Procedural Disarray in Illinois Ordinance Prosecution

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INTRODUCTION

The system governing the prosecution of ordinance violation cases is presently under attack in Illinois. Defendants' rights are being denied because certain aspects of the procedure applied in ordinance prosecution cases present serious due process and equal protection problems. This Comment will discuss the nature of the problems in this area, examine past and present ordinance prosecution in Illinois, analyze the studies of those committees and individuals who have worked to improve the system, and make recommendations for change in the procedures followed in the prosecution of Illinois ordinance violation cases.

THE NATURE OF THE PROBLEM

There has been a substantial degree of ambiguity regarding the proper procedures to be followed in prosecuting ordinance violations. This ambiguity arises from the courts' attempt to handle such diverse subjects as disorderly conduct, prostitution, gambling, housing code violations, traffic offenses, and possession of burglar's tools under one system of procedure. Rather than continually straining to classify these dissimilar offenses together under an artificial heading such as "quasi-criminal," ra-
tional guidelines are needed to provide procedures suitably related to the nature of the specific offense involved.

The problems created by the ambiguity as to the procedure must be resolved in order to promote reasonableness and essential fairness in the administration of these cases. These problems are a result of the grouping of offenses of a regulatory nature with those which traditionally have been treated as criminal. Since all "quasi-criminal" offenses have been treated as "civil in form," defendants in those cases which are substantially criminal have consistently been denied the constitutional protections guaranteed to defendants in criminal cases. Recognizing that the prosecution of criminal cases without the protections of criminal procedure was a serious problem, the General Assembly amended the Illinois Municipal Code in 1970 to require that violations of all municipal ordinances punishable by incarceration be prosecuted under the rules of criminal procedure.8 While this amendment alleviated the problem for defendants in the more serious ordinance violation cases, it did nothing to improve the situation for defendants who only would be subject to the sanction of a fine in ordinance violation cases of a criminal nature. The granting of protections guaranteed to defendants in criminal cases should not turn merely on the severity of the punishment; instead, protections should be granted according to the essential nature of the offense. Due process requires some procedural safeguards in what are essentially criminal cases, regardless of the specific classification of the offense.9 Thus, by continuing to prosecute categorization represent diverse areas of regulation having as a common element their mode of prosecution. The majority of appellate cases establishing the rule structure for "quasi-criminal" litigation have involved situations in which the penalty was a fine rather than a jail sentence. See, e.g., City of Danville v. Hartshorn, 53 Ill. 2d 399, 292 N.E.2d 382 (1973); Village of Maywood v. Houston, 10 Ill. 2d 117, 139 N.E.2d 233 (1956); City of Chicago v. Kiger, 130 Ill. App. 2d 162, 264 N.E.2d 488 (1st Dist. 1970).


9. The United States Supreme Court has recently propounded the logical argument that procedural safeguards must be provided if due process is to be accorded a defendant, regardless of the class of offense with which he or she is charged. It stands to reason that to insure that due process is guaranteed throughout all judicial administration, it must be granted in every circumstance regardless of the fact that the violation is of a municipal ordinance. In Argersinger v. Hamlin, it was held that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel. 407 U.S. 25, 37 (1972). See also Stevenson v. Holzman, 254 Ore. 94, 102, 458 P.2d 414, 418 (1969).

The principle that due process must be respected regardless of the specific classification involved was also upheld by the United States Supreme Court in Waller v. Florida, 397 U.S. 387 (1970). The Court held that successive prosecutions for the same offense by a state and by a municipality within that state are prohibited by the double jeopardy clause. Id. at 395. The Illinois Supreme Court interprets Waller
many ordinance violation cases under non-criminal procedure, without
attention to the nature of the offense, Illinois courts have denied and con-
tinue to deny due process of law to defendants in those ordinance cases
which are essentially criminal.

The problem presented above has been noted by Illinois courts. In an
attempt to bring the procedural structure of "quasi-criminal" prosecutions
into line with the mandate of constitutional due process, some criminal
protections have been provided on an ad hoc basis in ordinance cases.\(^{10}\)
Practically, this process has created a system in which each court arbi-
trarily determines its own rules of procedure. The failure to give adequate
notice of the applicable procedures in a particular case places the accused
at a severe disadvantage, denying the essential fairness of court proceed-
ings required by due process.\(^{11}\) Reform may take one step at a time,\(^{12}\)
but in the realm of procedure, reform that creates uncertainty and is sub-
ject to arbitrary application is no reform at all. The granting of criminal
protections must be done on a unified basis. This would accomplish the
desired result of meeting the constitutional directives without the creation
of ancillary due process problems.

In addition to the problems created by the irrational grouping of varied
ordinances under the "quasi-criminal" heading, a further problem is
created by the dual system of prosecution which exists in Illinois. Many
ordinances and state statutes deal with the same
subjects.\(^{13}\) This dual
system of laws places great discretionary powers in the arresting officer
and prosecuting officials who determine whether a defendant will be
charged under the state statute or an ordinance. That determination
affects the procedure to be followed and the rights to be granted a defend-
ant. The probability that this power will be abused is great because there
are no guidelines for choosing one system over another. This lack of

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\(^{10}\) See, e.g., People v. Allison, 46 Ill. 2d 147, 263 N.E.2d 80 (1970).

\(^{11}\) See, e.g., People v. Coleman, 52 Ill. 2d 470, 288 N.E.2d 396 (1972); People

\(^{12}\) See, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972); Boddie v. Connecticut, 401
U.S. 371 (1971); Gideon v. Wainwright, 372 U.S. 335 (1963); Lambert v. Califor-
nia, 355 U.S. 225 (1957); Betts v. Brady, 316 U.S. 455 (1942); Baldwin v. Hale,
68 U.S. (1 Wall.) 223 (1864).

\(^{13}\) See, e.g., Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).
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guidelines creates an equal protection problem because like offenders may be prosecuted under different systems of procedure.14

It could be argued that the area of ordinance prosecution does not merit the expenditure of valuable time and energy by the General Assembly and the Illinois Supreme Court. These cases deal with relatively minor matters, and a system already exists to deal with ordinance cases adequately. However, constitutional directives should not be ignored simply because the infringement of individual rights is slight. The assurance of due process and equal protection is essential to the legitimacy of the legal system. A system of law which is arbitrary and capricious and deals differently with citizens in similar positions cannot command the respect of the citizens who are to be bound by that system. Our society is one based on the premise of social contract. Citizens agree to be bound by the laws on the condition that those laws will deal fairly with, and treat equally, all citizens. It is the government’s compliance with the terms of this contract that legitimizes the laws promulgated and differentiates our government from one which bases its authority on raw power.15

On occasion, the policy of promoting the efficiency of judicial administration comes into conflict with the policy of providing essential fairness in judicial proceedings. A high value is placed on administrative efficiency, but a higher value is placed on the legitimacy of authority. Viewed in this light, the argument that individual rights must give way to judicial administration is clearly specious. Legitimacy must be maintained in every example of public ordering, including municipal ordinance prosecution. The greatest number of citizens have their contact with the judicial system at the municipal level.16 If the citizenry is to accept and submit to a government of laws, the legitimacy of the system must be demonstrated at the point where the citizens are most likely to encounter the

14. The United States Supreme Court has repeatedly held that if defendants in like circumstances are not afforded the same procedural rights, they are being denied equal protection. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Missouri Pac. R. Co. v. Larabee, 234 U.S. 459 (1914). The discretionary powers created in the arresting officers and prosecuting officials are a quirk of Illinois law that emerged because of the random development of law at different levels of government. This discretion does not represent any policy or objective of the state. If such a policy or objective could be found, there might be a reason to continue this dual system of prosecution. In McGowan v. Maryland, 366 U.S. 420 (1961), Chief Justice Warren stated that a difference in the treatment of individuals did not in and of itself violate equal protection, but where the difference in treatment had a basis which was wholly irrelevant to a state objective, the differentiation did violate equal protection. 366 U.S. at 425-26.

15. J.S. MILL, ON LIBERTY ch. 4 (1921).

system. This principle is supported by Illinois Supreme Court Rule 61 (c)(1) which provides:

*The Integrity of Our Legal System.* A judge should bear in mind that ours is a government of law and not of men and that his duty is the application of general law to particular instances. He should administer the office with due regard to the integrity of the system of the law itself, remembering that he is not a depositary [sic] of arbitrary powers, but a judge under the law.\(^\text{17}\)

**STATUTORY AND DECISIONAL HISTORY**

"Quasi-criminal" litigation in Illinois chronicles a lack of procedural uniformity and a consistent disregard for the constitutional protection of defendants' rights. In the early development of Illinois jurisprudence, ordinance prosecutions which provided the potential for fine only were handled as civil matters. Early cases held that a municipal corporation could recover a fine in an action of debt or assumpsit, and the municipality had the power to pursue such actions in any court of general jurisdiction, other than criminal court.\(^\text{18}\)

The Justices and Constables Act\(^\text{19}\) gave justices of the peace and police magistrates original jurisdiction over municipal ordinance violations.\(^\text{20}\) In these actions, both the prosecution and defense had a right to demand a jury trial. Originally, under the common law, jury trial did not extend to all crimes against public laws but only to the more serious ones. The right to a trial by jury was created by the above mentioned Act,\(^\text{21}\) and as such had only a statutory basis in Illinois.

With the repeal of the Justices and Constables Act, the Illinois courts were faced with a vacuum of authority for the procedure to be followed in the trial of municipal ordinance cases. This gave rise to an ad hoc system of procedure, the application of which varied greatly from court to court. The only common line running through the cases was the repeated use of the magical incantation "civil in form although quasi-criminal in character."\(^\text{22}\) Unfortunately, this oft quoted phrase did not estab-

\(^\text{17. ILL. REV. STAT. ch. 110 A, § 61(c)(1) (1973).}\)
\(^\text{18. Town of Jacksonville v. Block, 36 Ill. 508 (1865); Ewbanks v. President & Trustees, 36 Ill. 177 (1864).}\)
\(^\text{19. Act of April 15, 1895, ch. 79, [1895] ILL. REV. STAT. (repealed 1965) [hereinafter cited as JUSTICES AND CONSTABLES ACT].}\)
\(^\text{20. Id. at art. V, § 1:}\)
\(^\text{Justices of the Peace have jurisdiction in their respective counties in . . . actions . . . arising under the laws for incorporation of cities, towns, and villages, or any ordinance passed in pursuance thereof.}\)
\(^\text{21. JUSTICES AND CONSTABLES ACT, supra note 19.}\)
lish a sufficient guideline for the courts to follow.

An illustration of this uncertainty in municipal ordinance prosecution is the courts' treatment of the burden of proof issue. In a regular civil suit, the quantum of proof required is "a preponderance of the evidence." 23 In a criminal suit, the requirement is "beyond a reasonable doubt." However, in City of Chicago v. Joyce, 24 a public demonstration-disorderly conduct case, the burden of proof was held to be a "clear preponderance of the evidence." 25 This standard seems to fall somewhere between the civil and criminal requirements.

Bail, a procedure characteristic of a criminal proceeding, 26 is another example of the courts' deviation from a strictly civil format in municipal


25. Id. at 373.

It is normally held that the burden of proof in a civil action is merely a preponderance of the evidence. See note 23, supra. This means that the slightest quantum of evidence over 50% would satisfy this standard. However, in City of Chicago v. Carney, 34 Ill. App. 2d 303, 305-06, 180 N.E.2d 729, 730 (1st Dist. 1962) the court stated:

[T]he rule is that the violation of the ordinance must be proved like any ordinary civil suit for the recovery of a penalty, by a "clear" preponderance or by more than a "mere" preponderance of the evidence (citing City of Chicago v. Butler Bros., 350 Ill. App. 550, 554, 113 N.E.2d 210, 212 (1st Dist. 1953); City of Chicago v. Akins, 19 Ill. App.2d 177, 182, 153 N.E.2d 302, 304 (1st Dist. 1958).

It is questionable whether the use of the word "clear" in relation to the burden of proof in a civil case is of any value. In Teter v. Spooner, 305 Ill. 198, 137 N.E. 129 (1922), the court stated:

The use of the adjectives "slight" and "clear," with reference to the preponderance of the evidence required to sustain an issue, is only confusing to the jury. They ought not to be used in instructions in any case. Nobody knows what is a slight preponderance or what is a clear preponderance of the evidence, although everyone knows what is meant by a preponderance of the evidence. A preponderance of the evidence is necessarily clear even though it is slight. If there is a perceptible preponderance of the evidence it is sufficient, but it would not be proper for the court to give an instruction to the jury that a perceptible preponderance of the evidence was sufficient, any more than a clear preponderance of the evidence was required. The effect of the adjectives is merely to confuse the jury and invite them to minimize or maximize the weight of the evidence on one side or the other. Such instructions ought not to be given.

Id. at 211, 137 N.E.2d at 135.

ordinance prosecution. The Illinois Supreme Court Rules specifically provide for bail in ordinance violation cases.\textsuperscript{27} Similarly, the Illinois courts have denied defendants in municipal ordinance cases the protection of the Insolvent Debtors Act,\textsuperscript{28} stating in effect that these cases are really criminal.\textsuperscript{29} Thus, a distinction is made as to the criminal character of the proceeding for purposes of denying protection under the Insolvent Debtors Act. However, on the issue of whether a decision could be appealed by the prosecution, the courts have emphasized the civil aspect of the litigation, thus exposing the defendant to what would be characterized as double jeopardy if it occurred in a full fledged criminal prosecution.\textsuperscript{30} These examples are indicative of the valuelessness of the characterization "quasi-criminal in nature, civil in form." Truly, the defendant in an ordinance violation case is exposed to "The Worst of All Possible Worlds."\textsuperscript{31}

The most significant defect in this type of litigation is the fact that while many courts have recognized they are dealing with criminal responsibility, they have consistently denied defendants the safeguards of criminal procedure. These have included, for example, the full protection provided by the fifth amendment provision against self-incrimination. The Supreme Court has held that in an action which is essentially criminal in nature, the full protections provided by the fifth amendment should be insured;\textsuperscript{32} the courts of Illinois have recognized this principle.\textsuperscript{33} Equally distressing is the fact that many of the courts in the State have failed to provide a jury trial on demand, a right that was recognized for seventy years under the Justices and Constables Act.\textsuperscript{34}

\begin{footnotes}
\item 29. The statute authorizing the imprisonment and enforced labor, in case of non-payment of fines imposed under the ordinances of a city, was designed for the punishment of those offenders whose want of tangible property would otherwise place them beyond the reach of city discipline . . . and it is to be regarded merely as an alternative mode of punishment. \textit{Fosselman v. City of Springfield}, 38 Ill. App. 296, 302 (3d Dist. 1890), \textit{aff'd}, 139 Ill. 185, 28 N.E. 916 (1891).
\item 32. \textit{Boyd v. United States}, 116 U.S. 616 (1886).
\end{footnotes}
The recent case of *City of Danville v. Hartshorn* demonstrates the problems inherent in "quasi-criminal" litigation in Illinois. On the one hand, the court upheld the right to a jury trial since it is essential to an action which is criminal in nature, and on the other hand, denied the discovery procedures provided for in the Civil Practice Act. This case is consistent within itself. The judge characterized the action as criminal in nature whereby the right to a jury trial attached but the broad discovery provisions of the Civil Practice Act were not applicable. The problem is that a potential defendant will not know in advance of a judge's determination whether the prosecution will be governed under criminal or civil procedure. The result is that the judges of Illinois still have no real precedent to follow because each court can arbitrarily characterize an action as criminal or civil and thereby determine which procedural rules will apply.

**THE PRESENT STATE OF AFFAIRS**

The fourteenth amendment of the United States Constitution guarantees to each individual equal protection of the laws, including local laws. Legislative classifications must be rationally related to a legitimate state purpose and not discriminate invidiously against persons similarly situated.

In presenting the nature of the problem, it has been shown that Illinois often has a dual system of prosecution covering substantially the same behavior. The duplication of many state statutes by municipal ordinances leaves the choice of applicable law to the decision of a police officer or other local enforcement official.

Such a system is susceptible to abuse. In many cases the penalty for violation of a state statute is much greater than for violation of a municipal ordinance. The arresting officer who desires to be punitive may simply charge the individual under the state statute. Such discretion distorts the role of the law enforcement officer who was never meant to have the power to adjudicate.

Perhaps, the greatest discretion in relation to these proceedings lies with

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35. 53 Ill. 2d 399, 292 N.E.2d 382 (1973). The defendant in this case was charged with violating an ordinance of the City of Danville which prohibited the hindrance, resistance or obstruction of any police officer in the discharge of duty. The penalty provided by the ordinance was a fine.

36. *Id.* at 403, 292 N.E.2d at 385.

37. *Id.* at 404, 292 N.E.2d at 385.

38. See note 14 *supra*.

39. *E.g., compare ILL. REV. STAT. ch. 38, § 11-14 (1973), (up to 1 year imprisonment), with CHICAGO, ILL., MUNICIPAL CODE ch. 192, § 192-5.1 (1974), (fine not to exceed $200).*
Due to the vagueness of the rule structure, the judge is more or less at liberty to utilize the procedure for litigation which he or she deems appropriate. This discretionary power is a result of the courts’ attempts to remedy inadequacies in the proceedings. Each remedial attempt has added a new provision to the existing rule structure. These additions have produced a situation where a judge could find precedent for any course of procedure he or she might select.\textsuperscript{40} \textit{City of Danville v. Hartshorn} is indicative of this procedural miasma.\textsuperscript{41} Each court that considered the case applied a different system of procedure.\textsuperscript{42}

The foregoing discussion demonstrates the lack of procedural uniformity throughout the state. This serious deficiency of due process should provide the impetus to revise the procedure presently followed in "quasi-criminal" litigation in Illinois. This lack of uniformity, especially in light of \textit{Waller v. Florida}\textsuperscript{49} and \textit{Argersinger v. Hamlin},\textsuperscript{44} demonstrates that the present handling of municipal ordinance violation cases is violative of the due process clause of the fourteenth amendment of the United States Constitution.\textsuperscript{45} A definite and invariable set of procedures should be applied in ordinance cases to meet the constitutional requirements. In \textit{Waller}, the Supreme Court held that constitutional safeguards, such as the double jeopardy restraints, must be applied in essentially criminal cases. The state may not consider an ordinance proceeding as merely a device for regulating municipal affairs and ignore the fact that a de-

\begin{itemize}
  \item \textsuperscript{40} \textit{E.g., compare} Village of Park Forest v. Nickolas, 103 Ill. App. 2d 99, 243 N.E.2d 421 (1st Dist. 1968) with City of Chicago v. Mayer, 56 Ill. 2d 366, 308 N.E.2d 601 (1974).
  \item \textsuperscript{41} 53 Ill. 2d 399, 292 N.E.2d 382 (1973).
  \item \textsuperscript{42} In \textit{Danville}, the appellate court held that the trial court erred in refusing to allow the defendant pre-trial discovery as a matter of right, that the defendant was entitled to a jury trial, and that the city should have been required to answer written interrogatories. 131 Ill. App. 2d 999, 1003, 268 N.E.2d 878, 881-82 (4th Dist. 1971).
  
  The Supreme Court held that the defendant, indeed, had a right to a jury trial, but that civil pre-trial discovery procedures were not to be granted as a matter of right, rather their provision should be within the discretion of the court. 53 Ill. 2d 399, 403-04, 292 N.E.2d 382, 385 (1973).
  \item \textsuperscript{43} 397 U.S. 387 (1970). \textit{See note 9 supra.}
  \item \textsuperscript{44} 407 U.S. 25 (1972). \textit{See note 9 supra.}
  \item \textsuperscript{45} The fundamental requirement of due process is an opportunity to be heard upon such notice and according to those procedures as are adequate to safeguard the rights for which the constitutional protection is invoked. \textit{Anderson Nat'l Bank v. Luckett}, 321 U.S. 233, 246 (1944).

  If a defendant is denied adequate notice of the procedures to be applied in his case, he cannot properly prepare his defense. It is not sufficient to satisfy due process that the defendant is given an opportunity to be heard; the hearing must be at a meaningful time and in a meaningful manner. \textit{Goldberg v. Kelly}, 397 U.S. 254 (1970).
\end{itemize}
fendant's rights must be protected. Illinois' classification of municipal ordinance violation cases as "quasi-criminal in nature but civil in form" is directly at odds with Waller. Due process requires procedural safeguards in essentially criminal cases, regardless of a state's labeling the cases as civil in form.\footnote{46} The Illinois Supreme Court in People v. Allison\footnote{47} has explicitedly accepted the Waller holding that successive prosecution for the same offense by the state and by a municipality within the state are prohibited by the double jeopardy clause of the fifth amendment. In People v. Allison the Illinois Supreme Court stipulated that Waller applied to all ordinance prosecutions including those which imposed a fine only. This holding suggests that the supreme court agrees that these cases are essentially criminal. Due process cannot be satisfied by granting defendants' rights on a piecemeal basis; defendants must be given the full gamut of rights applicable to all criminal proceedings.\footnote{48}

\textbf{History of the Recommendations of the Committees}

In December of 1969, the Supreme Court of Illinois created the Illinois Supreme Court Committee on Quasi-Criminal Litigation to study and make recommendations regarding the Illinois procedures for prosecuting ordinance violations. A report was submitted in August, 1971, upon which no official action has been taken. In March, 1972, the Annual Associate Judges Seminar considered the issue and a report containing the judges' proposals was drafted by Richard Michael and John P. Heinz. After considering this report, the Illinois Judicial Conference's Executive Committee appointed another committee headed by John P. Heinz of Northwestern University College of Law to provide answers to questions which had not been covered in previous reports, most importantly the effect the recommendations would have on the autonomy of local governments. Essentially, the report of the Illinois Supreme Court Committee on Quasi-Criminal Litigation and the report submitted by Michael and Heinz in conjunction with the Associate Judges Seminar contained the same recommendations:

1. **Pre-emption of Ordinances Which Duplicate State Statutes**

The committee suggested that the state legislature provide for pre-emption of all local ordinances imposing sanctions on behavior covered by the Illinois Criminal Code.\footnote{49} Some doubts were raised as to whether

\footnote{46. See note 9 supra.}
\footnote{47. 46 Ill. 2d 147, 263 N.E.2d 80 (1970).}
\footnote{48. See note 9 supra.}
\footnote{49. Final Report of the Illinois Supreme Court Committee on Quasi-
the General Assembly has the authority to adopt this pre-emption proposal in view of the power granted to home rule units to punish by imprisonment up to six months. The report of the Associate Judges Seminar pointed out the constitutional authority for such a proposal:

The General Assembly may provide specifically by law for the exclusive exercise by the State of any power of function of a home rule unit other than a taxing power or a power or function specified in subsection (1) [sic] of this Section.

2. *Ordinances Providing for Jail Sentences*

Where there is a possibility of incarceration for violation of an ordinance, prosecution should be treated as a criminal matter, both procedurally and as to burden of proof, with the primary responsibility for prosecution resting upon the city attorney or village prosecutor. The recommendation is based on Section 1-2-1.1 of the Municipal Code, which states that wherever there is the possibility of incarceration, the prosecution will be handled in compliance with the Criminal Code of Illinois.

3. *Ordinances Providing for “Fine Only”*

(a) That ordinance violations be treated as civil proceedings both procedurally and as to burden of proof where there is no chance of imprisonment. (b) That civil rules of discovery shall not be applicable to these proceedings without leave of court. (c) In order to stress the civil nature of the proceedings, that the term “penalty” should be substituted for the term “fine.”

4. *Prohibition Against Compulsory Imprisonment to “Work-Off” Fine*

Article I, section 14 of the Illinois Constitution of 1970 prohibits compulsory imprisonment to “work-off” a fine which has been converted to a jail sentence because of indigency. A defendant who is unable to satisfy a money judgment in an ordinance violation case should not be incarcer-

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52. ILLINOIS SUPREME COURT COMMITTEE, supra note 49, at 1-2.
54. ILLINOIS SUPREME COURT COMMITTEE, supra note 49, at 5; MICHAEL & HEINZ, supra note 26, at 9.
55. ILLINOIS SUPREME COURT COMMITTEE, supra note 49, at 2.
56. Id. at 3.
ated unless there is willful refusal on his part to satisfy the judgment, in which case a defendant could be jailed for contempt of court.\textsuperscript{57}

5. \textit{Disbursement of Money Judgment Awards}

Monies raised as a result of these recommendations should be dispersed by the municipality, county, or state whose law enforcement officer or other official initiated the proceedings.\textsuperscript{58}

Although this Comment is in basic agreement with the recommendations of the various committees, we must take strong issue with what are considered to be the underlying bases for these recommendations. Their premises, although not incorrect, are seriously deficient because of their almost total disregard for the constitutional mandates of due process and equal protection. By ignoring these constitutional directives, the Committees have undermined the legal foundations of their recommendations and have lessened their impact. It is these underlying principles which necessitate the revision of the procedures to be followed in "quasi-criminal" litigation.

\textbf{Proposal}

\textit{Alternatives}

The major purpose of this Comment is to aid in the restructuring of the procedure to govern the prosecution of ordinance violations. This must be done in a manner which insures that the constitutional guarantees of the Bill of Rights, the fourteenth amendment and the directives of the Illinois constitution relating to trials are met. There are a number of possible alternative solutions which may produce the desired result.

It has been suggested that the procedural muddle which exists in ordinance prosecution could be eliminated by providing for the prosecution of all ordinance violations as either strictly criminal or purely civil matters.\textsuperscript{59} The idea of treating all matters under one system of procedure appears attractive because it would eliminate the confusion as to which set of procedures would be applicable to a given case. Treatment of all ordinance prosecutions as criminal matters would seem to eliminate the constitutional problems inherent in the present system of operation and would provide certainty. Unfortunately, such an approach would not completely eliminate all the constitutional problems; the duplication of state statutes by local

\textsuperscript{57} Id. at 2-3. \textit{See also} Tate v. Short, 399 U.S. 925 (1971).

\textsuperscript{58} ILLINOIS SUPREME COURT COMMITTEE, supra note 49, at 7.

\textsuperscript{59} \textit{See} MICHAEL \& HEINZ, supra note 26.
ordinances giving rise to different treatment of individuals similarly situated because of differing penalties and procedures would still present equal protection problems. In addition, treating all ordinance prosecutions as criminal matters might put substantial burdens on the administration of justice in Illinois. Treating regulatory matters as criminal attaches a stigma to them which may not be justified by the underlying behavior or the results achieved. In fact, it may actually be desirable to decriminalize many of these regulatory matters, as criminal treatment has not been particularly effective.60

Another alternative would be to handle all ordinance prosecutions under the Civil Practice Act.61 The main advantage of handling local ordinance violations as purely civil matters lies in the policy of decriminalization of matters which are actually regulatory schemes. While this approach is in line with the recent trend,62 and would provide a solution to the practical problems of the area, it would not sufficiently meet the constitutional requirements of due process and equal protection. Some ordinances deal with matters which are criminal and should be treated as such. Duplication would still exist and the mandate to provide the criminal protections dictated by Argersinger and other cases would still remain.

A third alternative would be the creation of a new code of procedure to set rules to be followed in all ordinance prosecutions. Through such an attempt, a system could be devised whereby the constitutional directives could be met without putting the substantial burden on the administration of justice that would result from treating all ordinance prosecutions as strictly criminal. Although this alternative would create a uniform system for ordinance prosecution, the confusion that would be generated by the implementation of a new code, without a history of development through reasoned elaboration, would hardly clarify or improve present practice.

One other possible alternative is that reached by the Committees which have previously studied the problem at the discretion of the Illinois Supreme Court.63 The crux of their recommendations has already been discussed. Although the Committees' recommendations come closest to approximating the desired result, these recommendations must be expanded upon in order to adequately resolve all the problems presented by the prosecution of local ordinance violations.

63. See text at pp. 597-99 supra.
To devise a system that will deal rationally with ordinance litigation, the following elements must be taken into account: (1) Due process problems presented by the arbitrary procedures followed under the present system; (2) Equal protection problems created by the duplication of state statutes by local ordinances; (3) Rationality of treatment of the varied ordinances as criminal or civil matters; (4) The diminution of local autonomy established for home rule units by the 1970 Constitution. One solution to this problem requires that several steps be taken to effect a rational restructuring of ordinance prosecution procedures.

The Pre-emption of All Local Ordinances Which Duplicate State Statutes

In every case where a state statute is duplicated by a local ordinance, pre-emption could be effected in order to eliminate the equal protection problems discussed above. Two examples of necessary pre-emption statutes are set out in the Appendix. All ordinances which duplicate provisions of the Illinois Criminal Code, 64 the Illinois Vehicle Code, 65 and any other ordinances which duplicate state statutes must also be preempted. Article VII, §§ 6(g), (h) and (i) of the Illinois Constitution of 1970 66 provide the structure for pre-emption. This pre-emption could probably be effected by simple majority vote of the General Assembly under section 6(h). 67 This should apply to traffic ordinances as well as offenses duplicating the Criminal Code. An issue is raised as to whether traffic ordinances could be pre-empted by simple majority vote. The General Assembly may pre-empt by simple majority when the State is active in the field. 68 The policy underlying pre-emption is the state's interest in uniformity as balanced against the need for systems tailored for varied local conditions. 69 The pre-emption of traffic ordinances is controversial because the area has been considered to be one uniquely within the competency of local governmental bodies. However, the primary interest of local governments is directed to the revenues produced by the collection of fines. A stipulation in the pre-emption bill that the governmental body initiating the prosecution would receive the revenue pro-

64. ILL. REV. STAT. ch. 38 (1973).
65. ILL. REV. STAT. ch. 95 1/2 (1973).
66. ILL. CONST. art. VII, §§ 6(g), (h), (i) (1970).
67. Id. at § 6(h).
68. Id. But see § 6(m).
duced would probably meet the concern of the local governments. Because the only ordinances eliminated would be those which duplicated existing state statutes, the local government would retain the same power to regulate the affected behavior as before pre-emption. This would eliminate the possibilities for arbitrary exercise of discretion by local law enforcement and prosecuting officials. One of the main considerations present in ruling on the competency of a local governmental body to deal with a given matter is "the effect that treatment of a matter as local or statewide would have on the administration of justice." \(^{70}\) This proposal would achieve the policy of "the protection of private interests against the arbitrary exercise of local power." \(^{71}\) Retention of duplicative traffic ordinances would inhibit the rational development of ordinance prosecution and defeat state policy. In weighing local prerogatives, one must look to "the relative importance of a local policy which is in conflict with a state or federal policy." \(^{72}\)

In the recent case of *Fuehrmeyer v. City of Chicago*, \(^{73}\) the Illinois Supreme Court struck down a bill pre-empting the right of local governments to regulate several professions. The court reasoned that the bill was not confined to one subject as required by article IV, section 8(d) of the 1970 Constitution, which provides in relevant part, "[b]ills, except bills for appropriations and for the codification, revision, or rearrangement of laws, shall be confined to one subject." \(^{74}\) The limitation established by *Fuehrmeyer* may not apply to the pre-emption package because it could be considered a revision of the laws establishing the procedure for ordinance prosecutions. If the pre-emption of duplicating ordinances does not fall into the exception provided for the revision or rearrangement of laws, pre-emption could still be accomplished merely by passing a bill covering the specific area involved. The number of bills required would be small as one bill could pre-empt all duplications of the Criminal Code and one bill could pre-empt all duplications of the Vehicle Code and still fit within a strict reading of *Fuehrmeyer*.

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70. *Id.* at 1312.
71. *Id.*
72. *Id.*
73. 57 Ill. 2d 193, 311 N.E.2d 116 (1974). It is likely that *Fuehrmeyer* may be limited to its facts. Basically, this case represented an attempt by the Illinois Supreme Court to protect home rule powers from blanket laundry list pre-emptions. A contrary holding in this case would have prevented local governmental units from taking regulatory measures in relation to thirty different professions ranging from real estate brokers to doctors.
The Appropiateness of the Judiciary to Initiate the Change

The governmental body most competent to effect the necessary changes in ordinance violation procedure is the Illinois Supreme Court. It may recommend the bills necessary to remedy these problems to the legislature. The Illinois Supreme Court is most competent to deal with problems of judicial administration because it is familiar with the present functioning of the Illinois courts in ordinance prosecutions and has an understanding of the nature of the problems in this area and the kinds of remedial action necessary to alleviate these problems.

It is a traditional argument that the separation of powers doctrine requires that the impetus for legislation come from the representative body of government. This type of an argument is sophomoric and disregards the close interaction between the courts and the legislature that is vital to insure a system of public ordering which is responsive to the needs of the people. The Illinois Constitution of 1970 specifically provides for just such interaction in article VI, section 17:

> The Supreme Court shall provide by rule for an annual judicial conference to consider the work of the courts and to suggest improvements in the administration of justice and shall report thereon annually in writing to the General Assembly not later than January 31.75

This provision is implemented through Supreme Court Rule 61(c)(20) which provides:

> Legislation. A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and ascertain whether they tend to expedite or impede the just disposition of controversies. Where it is clear that he might contribute to the public welfare, he should advise those in authority of his observation and experience in order that they may remedy defects of procedure.76

and through Supreme Court Rule 41(a):

> Duties. There shall be a Judicial Conference to consider the business and the problems pertaining to the administration of justice in this State, and to make recommendations for its improvement.77

In light of the above provisions, the Illinois Supreme Court should take the initiative in this area, rather than wait for legislative action, by recommending the institution and passage of the bills necessary for the scheme of pre-emption presented above. The court has the greatest familiarity with the nature of ordinance prosecutions, the deficiencies therein, and the kind

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75. *Ill. Const. art. VI, § 17 (1970).*
77. *Ill. Rev. Stat. ch. 110A, § 41(a) (1973).*
of remedial action necessary to eliminate these deficiencies. Such action by the Illinois Supreme Court would not be violative of the doctrine of separation of powers. The solution to the problems of revision of the procedures to be followed in ordinance prosecutions is uniquely within the province of the Illinois Supreme Court. It is the responsibility of that court to insure that the implementation of the changes necessary to effect a rational revision will be instituted in such a way as to promote the greatest efficiency in judicial administration while protecting the rights of those individuals who come before the system.

Those ordinances which are not pre-empted should be treated as purely civil unless the individual local governmental body specifically demonstrates its intention that the ordinance in question be treated as criminal. This aspect of reorganization can be effected through the adoption of additional Supreme Court Rules. These rules could state, in effect, that all ordinances are to be treated as civil matters and handled under the Civil Practice Act. If the local body, specifically by law, enacted legislation preserving the criminal nature of the offense regulated by the ordinance, then that offense would be prosecuted under the Criminal Code of Procedure. These rules could establish a six month time period in which the local bodies could catalog and categorize their ordinances in order to come to a decision as to which ordinances should be treated as criminal and which as civil. The Supreme Court Rules could also establish guidelines for the local governments to follow in this decisional process. The Rules should also establish that any ordinances passed by home rule units pursuant to their power to imprison for up to six months under article VII, section 6(e)(1) of the Illinois Constitution of 1970, 78 shall be prosecuted under the Criminal Code of Procedure.

The Supreme Court Rules proposed in the preceding paragraph would have the effect of forcing the local bodies to make a decision as to what types of behavior they feel must be placed under criminal sanctions. The six month period would allow the local government units the time to take the necessary steps. In any event, even if a local body chose not to act at all, the Supreme Court Rules would take effect, making those ordinance violations not acted upon a matter of civil concern. This provides an opportunity for the decriminalization of regulatory measures and, more broadly, an opportunity to examine the nature of local ordinances so as to make a rational decision as to which ordinances are essentially criminal in nature and which are essentially civil in nature, thereby determining the mode of procedure. It should be noted that failure on the part of

78. Ill. Const. art. VII, § 6(e)(1).
the local authorities to designate an ordinance as criminal in nature would result in the loss of the local body’s arrest power under the ordinance. This should provide a sufficient impetus to local governments to classify their criminal ordinances as such, and, thus avoid the possibility of criminal ordinances falling under the Civil Practice Act.

The scheme proposed above for the revision of ordinance prosecution in Illinois is the most rational approach to the problem and the only one which completely meets the constitutional directives of due process and equal protection. By pre-empting all duplications of state statutes, the problems of selective and arbitrary enforcement at the discretion of the local prosecutor or law enforcement official is eliminated. Requiring local governmental units to make a decision as to whether specific ordinances are to be prosecuted under the Criminal Code or the Civil Practice Act eliminates the uncertainty as to what procedures are to be applied in the prosecution of ordinance violation cases. It also obviates the necessity of trying to bring together all the non-related matters covered by ordinances under one system of procedure. The rationality of the classification of ordinances and the certainty that would result, would immeasurably improve the quality of justice in the prosecution of ordinance cases in Illinois.

Few citizens ever have contact with the higher courts. In the main, it is the police and the lower court Bench and Bar that convey the essence of our democracy to the people. Justice, if it can be measured, must be measured by the experience the average citizen has with the police and the lower courts.79

**Conclusion**

The area of ordinance prosecution has been a nagging problem to the judiciary for many years. Attempts to solve the constitutional problems of due process and equal protection inherent in the present mode of handling ordinance cases on a case-by-case method, have proved unavailing. In fact, the attempts to rationalize this system, although well meaning, have actually increased the confusion as to the procedural structure to be applied by the courts in the litigation of ordinance violations. As the Illinois Supreme Court has recognized, the present procedures followed in ordinance cases must be abandoned and a rational, unified system must be adopted in order to eliminate the confusion that presently exists. The authors believe that the following proposals will achieve the desired result:

1. Pre-emption of all ordinances duplicating state statutes.

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2. The prosecution of all ordinances under the Civil Practice Act unless specifically designated as criminal ordinances by the local governing bodies.

3. The prosecution of all criminal ordinances under the Criminal Code of Procedure.

It is uniquely appropriate, indeed, it is incumbent upon the judiciary that action be taken in this area so as to insure that the requirements of due process and equal protection are satisfied, and to eliminate the disarray in this area of Illinois jurisprudence.

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APPENDIX

A. PROPOSED SUPREME COURT RULE:

a. The procedure to be followed in the prosecution of all ordinance violations shall be as dictated by the Civil Practice Act.

b. Where the local body wishes, it may enact legislation preserving the criminal nature of an ordinance. These ordinances shall be prosecuted under the Criminal Code of Procedure. In all subsequent legislation in which a local body wishes to enact a criminal ordinance and retain the power of arrest, the Criminal Code of Procedure shall apply.

c. The local governmental unit shall have six months time in which to enact legislation preserving the criminal nature of an ordinance.

d. Ordinance violations which are not specifically treated as criminal by local governmental units shall be handled as civil actions subject to the Civil Practice Act.

B. PROPOSED STATUTE PRE-EMPTING DUPLICATION OF THE ILLINOIS CRIMINAL CODE:


"Purpose: To insure that the protections of the Criminal Code of Procedure are granted to all defendants in prosecutions arising out of behavior regulated by the Criminal Code of Illinois, and to promote efficiency and essential fairness in the administration of justice within this State.

"Be it enacted by the People of the State of Illinois, represented in the General Assembly;"
Section 1. Pursuant to paragraph (h) of section 6 of article VII of the Constitution of 1970, the power to make criminal all acts covered by the Illinois Criminal Code shall be exercised exclusively by the State and may not be exercised by any unit of local government, including home rule units.

Section 2. Section 1 of this Act shall not be construed to deny to any unit of local government, including home rule units, the power to punish by imprisonment up to six months for offenses not pre-empted.

Section 3. This Act shall become effective six months after the date of its enactment.

C. Proposed Statute Pre-empting Duplication of the Illinois Vehicle Code:


"Purpose: To insure that the protections of the Illinois Civil Practice Act are granted to all defendants in prosecutions arising out of behavior regulated by the Illinois Vehicle Code; to eliminate the inherent arbitrary exercise of discretion which results from enforcement under a dual system of traffic regulation, and to promote efficiency and uniformity in the administration of justice within this State.

"Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Pursuant to paragraph (h) of section 6 of article VII of the Constitution of 1970, the power to regulate all offenses covered by the Illinois Vehicle Code, shall be exercised exclusively by the State and may not be exercised by any unit of local government, including home rule units.

Section 2. The right to receive revenues produced from the enforcement of the Illinois Vehicle Code shall be granted to the local governmental body initiating the action.

Section 3. This Act shall become effective six months after the date of its enactment."