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Driving Miss Hazy: Civil Motor Vehicle Infractions*

*Stephen Krüger***

INTRODUCTION

Legislative trickery includes so-called decriminalization of motor-vehicle infractions.¹ **The term "decriminalization" is misleading because it implies removal from the purview of government.** Actually, the tidal flow of motor vehicles and the perambulations of pedestrians remain as minutely regulated after decriminalization as before, and the degree of enforcement is not lessened.

The aim of decriminalization is grafting of civil-law characteristics onto motor-vehicle infractions, but the surgery is selective. In the typical scheme, such as the Massachusetts act discussed in this article, the nature of enforcement by government of traffic laws on streets and highways is criminal. **In courtrooms, government reduces its procedural and substantive burdens to those which are civil. Before and after adjudications, the remedies available to government are both civil and criminal. The benefits of so-called decriminalization accrue to government; the burdens fall on citizens.**

THE BAY STATE

Under Chapter 90C of the Massachusetts General Laws,² nearly every act or omission, contrary to law, which arises from operating a

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** Member of the Palau Bar. Thanks are due to Adam Winter, who brought the Mass. law to the author's attention, and Sandra Kincer, who typed the manuscript.

1. See, e.g., ALASKA STAT. § 28.40.050(d) (1989); ARIZ. REV. STAT. ANN. §§ 38-1071 TO -1080 (SUPP. 1992); CAL. PENAL CODE § 1042.5 (West 1993); COLO. REV. STAT. § 41-4-501 (Aupp. 1992); D.C. CODE ANN. § 40-616 (1991); FLA. STAT. ANN. § 318.14 (West 1992); IDAHO CODE § 49-1502 (1993); IND. CODE § 34-4-32.1 (1992); ME. REV. STAT. ANN. § 171-A (West 1992); MASS. GEN. L. c. 90C (1992); NEB. REV. STAT. § 25-2705 (1992); N.Y. PENAL LAW § 55.10 (McKinney 1992); N.C. GEN. STAT. § 15A-1114 (1992); OR. REV. STAT. § 153.575 (1992); R.I. GEN. LAWS § 31-43-3 (1992); VA. CODE ANN. § 18.2-8 (Michie 1992); WASH. REV. CODE § 46.63.010 (1992).

2. Enacted by Mass. St. 1982, c. 586 § 2. MASS. GEN. L. c. 90C (1992) [hereinafter Chapter 90C] is titled "Procedure for Motor Vehicle Offenses." The chapter has been amended extensively since its enactment.

lity is lower than would be the at issue for another time.

motor vehicle³ is an "automobile law violation." The term includes any violation of any statute, ordinance, by-law or regulation relating to the operation or control of motor vehicles[,] other than a violation (1) of any rule, regulation, order, ordinance or by-law regulating the parking of motor vehicles[,] established by any city or town or by any commission or body empowered by law to make such rules and regulations therein, or (2) of any provision of chapter one hundred and [sic] fifty-nine B.⁴

The genus *automobile law violation* has but one species: *civil motor vehicle infraction*. This is

an automobile law violation for which the maximum penalty does not provide for imprisonment, excepting: (a) operation of a motor vehicle in violation of the first paragraph of section ten of chapter ninety; (b) a violation of section twenty-five of chapter ninety; and (c) any automobile law violation committed by a juvenile under the age of seventeen years who does not hold a valid operators [sic] license.⁵

Though the definitional scheme is incomplete, **the legislative intent was to establish two kinds of automobile-law violations: one civil and the other criminal.** The plan is evident in Section 3 of Chapter 90C. Subsection (A) of Section 3 sets procedures for "a civil motor vehicle infraction";⁶ subsection 3(B) sets procedures for "an automobile law violation that constitutes a criminal offense";⁷ and subsection (C) sets procedures

3. "Motor vehicle" is not defined in Chapter 90C. The term includes "all vehicles constructed and designed for propulsion by power other than muscular [sic] power," subject to several exceptions. MASS. GEN. L. c. 90, § 1. "[M]uscle power" rather than "muscular power" conveys the legislative intent. Similarly, the better phrase is "designed and constructed," because design precedes construction.

4. Chapter 90C, § 1. MASS. GEN. L. c. 159B regulates carriage of property by motor vehicle. The definition of automobile law violation goes on to specify that recreation vehicles, snow vehicles and motorized bicycles are motor vehicles under Chapter 90C, and that motor boats are not.

5. Chapter 90C, § 1. "Civil motor vehicle infraction" is also defined in Mass. St. 1985, c. 794, § 12, amended by Mass. St. 1986, c. 35, § 10 and Mass. St. 1988, c. 202, § 28. Section 12 is uncodified. Whether the Chapter 90C definition impliedly repealed that in Section 12 is an open question. *Boston Housing Auth'y v. Labor Relations Comm'n*, 500 N.E.2d 802, 804 (Mass. 1986) (implied repeal only if inconsistency precludes validity of both statutes).

The first paragraph of MASS. GEN. L. c. 90, § 10 prohibits, with some exceptions, driving by anyone younger than sixteen. MASS. GEN. L. c. 90, § 25 makes it unlawful to refuse to obey certain orders of a police officer.

The phrase "juvenile under the age of seventeen years" suggests that there are juveniles older than seventeen. This is unlikely. The only statutory definition of "juvenile" is a person between seven and seventeen years of age. MASS. GEN. L. c. 111B, § 3 (Alcoholism Treatment and Rehabilitation Law). There is no reason for the cut-off age of seventeen. Cf. MASS. GEN. L. c. 4, § 7, cl. 48 (minor is person under age eighteen); cl. 49 (full age is eighteen); cl. 50 (adult is eighteen years of age or older); and cl. 51 (age of majority is eighteen). "[O]perators license" probably means "operator's license" as used in MASS. GEN. L. c. 90, § 8. See also MASS. GEN. L. c. 90F, § 1 ("driver license" is "a license issued by the commonwealth to an individual to drive a motor vehicle").

The definition of "civil motor vehicle infraction" has a curious feature: All four words of the defined term have initial capital letters. No other Section 1 term appears in that form. Among the other terms which contain more than one word, only the initial word has an initial capital letter. The unique orthography is unexplainable.

6. Chapter 90C, § 3(A)(1), ¶ 1.

7. Chapter 90C, § 3(B)(1), ¶ 1. The only definition of "criminal" in Chapter 90C, § 1 states

for "a civil motor vehicle the occurrence as an auto offense."⁸ This article is tions which have no crim

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8. Chapter 90C, § 3(C), ¶ 1.

9. Chapter 90C, § 3(A)(4)

10. MASS. GEN. L. c. 274.

11. *Commonwealth v. New e.g., N.Y. PENAL LAW § 10.00 (McKinney 1992). Thereunder, which imprisonment or fine is pr are crimes), and violation and t*

12. *Browning-Ferris Indus. Commonwealth v. Hersey*, 85 N 476, 480 (1893) (civil suit for st

13. *Rombola v. Cosindas*, ;

14. Chapter 90C, § 1. The sentence to more substantive la visibly posted in each office of t each district court." *Id.*

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iminal" in Chapter 90C, § 1 states

for "a civil motor vehicle infraction in conjunction with and arising from the occurrence as an automobile law violation that constitutes a criminal offense."⁸ This article is concerned only with civil motor vehicle infractions which have no criminal component.

A Section 3(A) hearing is declared to be "noncriminal,"⁹ but its language (as that of Chapter 90C) abounds with criminal-law terms of art such as "offense," "violation" and "infraction," as well as "fine" and "penalty." A motorist is considered a "violatee;" this term, too, is part of criminal-law terminology.

Neither "offense" nor "violation" nor "infraction" is in the Massachusetts legal vocabulary. An act contrary to law which punishable by imprisonment is either a felony or a misdemeanor.¹⁰ There is no third category of criminal act.¹¹

"Fine" and "penalty" mean amounts imposed by a court, to inflict punishment in the form of monetary deprivation.¹² The amounts of fines and penalties are set by law. In the civil context, the award of the trier of fact is not set by law, for the award depends on the facts.¹³

The statutory term "scheduled assessment" is an unsuccessful fudging of the distinction between a criminal fine or penalty and a civil award. A scheduled assessment is "the amount of the civil assessment for a particular civil motor vehicle infraction, as established jointly by the administrative justice of the district court department and the registrar. A scheduled assessment shall not exceed the maximum assessment or fine established by law for each such violation."¹⁴

The amount of a scheduled assessment is set by law or in accordance

that the word "shall include a delinquency matter under chapter one hundred and [sic] nineteen." MASS. GEN. L. c. 119 is titled "Protection and Care of Children and Proceedings Against Them."

8. Chapter 90C, § 3(C), ¶1.

9. Chapter 90C, § 3(A)(4), ¶1.

10. MASS. GEN. L. c. 274, § 1.

11. Commonwealth v. New York Central & H.R.R. Co., 92 N.E. 766, 768 (Mass. 1910). Cf., e.g., N.Y. PENAL LAW § 10.00 (1)-(6) (McKinney 1992) and N.Y. CRIM. PROC. LAW § 1.20(39) (McKinney 1992). Thereunder, the general term "offense" encompasses all acts contrary to law for which imprisonment or fine is prescribed. Offense includes felony and misdemeanor (both of which are crimes), and violation and traffic infraction (both of which are petty offenses).

12. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 n.6 (1989) (fine); Commonwealth v. Hersey, 85 N.E.2d 447, 454 (Mass. 1948) (fine); Lees v. United States, 150 U.S. 476, 480 (1893) (civil suit for statutory penalty is criminal in nature).

13. Rombola v. Cosindas, 220 N.E.2d 919, 922 (Mass. 1966).

14. Chapter 90C, § 1. The "definition" goes on from the substantive-law provision in its second sentence to more substantive law in its third sentence: "A schedule of such assessments shall be visibly posted in each office of the registry of motor vehicle and in the clerk-magistrate's office of each district court." *Id.*

The setting of assessments is an unconstitutional delegation of the authority of the General Court. MASS. CONST. part 1, art. XXX; Brodbine v. Inhabitants of Revere, 66 N.E. 607, 608 (Mass. 1903). It is unlawful for the legislative act of establishing fines and penalties to be placed in the hands of the executive (the registrar) or to the judiciary (the administrative justice). Certainly, the executive and the judiciary may not act jointly to do that which only the General Court may do.

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90C. The General Court on, corporation, society, mobile law violation."¹⁵ punished by the legislative is found *responsible* for a violator (one who was ac- on). Further, the general violator" to refer, in Section re-adjudication motorists

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as upheld. *Commonwealth v. Mon-* 25 N.E.2d 678 (Mass. 1988). *Commonwealth*, 316 N.E.2d 610, 619 ranted jury trial for "minor"

ss. 1978). scheduled assessment, before or after (other criminal-law term!) for admin- apter 90C, § 3(A)(3), ¶ 2, § 4, ¶ 3.

ray, 541 N.E.2d 323 (Mass. 1989), of both the Commonwealth and the e defendant was found *responsible* by

mination of *not guilty*.²³

By what right does a police officer make a criminal arrest of a motorist for a civil matter such as an alleged civil motor vehicle infraction? There is no doubt that a traffic stop is an arrest within the criminal law. The traffic stop is made as part of the police officer's official duties. The police officer is employed as such; he is assigned to traffic patrol; he wears a uniform; he drives a police vehicle; he uses (if appropriate) a police-owned radar device; and he orders the motorist to halt by force of police authority. The stopping of a motorist by a policeman is, as a matter of law, within the ambit of the Fourth Amendment²⁴ and of Article XIV.²⁵ A motorist who allegedly committed a civil motor vehicle infraction, however, neither committed a crime nor is suspected of having committed a crime, so he may not be arrested.²⁶

Similarly, a civil arrest may not be effected by the Commonwealth for a civil matter such as a civil motor vehicle infraction. Under former practice, civil arrest was a mesne (*i.e.*, an intermediate) process. It was used between the original process, the summons, and final process, enforcement of the judgment.²⁷ Civil arrest was recognized to be a drastic remedy, penal in nature, which was to be used with caution.²⁸ "Owing to the severity of the relief, the courts do not look with favor upon its pursuit, except where it is necessary to protect the interests of plaintiff."²⁹

the clerk-magistrate. The motorist sought *de novo* review by the district court, which also found the him *responsible*. The motorist appealed. The appellate division vacated the finding of district court and dismissed the citation. The town appealed to the Supreme Judicial Court; the Commonwealth intervened, and it, too, was permitted to appeal. The Supreme Judicial Court reinstated the finding of *responsible*. One may conclude from *Reading* that the Commonwealth and the motorist may each appeal a civil-motor-vehicle-infraction case from the clerk-magistrate to the Supreme Judicial Court.

23. *Commonwealth v. Therrien*, 420 N.E.2d 897, 899 (Mass. 1981).

24. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

25. *Commonwealth v. Shields*, 521 N.E.2d 987 (Mass. 1988). MASS. CONST. part 1, art. XIV is independent of the Fourth Amendment. *Commonwealth v. Upton*, 476 N.E.2d 548, 554-56 (Mass. 1985); *cf. Raven v. Deukmejian*, 52 Cal. 3d 336, 353, 801 P.2d 1077, 1087 (1990) (when construing the California Constitution, "cogent reasons" are required to "depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution"; absent "very strong countervailing circumstances," there is "no independent state interest" in additional constitutional protection). *Upton* notwithstanding, it would have been astonishing were the Supreme Judicial Court to have ruled that a stop is *not* an arrest.

26. *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898, 901-5 (1986) (constitutional right to travel throughout the United States); *Florida v. Royer*, 460 U.S. 491, 498 (1983) (absent probable cause or objective and reasonable suspicion of criminal activity, Fourth Amendment prohibits arrest or detention). *Contra*, *Commonwealth v. Shields*, 521 N.E.2d 987 (Mass. 1988) (sobriety checkpoints are constitutional), *but see* Stephen Krüger, *Implied Consent Is Fourth Amendment Fakery*, 45 WASH. ST. B. NEWS 45 (Dec. 1991).

27. *Sunrise Beach, Inc. v. Phillips*, 181 S.2d 169, 171 (Fla. 1965); BLACK'S LAW DICTIONARY 1205 (6th ed. 1990). The common-law writ was *capias ad respondendum*. *Id.*

28. *Burns v. Newman*, 83 N.Y.S.2d 285, 287 (N.Y. App. Div. 1948).

29. *Id.* Civil arrest was also limited because the authority of a court to order an arrest is strictly statutory, and jurisdiction to arrest must comport with the constitutional guarantee against unreasonable seizure. *Silvagni v. Superior Court*, 157 Cal. App. 2d 287, 292, 321 P.2d 15, 18-19 (1958).

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MASS. GEN. L. c. 224, § 13 (1974),
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is used against all — male and female, resident and non-resident; it is not restricted to a contract or tort claim; it is available without regard to the amount of the scheduled assessment; and it does not require proof (let alone clear proof) by the Commonwealth that the motorist is able, but unwilling, to pay the scheduled assessment prescribed for the alleged civil motor vehicle infraction. Not least, **the police officer arrests the motorist without judicial authorization.**³⁵

How does one raise these issues? The key is the civil nature of civil motor vehicles infractions. **The procedural response of a defendant motorist who has a legal grievance against the plaintiff Commonwealth is to file a counterclaim.**

Three counts can be stated: (1) Violation of the motorist's rights under the Fourth, Fifth and Fourteenth Amendments. The statutory basis for the count is 42 U.S.C. § 1983.³⁶ (2) Violation of the rights guaranteed by Articles XI and XIV of the Declaration of Rights. (3) Violation of the Racketeer Influenced and Corrupt Organization Act.³⁷ A RICO count may be stated against the Commonwealth, subordinate governmental units and the judiciary,³⁸ as well as against police forces.³⁹ The count arises from the systematic disruption by police officers of the Commonwealth, its subdivisions and instrumentalities of the right of motorists to unimpeded travel; from the systematic arrests of motorists for civil matters and from the systematic utilization of criminal laws to collect civil penalties.⁴⁰

N.E.2d 313 (Mass. 1946) (writ is foundation of action, and means by which defendant is brought into court).

35. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (issuance of a writ of attachment by clerk of court, without judicial authorization, based on conclusory allegations in affidavit, is unconstitutional); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (approving of writ of attachment issuable only by a judge upon a factual affidavit and posting of bond; immediate hearing after seizure; dissolution of writ absent proof by creditor of propriety of seizure); *Fuentes v. Shevin*, 407 U.S. 67, 8 (1972) (due process violation results from seizure, not from duration of seizure).

A nonpossessory pre-judgment attachment of real property in a civil dispute is subject to the Fourteenth Amendment. *Pinsky v. Duncan*, 898 F.2d 852, 854 (2d Cir. 1990), *aff'd*, *Commonwealth v. Doeher*, 111 S. Ct. 2105 (1991). If it is held that a pre-judgment arrest of a natural person is not of constitutional concern, then judicial destruction of the civil liberties guaranteed by the Constitution will be complete.

36. The constitutional claim may be asserted in a Commonwealth court. *Allen v. McCurry*, 449 U.S. 90, 99 (1980).

37. 18 U.S.C. § 1961 (1988). The count may be heard in a Commonwealth court. *Taffin v. Levitt*, 493 U.S. 455 (1990).

38. *United States v. Turkette*, 452 U.S. 576, 580-81 (1981) (RICO enterprise includes legitimate as well as illegitimate organizations); *United States v. Clark*, 646 F.2d 1259, 1263-67 (8th Cir. 1981) (citing cases showing applicability of RICO to governmental agencies and offices); *United States v. Bachelier*, 611 F.2d 443 (3rd Cir. 1979) (RICO applies to traffic court).

39. *United States v. Lee Stoller Enters.*, 652 F.2d 1313 (7th Cir.), *cert. denied*, 454 U.S. 1082 (1981) (sheriff's office); *United States v. Baker*, 617 F.2d 1060 (4th Cir. 1980) (sheriff and sheriff's office); *United States v. Grzywacz*, 603 F.2d 682 (7th Cir. 1979) (police department and police officers).

40. Act of June 18, 1798, 1 Stat. 566; Act of June 25, 1798, 1 Stat. 570; Act of July 6, 1798, 1

The issues need not wait until trial for determination. The facts, including warrantless arrest of the motorist by the police officer for an act which is neither a felony nor a misdemeanor, are beyond dispute. The validity of the police conduct on the undisputed facts is a legal issue. Therefore, a motion for summary judgment is appropriate.

It is insufficient for the Commonwealth to argue, on the motion, that convenience overrides constitutional guarantees. Though it is convenient for the Commonwealth to arrest motorists who have committed no crime, convenience is a dangerous argument. It is not convenient for the Commonwealth, as prosecutor of criminal cases, to specify the charges. It is likewise inconvenient for the Commonwealth to prepare its case and put on its witnesses, only to have the effort nullified by cross-examination and by the defendant's witnesses. In civil litigation by or against the Commonwealth, it is inconvenient for the Commonwealth to be subjected to discovery; or to present its evidence to the trier of fact, which can find against it. Were convenience the measure of constitutionality, the Alien and Sedition Acts⁴¹ would be the law of the land.

CONCLUSION

Arrests for civil motor vehicle infractions are constitutionally deficient. Government should not be allowed to eat its cake and have it too, when the indulgence in arrests for civil matters is at the expense of the rights of motorists. When the governmental choice is to enforce traffic laws by civil means, the government must allow to motorists all rights which attend upon that choice.

Stat. 577; Act of July 14, 1798, ch. 74, 1 Stat. 596. As to the Alien Acts, see *Johnson v. Eisentrager*, 329 U.S. 763, 744 n.6 (1956); *Perez v. Brownell*, 356 U.S. 44, 82 n.1 (1958); *Gussefeldt v. McGrath*, 342 U.S. 308 (1952). As to the Sedition Act, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 355-57 (1974) (Douglas, J., dissenting); *Watts v. United States*, 394 U.S. 705, 709-12 (1969) (Douglas, J., concurring); *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 155-61 (1961) (Black, J., dissenting).

41. *Peoples Appliance & Furniture, Inc. v. City of Flint*, 99 N.W.2d 522, 529 (Mich. 1959) (civil penalties provided by law may be recovered only in civil actions).

Sex and the A Review of Se

One of the most interesting in *Reason*¹ has nothing to do with sex (it is fascinating, but then it's boring), but the author, one of the superstars—many of them have been compared to the publican control of the festivities to be nominated to sit upon the nation's

There is, of course, Presidents Reagan and Bush but this only explains the Bork.⁶ The Reagan White House Supreme Court when the

* Mr. Calkins is presently a professor of law, Fourth Appellate District, and is writing and researching at Western State University.

1. RICHARD A. POSNER, *SEX AND REASON* (1981).

2. Posner has been a judge on the Seventh Circuit since 1981. As for accolades, consider "could be the most influential legal philosopher of the 1980s," notes, *THE AMERICAN LAWYER*, 1981.

3. See Profile, *L.A. DAILY NEWS*, 1981; Robert Ellickson, a land-use professor at the University of California, Berkeley.

4. President Reagan nominated Justice Bork on July 7, 1987 (withdrew Nov. 7, 1987) and nominated Justice Souter on July 23, 1987.

5. This sort of thing has, of course, happened before and shows, Presidents do not always restrict their choices to those of the public.

6. One might assert that Posner's easy confirmation by the Senate is a confirmation by the *American Lawyer*: "Richard Posner's confirmation by the Senate is a confirmation by the American Lawyer." Headnotes, *Conservative*, 1987.

7. See *supra* note 4.