarine taxes have undergone considerable revision since 1945. A mechanical application of sections 939.60 and 959.044 might indicate that some of the offenses discussed below constitute felonies. The legislative history of these provisions, however, clearly demonstrates that the offenses still are misdemeanors.

---

[66] The legislative drafting file contains a document, initialed "ALC.45," providing an index to the bill, various objectives, and numerous "Explanatory Notes."

[67] *Id.* The Supreme Court has held that similar material in the legislative drafting files provides competent evidence of the legislature's intent. State *ex rel.* Reynolds v. Circuit Court, 15 Wis.2d 311, 316, 112 N.W.2d 686, 688 (1961); Estate of Stone, 10 Wis.2d 467, 475, 103 N.W.2d 663, 667 (1960); State *ex rel.* Boroo v. Town Board, 10 Wis.2d 153, 159-60, 102 N.W.2d 238, 241-42 (1960).

[68] Wis. Stat. §29.134(11) (1945).

[69] Wis. Laws 1947, ch. 127, §2, creating §29.134(6m).

[70] Wis. Laws 1947, ch. 127, §1, amending §29.134(11).

Section 139.25(2) punishes filing of fraudulent beverage tax returns by a fine of "not less than $1,000 nor more than $5,000" or imprisonment "for not less than 90 days nor more than one year, or both." The identical provision was found in section 139.03(16) of the 1961 statutes. The latter section, however, contained a further sentence, punishing failure to keep records, which provided that the offender "shall be guilty of a misdemeanor and shall upon conviction be subject to punishment in a like manner." Reading section 139.03(16) in its entirety, it is apparent that the "misdemeanor" label of the second sentence applied to offenses punishable under both sentences. It would have been incongruous to construe offenses punishable under the first sentence as felonies and to construe offenses punishable "in like manner" as misdemeanors.

Pursuant to a revisor's bill in 1963,[71] the first sentence of section 139.03(16) was reenacted verbatim as section 139.25(2). The second sentence was repealed, and failure to keep records was made punishable by fine only under section 139.25(4).[72] Without the second sentence, the State may contend that the statute calls for felony punishment. It is apparent, however, that the revisor did not raise the grade of the offense and that the statute must be construed as continuing the misdemeanor punishment originally intended by the legislature.

Section 139.50(25) of the 1963 statutes, which punished tobacco tax offenses, was in all important respects substantially similar to section 139.03(16) of the 1961 statutes. In the 1959 version, both sentences specified "misdemeanor" and "county jail."[73] The 1961 legislature deleted the provision punishing failure to file a timely return and struck out "misdemeanor" and "county jail" from the first sentence.[74] The sole purpose of the change was to provide "a $10.00 late filing fee in place of the misdemeanor charge."[75]

In 1965, the first sentence of section 139.50(25), punishing fraudulent returns, was repealed and recreated in substantically the same form as section 139.44(2).[76] The legislature repealed the second sentence of

---

[71] Wis. Laws 1963, ch. 141, §6.

[72] The second sentence of the 1961 version was repealed because failure to keep records was punished by a fine only under §139.295 of the 1961 statutes. The lighter penalty of the latter section was utilized in newly enacted §139.25(4). The Revisor's Note following §139.25 refers to the conflict between the "last sentence" of §139.03(16) and §139.295(2). The context, however, discloses that the revisor meant the "second" or "second last sentence." The last sentence of old §139.03(16) added by Wis. Laws 1961, ch. 352, §1, was incorporated verbatim as §139.25(3).

[73] WIS. STAT. §139.50(25) (1959).

[74] Wis. Laws 1961, ch. 352, §5.

[75] An "Explanatory Note" in the legislative drafting file states that "the present statutes treat the failure to file a beer or cigarette tax as a misdemeanor," and that the amendment "conforms penalties and late filing fees to similar provisions that have existed for many years in the corporate income tax field."

[76] Wis. Laws 1965, ch. 67, §§4-5.

the old section, which punished failure to keep records by fine or imprisonment not exceeding one year. Instead, that offense was made punishable by a lighter fine and imprisonment not exceeding six months under section 139.44(3). It is apparent that the sole purpose of the change was to provide a lesser penalty for failure to keep records, and that there was no intention of creating felony punishment for the offense of filing a fraudulent return.

Section 139.60(20) provides that violations of the oleomargarine regulations shall be punished by a fine not exceeding $500 or imprisonment not more than three months. The statute also provides that any subsequent offense shall be punished by a fine or imprisonment for "not less than 6 months nor more than one year."

The felony definition of section 939.60 applies to any "crime" punishable by imprisonment in the state prison, not to "any offense" so punishable. Thus, the statute does not make felons out of repeaters, which was an incongruous possibility under an earlier felony definition. In any event, the statute originally provided for "imprisonment in the county jail" for the same term.[77] The place of imprisonment was deleted in the 1959 amendment, which transferred administration of the tax from the Department of Agriculture to the Department of Taxation.[78]

### Family Code Offenses

The laws relating to marriage and divorce were completely revised in 1959 and incorporated in Title XXIII of the statutes as "The Family Code." All penalty provisions pertaining to the marriage laws are now combined in section 245.30. The penalty clause of subsections (1) and (2) reads as follows: ". . . shall be fined not less than $200 nor more than $1,000, or imprisoned not more than one year, or both." Inasmuch as the statute does not specify the grade of any offense, superficially it is not clear whether the offenses punished by sections 245.30(1) and (2) are misdemeanors or felonies.

Section 245.30 incorporates penalty provisions which had been found in various sections. Most of the predecessor statutes specified that the offender should be deemed guilty of a misdemeanor and provided for imprisonment in the "county jail" for not more than one year.[79] The only change in punishment effected by the revision was the increase in the maximum fine to $1,000, which had been the maximum fine for false solemnization of marriage.[80]

A Legislative Council note states that the penalties in section 245.30 "have all been taken from present law but the upper limit of monetary penalties has been doubled in most cases."[81] Having taken pains to note

[77] Wis. Stat. §97.72(2) (1957).
[78] Wis. Laws 1959, ch. 459.
[79] See Wis. Stat. §§245.18, 245.19, 245.26, 245.27, 245.28 (1957).
[80] Wis. Stat. §245.28 (1957).
[81] Wis. Annot., 1960, p. 1123.

that the *monetary* penalty had been doubled, mention unquestionably would have been made of any change in the grade of an offense. The inference is inescapable, therefore, that there was no intention to upgrade any existing offense.

## CONCLUSION

The decision of the supreme court in the *Gaynon* case demonstrates the danger involved in the mechanical application of statutes without regard to legislative history. It is now apparent that the legislative history may be crucial in determining the grade of offenses found outside the Criminal Code.

Although no great difficulty should be encountered in determining the grade of criminal offenses in the light of the principles set forth in the *Gaynon* case, a change in the felony definition nevertheless seems advisable. Most, if not all, of the existing ambiguity and disparity could be removed by defining a felony as a crime punishable by imprisonment in the state prison for a term *exceeding* one year. Preferably, however, the law should be amended to impose the felony stigma only on offenders who actually are sentenced to the state prison.