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Defending An Illinois Proceeding for Violation of a Municipal Ordinance: The Worst of All Possible Worlds

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DEFENDING AN ILLINOIS PROCEEDING FOR VIOLATION OF A MUNICIPAL ORDINANCE: THE WORST OF ALL POSSIBLE WORLDS

A proceeding to enforce a municipal ordinance could conceivably be classified as either civil or criminal. Adherence to these traditional classifications presents interesting questions, particularly as to the proper procedures to be followed in these proceedings.[1] These questions result from the hybrid nature of municipal ordinance proceedings, which have aspects characteristic of both civil and criminal actions. This mixture makes any classification difficult. The difficulty involved becomes apparent when characteristics of such an action are compared with those of true criminal and civil proceedings.

Municipal ordinances cover a broad range of acts. Their common bond is that they govern forms of activity deemed best regulated by the community. While ordinances sometimes prohibit acts much less serious than those involved in civil suits, they may also encompass acts which are state crimes.

In a civil suit, the plaintiff acts in an individual capacity to assert a personal right or to seek redress of a private injury. Conversely, in a criminal suit, the plaintiff is the state acting primarily to protect the interests of society. In this regard, most ordinance proceedings more closely resemble the criminal action, as the rights protected are primarily those of the public at large and the plaintiff-municipality prosecutes the action in its governmental capacity.

The nature of the remedy afforded in civil suits differs markedly from that in criminal actions. In civil cases, the judgment is remedial in nature and is intended to compensate the plaintiff for encroachment on a personal right. In criminal cases, however, the sanction is normally penal in nature and often bears no direct relationship to the harm suffered. Generally, an ordinance proceeding results in the imposition of a fine which bears little or no relation to the harm caused.[2] Such

1. Proper classification of a municipal ordinance proceeding is procedurally important. The burden of proving a defendant guilty in a suit classified as civil is significantly less than that demanded in one termed criminal. Also, the rules of discovery are more strict in a criminal action. Most significantly, a criminal case affords a defendant greater constitutional protections. For a criminal defendant's right to pretrial discovery *see* 1961 U. ILL. L.F. 187. *See also* ILL. SUP. COURT RULES, Rule 201-219.

2. Some municipal ordinances might be considered remedial in nature if the fine

fines, therefore, would seem to be penal in nature and closely analogous to judgments handed down in true criminal cases.

CLASSIFICATION BY ILLINOIS COURTS: CIVIL OR CRIMINAL?

The Illinois courts have repeatedly used the term "quasi-criminal" in classifying a proceeding for violation of a municipal ordinance.[3] However, no system of quasi-criminal procedure has been developed. Instead, the proceeding is referred to as "criminal in nature, but civil in form".[4] The Illinois courts have determined that the procedure followed is to be governed by the Illinois Civil Practice Act and not the rules applicable to a criminal proceeding.[5]

The classification of civil in form has had important procedural effects. In Illinois, a municipality may appeal an adverse decision in an ordinance proceeding.[6] The courts have allowed appeal by stressing the civil characteristics of the proceeding. This is noteworthy, for both the Illinois and Federal Constitutions prohibit appeal after final judgment by the state in criminal cases.[7] Stressing the civil form, the Illinois courts allow more informal pleadings and complaints than would be allowed in a criminal case. While the Supreme Court of Illinois has held a judgment a nullity where the complaint was not brought in the corporate name of the municipality, the complaint need not be drawn with the precision of an indictment or information.[8] The Illinois courts have held that the burden of proof followed in an ordinance proceeding is a "clear, or more than a mere" preponderance of the evidence, thus making the criminal standard of "proof beyond a reasonable doubt" inapplicable.[9]

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they impose is designed to reimburse the municipality for the expense it incurs because of violations of the ordinance.

3. City of Chicago v. Lewis, 28 Ill. App. 2d 189, 171 N.E.2d 70 (1960); Village of Maywood v. Houston, 10 Ill. 2d 117, 139 N.E.2d 233 (1956); Village of Park Forest v. Bragg, 74 Ill. App. 2d 87, 220 N.E.2d 61 (1961); City of Chicago v. Westphalen, 95 Ill. App. 2d 331, 238 N.E.2d 225 (1960).

4. *Id.*

5. *Id.* Generally, the Civil Practice Act is followed in municipal ordinance proceedings. However, it is not clear whether all provisions of the act actually apply.

6. Village of Maywood v. Houston, *supra* note 3; Village of Park Forest v. Bragg, *supra* note 3; City of Evanston v. Waggoner, 90 Ill. App. 2d 5, 234 N.E.2d 355 (1967); City of Evanston v. Jaman, 88 Ill. App. 2d 441, 232 N.E.2d 28 (1967); City of Chicago v. Baldwin, 68 Ill. 418 (1893).

7. SHA CONSTITUTION art. VI, § 7; Benton v. Maryland, 395 U.S. 784 (1968).

8. City of Chicago v. Westphalen, 95 Ill. App. 2d 331, 238 N.E.2d 225 (1960); People v. Stout, 246 N.E.2d 319 (1969).

9. While the majority of the Illinois decisions have indicated that the burden of proof in municipal ordinance proceedings is a "clear preponderance" of the evidence, not all courts have recognized that this standard differs from that used in a purely civil case.

For example, the Illinois court in Flynn v. City of Springfield, 120 Ill. App. 266, 269

Attempts have been made to interpret the Illinois Code of Criminal Procedure as applying to municipal ordinance violations. An "offense" is defined in the 1967 statute as a violation of "any penal statute of this State or of any penal ordinance of its political subdivisions".[10] It has been argued that a municipal ordinance violation fits into this definition, and therefore the proceeding should be covered by the criminal rules. However, the Illinois Supreme Court has determined that legislative intent was not shown for equating "criminal case" with "offense".[11] Recently, Illinois House Bill 786 was signed into law deleting the phrase "any political subdivision" from the definition of "offense".[12] This change in the definition of an "offense" clearly demonstrates legislative intent to exclude municipal ordinance proceedings from the coverage of the Illinois Code of Criminal Procedure.

Another argument has been raised attempting to apply the Criminal Code to municipal proceedings. In *City of Highland Park v. Curtis*,[13] the defendant argued that when contemporaneous legislative enactments regulate the same activity, the state provisions should take precedence. The court held that state law did not preempt the area, but rather that both the municipality and the state have the ability to make and enforce such complimentary rules.[14]

While the Illinois courts have been generally consistent in their ultimate classification of a municipal ordinance proceeding as criminal in nature and civil in form, application of this principle has yielded inconsistent results. For instance, the Illinois Supreme Court has deter-

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(1905) suggested that there was a higher standard for a quasi-criminal proceeding than for pure civil suits, stating: "The plaintiff, in an ordinary civil suit, is entitled to recover if the evidence merely preponderates in his favor. In suits for the recovery of penalties, the plaintiff is not entitled to recover upon a mere preponderance, but there must be a clear preponderance in favor of plaintiff". *Cf.* City of Chicago v. Wholesale Coal Distributors Co., 320 Ill. App. 685, 51 N.E.2d 1010 (1943).

However, in City of Chicago v. Williams, 45 Ill. App. 2d 327, 329 n.2, 195 N.E. 2d 425, 426 (1965), the court suggests there is no distinction between the quasi-criminal and the civil burden of proof, stating: "Since the proceeding is quasi-criminal, it is to be tried and reviewed as a civil case, and the city's burden of proof is to establish violation of the ordinance by a clear preponderance of the evidence." *Cf.* City of Chicago v. Butler Bros., 350 Ill. App. 550, 113 N.E.2d 210 (1953).

Other cases only state the burden of proof as "clear or more than mere" preponderance; making no reference to the similarity of a civil suit. City of Chicago v. Joyce, 38 Ill. 2d 368, 232 N.E.2d 289 (1967); City of Chicago v. Stone, 187 Ill. App. 90 (1914); City of Chicago v. Carney, 34 Ill. App. 2d 303, 180 N.E.2d 729 (1962).

10. ILL. REV. STAT. ch. 38, § 102-15 (1967).

11. The defendant was charged with drunken driving in Village of Park Forest v. Bragg, *supra* note 3. *See also* Village of Park Forest v. Nicklas, 103 Ill. App. 2d 99, 243 N.E.2d 421 (1968).

12. The Illinois House Bill 786 changes the definition of "offense" found in ILL. REV. STAT. ch. 38, § 102-15. The bill was signed by the Governor in October, 1969.

13. 83 Ill. App. 2d 218, 226 N.E.2d 870 (1967).

14. *Id.*

mined that a violation of a municipal ordinance may be a criminal offense for purposes of the statute on arrest.[15] The provision of the criminal code then in existence authorized arrest "by an officer or by a private person without a warrant for a criminal offense committed or attempted in his presence".[16] Similarly, municipal ordinance proceedings may be commenced by a summons or a complaint under oath upon which warrants for arrest may be issued.[17] In addition, a defendant may be required to give bail for his appearance in court.[18] These procedures, though applied in cases deemed to be "civil in form", are clearly more characteristic of a true criminal proceeding.

Further examples of inconsistent results exist. For instance, in an ordinary civil suit, if the plaintiff is found to have brought the suit in bad faith, a judgment for costs can be granted to the defendant.[19] No such judgment can be procured against the plaintiff-municipality in an ordinance proceeding. Moreover, the Illinois Insolvent Debtors Act[20] prohibits incarceration of an individual for failure to pay a judgment in a "civil suit where malice is not the gist of the action". However, the court in *City of Chicago v. Thomas*[21] refused to apply the act to a fine for violation of an ordinance even though there was no malice involved. The court concluded that the imposition of a fine does not create a debtor-creditor relationship and stated: "(T)he criminal nature inherent in such actions excludes such actions from falling within the purview of . . . the Insolvent Debtors Act".[22]

Although the Illinois courts recognize that these inconsistencies exist, they have failed to rectify the situation. A typical example is *City of Chicago v. Lewis*[23] where the court stated:

> Our courts have recognized the criminal aspect of proceedings for violation of city ordinances and have designated them as quasi-

15. In People v. Edge, 406 Ill. 490, 94 N.E.2d 359 (1950), the defendant was originally arrested for violating two municipal ordinances. The question of valid arrest was raised to determine whether subsequent seizure of evidence was proper.
16. ILL. REV. STAT. ch. 38, § 657 (1949).
17. City of Chicago v. Williams, 254 Ill. 360, 98 N.E. 666 (1912).
18. *Id.*
19. Flynn v. City of Springfield, 120 Ill. App. 266 (1905). City of Carrollton v. Bazette, 159 Ill. 284, 42 N.E. 837 (1896). City of Bloomington v. Ramey, 393 Ill. 467, 66 N.E.2d 385 (1946).
20. ILL. REV. STAT. ch. 72, § 2 (1965).
21. 102 Ill. App. 2d 143, 243 N.E.2d 572 (1968).
22. *Id.* at 151, 576. The defendant was charged with a building code violation. This case points up the inconsistency inherent in many ordinance proceedings. Because of the "*civil form*" of the proceeding the defendant is often denied the protections afforded in criminal prosecutions. Yet, because of the "*criminal nature*" of the proceeding, the court here denied the defendant the protection which the Illinois legislature had afforded to civil defendants in the Insolvent Debtors Act.
23. 28 Ill. App. 2d 189, 171 N.E.2d 70 (1960).

> criminal. . . . (A)t the same time it is definitely established . . . that these proceedings are governed by rules applicable to civil practice. . . . (T)hat there is an ambivilance here cannot be denied. . . .The court recognizes that these conclusions have not been arrived at with rigid logical consistence . . . (T)here is room for improvement no doubt.[24]

However, the court in *Lewis* declined to change the pleading requirements for ordinance cases. In *Flynn v. City of Springfield*,[25] an Illinois appellate court noted that such suits more nearly resemble criminal proceedings than civil actions in all their essential elements. The court also focused on the term "civil in form"; stating that "While it is civil in form, it is such only in form. It partakes largely of the criminal nature".[26] *Flynn* and *Lewis* indicate that the Illinois courts have recognized that logical inconsistencies surround their treatment of municipal ordinance proceedings. Of particular note is the fact that, although the conclusion of the *Flynn* court that these proceedings are basically criminal in nature seems to be a sound one, the courts have failed to afford defendants criminal protections.

Does the Illinois Approach Ignore Any Constitutional Procedural Protections?

Privilege Against Self-Incrimination:

The fifth amendment provides, in part, that no person shall be compelled, in any criminal case, to be a witness against himself. This provision has given rise to two different privileges. The first is the privilege of a defendant in a criminal case to refrain completely from testifying. The second privilege is that of any witness to refrain from answering an individual question when the answer might tend to incriminate him. The focus of this second protection is on impending criminal liability, but proper assertion of the privilege is not limited to criminal cases. The Court of Appeals for the Seventh Circuit stated in *United States v. Zuskar*[27] that:

> The privilege against self-incrimination is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.[28]

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24. *Id.* at 193, 71.
25. Flynn v. City of Springfield, *supra* note 19.
26. *Id.* at 269.
27. 237 F.2d 528 (7th Cir. 1956).
28. *Id.* at 534.

In a purely civil suit where there is no possibility of concurrent or subsequent criminal prosecution this exposure does not exist. In a strictly criminal proceeding, the threat exists within that very suit. The danger of incrimination exists in a proceeding for violation of a municipal ordinance in two situations.

Often the more serious municipal ordinance violations are also state crimes. The Illinois courts have held that the violation of a state statute and the violation of a municipal ordinance by the same act are separate offenses and are separately punishable.[29] In such a situation the threat of criminal liability is present at least in the potential subsequent state prosecution.[30] Therefore, under these circumstances, the privilege against self-incrimination is clearly available in a municipal proceeding.[31]

An argument for invoking the fifth amendment privilege arises in a second situation due to the criminal aspects of the municipal ordinance proceeding itself.[32] Analysis of an ordinance action shows that it is often criminal in nature and penal in result. In *United States v. Boyd*[33] a civil suit involving forfeiture of property for failure to pay import duty, the United States Supreme Court noted that:

> As therefore suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes . . . of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.[34]

In *City of Chicago v. Lord*[35] the court noted that the privilege is not dependent upon the nature of the proceeding in which testimony is sought, but rather where one testifying can be subject to criminal liabil-

29. City of Evanston v. Wazau, 364 Ill. 198, 4 N.E.2d 78 (1936); City of Highland Park v. Curtis, *supra* note 13.

30. At least this is true as long as such dual prosecutions are allowed. *See* Waller v. Florida, *infra* note 53.

31. City of Chicago v. Lord, 3 Ill. App. 2d 410, 122 N.E.2d 439 (1954), *aff'd.*, 7 Ill. 2d 379, 130 N.E.2d 504 (1955); *see also* City of Chicago v. Berg, 48 Ill. App. 2d 251, 199 N.E.2d 49 (1964).

32. The argument suggested here would seem to require application of both the "witness" privilege and the "defendant" privilege. The defendant could then refuse to testify at all, and no adverse inference could be drawn from this refusal.

33. 116 U.S. 616 (1886).

34. *Id.* at 634. This is a civil suit for penalty and forfeiture for failure to pay duty on imported goods. The revenue law prescribed a penalty of forfeiture and fine or imprisonment or both. The court held that a forced production of an invoice was a violation of both the fourth and fifth amendments.

Although in court testimony was not involved in Boyd, the court's language seems to indicate that the full protections provided by the fifth amendment should apply to any action which is essentially criminal in nature.

35. City of Chicago v. Lord, *supra* note 31.

ity. The court then proceeded to emphasize the criminal aspects and penal nature of a municipal ordinance proceeding. Thus, the court suggested that the ordinance proceeding in and of itself offers criminal exposure by its penal nature. The *Lord* court also cited *Lees v. United States*[36] a case dealing with an action to recover penalties for importing alien labor, where the Supreme Court said: "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself."[37] It is not clear whether *Lord* would allow a witness to refrain completely from testifying.

Protection From Unreasonable Search And Seizure:

The fourth amendment establishes the right of a person to be secure against unreasonable searches and seizures. The application of this protection to exclude evidence from trial has developed in stages. In *Weeks v. United States*[38] the Supreme Court held that evidence seized in violation of fourth amendment rights was inadmissible in the federal courts. *Mapp v. Ohio*[39] held the protection applicable to both federal and state proceedings. There it was stated:

> Having once recognized that . . . the right to be secure against rude invasions of privacy by state officers is . . . constitutional in origin . . . we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.[40]

It appears the focus is on controlling public agencies. To be consistent, the fourth amendment protection should also apply to control a corporate municipality in an ordinance proceeding. Thus, in *Camara v. San Francisco*[41] the United States Supreme Court held that the fourth amendment prohibited a municipality from imposing a fine upon an individual for refusing to allow an unreasonable search even though it was authorized by a municipal ordinance. The court stated:

> The basic purpose of this Amendment, as recognized by countless decisions of this court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.[42]

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36. 150 U.S. 476 (1893).
37. *Id.* at 480.
38. 232 U.S. 383 (1914).
39. 367 U.S. 643 (1961).
40. *Id.* at 660.
41. 387 U.S. 523 (1967).
42. *Id.* at 528. This case involved municipal inspection of an individual's home. *See also* See v. City of Seattle, 387 U.S. 541 (1967) dealing with inspection of commercial premises.

In *Lord*[43] the Illinois Supreme Court recognized the application of the protection in a municipal ordinance proceeding. There, the owner of an arcade was charged with unlawfully exhibiting obscene, lewd, and indecent motion pictures in violation of a municipal code. These films were seized by police without a search warrant and without an arrest being made. The court held the films were unlawfully seized and that they were not admissible in evidence. In light of *Camara*, this position seems not only proper, but required.

Protection from Double Jeopardy:

The fifth amendment in part provides that no person shall be put in jeopardy twice for the same offense. The Illinois courts, by classifying a municipal ordinance proceeding as criminal in nature but civil in form, may be ignoring this Constitutional protection in a penal situation.

A possibility of double jeopardy arises when a municipality is allowed to appeal from an adverse decision. Nevertheless, Illinois courts have repeatedly permitted a plaintiff-municipality to appeal such decisions[44] on the ground that such an appeal does not place the defendant in double jeopardy because of the civil form of the action.[45]

The leading case in point is *Village of Maywood v. Houston.*[46] In allowing the village to appeal a decision of acquittal, the Illinois Supreme Court noted that the decisions in this area are not always logical and that problems cannot be solved by a labeling process. However, the court returned to the label of "civil in form" to allow the appeal. In treating the next issue as to where the appeal may be directed, there is an apparent reversal in reasoning; for the court stressed the criminal nature of the proceeding to allow appeal to the Criminal Court of Cook County.[47]

The court in *Maywood* also cited *Palko v. Connecticut.*[48] In that case the United States Supreme Court dealt with an appeal by the prosecution on a state level. The court held that the fifth amendment

43. City of Chicago v. Lord, *supra* note 31.
44. Village of Maywood v. Houston, *supra* note 3; Village of Park Forest v. Bragg, *supra* note 3; City of Evanston v. Jamen, *supra* note 6; City of Evanston v. Waggoner, *supra* note 6; City of Chicago v. Baldwin, *supra* note 6.
45. Village of Maywood v. Houston, *supra* note 3.
46. *Id.*
47. The Illinois Constitution, SHA CONSTITUTION art. VI, § 26, at that time read: "All recognizances and appeals taken in said county, in criminal and quasi-criminal cases, shall be returnable and taken to said (criminal) court". The powers and duties of the Criminal Court of Cook County are today transferred to the respective circuit courts; effective January 1, 1964, SHA CONSTITUTION art. VI, Sch., par. 5.
48. 302 U.S. 319 (1937).

double jeopardy provision did not apply to the states. The court instead applied a fourteenth amendment test of due process. However, in the recent case of *Benton v. Maryland*,[49] the Supreme Court overruled *Palko* on this issue, stating:

> The validity of petitioner's . . . conviction must be judged not by this watered-down standard enunciated in *Palko* but under this court's interpretations of the Fifth Amendment double jeopardy provision.[50]

Possibly it is time to also apply a new standard in Illinois regarding a plaintiff-municipality's right to appeal in an ordinance proceeding.

Double jeopardy issues also arise where a defendant is prosecuted by both a municipality and the state for the same act. However, the Illinois courts have held such offenses to be separately enforceable and punishable.[51] The theory often mentioned in support of this position is that a defendant may be tried in two jurisdictions for offenses against different sovereigns.[52]

This theory has found acceptance to distinguish between prosecutions at both the state and federal levels, but conceptually it seems better suited to that situation. There may be a real distinction between state and federal governments, but there is little distinction between the state and a municipality. A municipality is merely a subdivision of the state, and thus it derives its basic authority from the state. Analyzing a municipality's legal position, it is logical to view dual prosecutions by a municipality and the state as violating the provisions of the fifth amendment.

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49. 395 U.S. 784 (1968). *See also* Double Jeopardy After Benton v. Maryland, 1 LOYOLA L.J. 98 (1970).

50. 395 U.S. at 796.

51. City of Highland Park v. Curtis, *supra* note 13; City of Evanston v. Wazau, *supra* note 29.

When both state and municipal enactments punish the same conduct, an argument might be made that certain defendants are denied the equal protection of the laws in violation of the fourteenth amendment, in addition to being placed twice in jeopardy. Since the municipality is an agent of the state, it would appear that certain citizens would receive harsher treatment for committing an act than others merely because they engaged in the proscribed activities in a different portion of the state.

52. The primary exposition of this theory has been effected in dual prosecutions by a state and the federal government. While this practice was upheld by the Supreme Court as late as 1959 in Bartkus v. Illinois, 359 U.S. 121 and Abbate v. United States, 359 U.S. 187, the vitality of these opinions is now somewhat questionable, primarily because of the Supreme Court's subsequent decision in Murphy v. Waterfront Commission, 378 U.S. 52 (1964). *Murphy* held that one jurisdiction could not use incriminating testimony which had been elicited from a defendant by the other after a grant of immunity from prosecution. The Court seemed to indicate that a defendant could not be deprived of this basic fifth amendment right merely because he had violated both state and federal prohibitions. This reasoning would seem to apply equally well to potential violations of the fifth amendment double jeopardy clause, now applicable to the states through the fourteenth amendment. *See* Benton v. Maryland, 395 U.S. 784 (1968).

These questions have been debated extensively, not only in Illinois, but in many jurisdictions. The question of double prosecution by the state and a municipality was raised in *Waller v. Florida*.[53] In June of 1969 the United States Supreme Court granted certiorari in this case. Thus, the Court might soon resolve these unsettled issues.

Right to Assistance of Counsel:

The right to assistance of counsel for a defendant in a criminal case is provided by the sixth amendment of the United States Constitution. Accordingly, the Illinois Code of Criminal Procedure provides for counsel to be supplied to an indigent in all cases except those which impose only a fine.[54] Since the vast majority of municipal ordinance proceedings result only in the imposition of a fine, a defendant in the normal Illinois ordinance case will not have a right to appointed counsel.

The United States Supreme Court has not yet gone so far as to require the appointment of counsel for indigent defendants in minor misdemeanor cases.[55] However, the day when this procedure will be required may not be too distant. The Supreme Court of Oregon recently held that the sixth amendment right to counsel applied to any misdemeanor, including prosecution for violation of a municipal ordinance, which resulted in the imposition of a jail sentence.[56]

It is distinctly possible that the rationale embodied in this decision might be extended to apply in the situation where the defendant is incarcerated for failure to pay the fine imposed for violation of a municipal ordinance. This seems logical for it is not unlikely that a defendant who is sufficiently indigent to justify receipt of appointed counsel will, because of this same indigency, be unable to pay any substantial fine. Failure to pay the fine imposed in any ordinance proceeding therefore may result in incarceration similar to that imposed in minor misdemeanors.

Thus, if the interpretation of the sixth amendment advanced by the Supreme Court of Oregon is adopted by the United States Supreme Court, Illinois may be forced to either provide counsel in ordinance proceedings, or abolish the practice of imprisoning, even for a short period of time, those who fail to pay the fines in such proceedings.

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53. 213 So. 2d 623 (Fla. 1969).
54. ILL. REV. STAT. ch. 38, § 113-3-(b) (1967).
55. Winters v. Beck, 385 U.S. 907 (1966).
56. Stevenson v. Holzman, — P.2d — (Sept. 1969).

Conclusion:

The defendant in an Illinois municipal ordinance proceeding seems presently to have the worst of all possible worlds. In most cases he is not accorded the same procedural protections which would be afforded to a criminal defendant.[57] At the same time, certain protections normally provided for civil defendants, such as the protection of the Insolvent Debtors Act and the availability of a judgment for costs in actions brought in bad faith, are also denied to the defendant in an ordinance proceeding. The inconsistency and confusion which seem to characterize Illinois' treatment of ordinance violations result mainly from the interplay of two major factors:

1) Municipal ordinances cover a broad range of conduct and include violations of varying magnitude.

2) In spite of the broad range of conduct governed by municipal ordinances, the courts have failed to establish realistic categories through analysis of the nature of individual ordinances. Instead, they have exhibited a strong tendency toward reliance upon the well-worn label that ordinance proceedings are "civil in form".

Resolution of the problems presently existing in this area will not be easily attained. A reasonable approach may be the avoidance of any single classification for all ordinance violation cases. Thus, those offenses which are penal in nature could be treated differently than those which are remedial in nature or of such minimal consequence as not to require protections analogous to those afforded in criminal proceedings.[58] This approach will not solve completely the great difficulties

57. These would include the protection against double jeopardy, full self-incrimination protections, right to counsel, protection from the use of illegally seized evidence, and right to trial by jury. If an action can clearly be denominated as criminal in nature, denial of these protections may also give rise to claims of violation of the fourteenth amendment equal protection clause. For a recent case treating generally the right to trial by jury in minor criminal cases, *see* Hogan v. Rosenberg, 24 N.Y.2d 207, 247 N.E.2d 260 (1969). *See also* a companion case Baldwin v. New York which is on the docket in the United States Supreme Court (#188). The Court noted probable jurisdiction on April 8, 1969. Thus, clarification of the constitutional issues raised in this area is probable.

58. Any such classification would be imperfect of course, but probably an improvement on the present general practice. Thus, while certain ordinance violations are sufficiently penal in nature to require criminal protections, it may be argued that others are intended only to reimburse the municipality for its expenses in providing remedial service. Fines for pollution or similar violations, if directly related to the cost of the municipality's corrective methods might be an example of such an ordinance. The burden of establishing that an ordinance is basically remedial and should thus be administered as a civil action, would properly seem to be on the party asserting that position.

Furthermore, some ordinances might be so minor as not to justify criminal protections, regardless of their precise nature. These might more properly be viewed as

inherent in administering ordinance violations, but certainly consistency would be increased and some severe constitutional questions mooted.

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minor administrative regulations necessary to the proper functioning of the municipality. Parking tickets, at least under certain conditions, might fall within this category.