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Criminal Punishments and Civil Remedies

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In the criminal justice system, sanctions include criminal punishments and civil remedies. The distinction between them is important, as a criminal punishment triggers a number of constitutional protections. For instance, a criminal punishment that purports to apply retroactively would be an unconstitutional *ex post facto* law. However, as the Supreme Court of Wisconsin has said, "... [I]t is not always clear whether a particular sanction constitutes punishment."[1] Constitutional protections that are relevant to this distinction include the Double Jeopardy Clause, the right to be informed of the maximum potential punishment during a plea colloquy, the right to have all facts increasing a sentence be found by a jury, and the right against self-incrimination.

This issue brief is intended to provide background information that may be helpful as legislators draft bills and consider the potential use of criminal penalties and civil remedies.

INTENTS-EFFECTS TEST

Whether a sanction constitutes criminal punishment is a matter of statutory construction. Courts use a two-part test, often called the intents-effects test, to determine whether a sanction is a criminal punishment.[2]

First, a court looks to the statute's primary function to determine whether the Legislature intended that the sanction be punitive, including whether the Legislature labeled the statute as a civil remedy or as a criminal penalty. For example, when determining whether a monetary sanction is punitive, the Wisconsin Supreme Court considers whether the statute describes the sanction as a fine or forfeiture and gives "great deference" to those labels.[3]

Second, if the court determines that the Legislature did not intend the statute to be punitive, the court then considers whether the sanction is nevertheless "so punitive in form and effect as to transform what was clearly intended as a civil remedy into a criminal penalty."[4] To evaluate form and effect, courts typically look to seven non-exhaustive factors, sometimes called the *Mendoza-Martinez* factors.[5] Those factors are whether the sanction:

- Involves an affirmative disability or restraint. The Wisconsin Supreme Court has also found it instructive whether the restraint is permanent or may be temporary.[6]
- Has historically been regarded as a form of punishment.
- Applies only upon a finding of scienter (knowledge of wrongdoing).
- Will promote retribution and deterrence.
- Applies to behavior that is already a crime.
- May be rationally connected to an alternative purpose.
- Appears excessive in relation to the alternative purpose assigned.

Courts consider these factors in their totality. Even if some factors are present, a court may find that the absence of other factors shows the sanction is not punitive in effect.

EXAMPLES OF SANCTIONS HELD TO BE NON-PUNITIVE

Some examples may be helpful in illustrating the types of sanctions that tend to be challenged and how courts use the intents-effects test. Challenges commonly assert that retroactively applying a sanction violates the Double Jeopardy or *Ex Post Facto* Clauses of the U.S. and Wisconsin Constitutions.

In *Hudson v. United States*, the U.S. Supreme Court considered a claim that administrative monetary penalties and occupational debarment, followed by criminal indictment for essentially the same conduct, violated the Double Jeopardy Clause. The Court held that the administrative sanctions were not intended to be criminal and were not so punitive in effect as to become a criminal penalty because: (1) neither monetary penalties nor occupational debarment have historically been viewed as punishment; (2) debarment is not normally understood as an affirmative restraint; (3) neither sanction came into play only upon a finding of scienter because "good faith" was a statutory consideration for the amount of the penalty to be administratively imposed; (4) the conduct that led to the sanctions was also criminal; and (5) while the sanctions promoted deterrence, they also promoted the stability of the banking industry.[7]

An example from Wisconsin may be found in *State v. Rachel*, where a person was committed as sexually violent under ch. 980, Stats., following a series of legislative changes that included a requirement that persons found to be sexually violent by a court or jury be placed in institutional care. The Wisconsin Supreme Court held that the commitment process was not punitive, so the changes could be applied retroactively without violating the Double Jeopardy or *Ex Post Facto* Clauses. Evaluating the *Mendoza-Martinez* factors, the Court found that while the changes involved an affirmative restraint, the remaining factors were not satisfied and the provisions were "easily assigned to a nonpunitive purpose": treating the person confined and protecting the public.[8]

Financial burdens associated with criminal convictions have also been challenged. *State v. Scruggs* involved a challenge to the imposition of a $250 DNA surcharge that was made mandatory by statute after a person was charged but before she was sentenced.[9] The Wisconsin Supreme Court found that the surcharge was not a punishment (and therefore not unconstitutionally applied) and the Legislature's intent was not to create a fine (which evidences intent of creating a criminal punishment). Regarding effect, the Court found that even though the sanction applies to behavior that is already a crime, it is not punitive in effect because it: (1) does not impose an affirmative disability or restraint; (2) has not historically been considered a punishment; (3) does not require a finding of scienter; (4) does not serve the traditional aims of punishment, retribution, and deterrence; (5) is rationally connected to the increased costs associated with collecting, analyzing, and maintaining DNA samples; and (6) does not appear to be excessive in relation to those costs.[10]

Similarly, Wisconsin courts have held that the following sanctions are not punitive:

- Civil commitments for persons found not guilty by reason of mental disease or defect.[11]
- Lifetime registration for persons convicted of certain sex offenses.[12]
- Lifetime global positioning system (GPS) tracking of sex offenders.[13]
- A $500 surcharge for each image of child pornography "associated with the crime" for which a person is sentenced.[14]
- A city ordinance that prohibits persons convicted of sexually assaulting a child from living within 1,000 feet of a school.[15]

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[1] *State v. Schmidt*, 2021 WI 65, ¶ 22.
[2] *United States v. Ward*, 448 U.S. 242, (1980), *Hudson v. United States*, 522 U.S. 93 (1997), and *State v. Fugere*, 2019 WI 33, ¶ 38.
[3] See *State v. Scruggs,* 2017 WI 15, *State v. Williams*, 2018 WI 59, and *State v. Schmidt*, 2021 WI 65.
[4] *State v. Scruggs*, 2017 WI 15, ¶ 16 (internal citation omitted).
[5] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).
[6] See *State v. Bollig*, 2000 WI 6, *State v. Rachel*, 2002 WI 81, and *State v. Fugere*, 2019 WI 33.
[7] *Hudson v. United States*, 522 U.S. 93 (1997).
[8] *State v. Rachel*, 2002 WI 81.
[9] s. 973.046, Stats.
[10] *State v. Scruggs*, 2017 WI 15. See also *State v. Williams*, 2018 WI 59.
[11] *State v. Fugere*, 2019 WI 33.
[12] *State v. Bollig*, 2000 WI 6.
[13] *State v. Muldrow*, 2018 WI 52; see also *Belleau v. Wall*, 811 F.3d 929 (7th. Cir. 2016).
[14] *State v. Schmidt*, 2021 WI 65.
[15] *City of South Milwaukee v. Kester*, 2013 WI App 50.