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Judicial Scrutiny of Prosecutorial Discretion in the Decision Not to File a Complaint

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JUDICIAL SCRUTINY OF PROSECUTORIAL DISCRETION IN THE DECISION NOT TO FILE A COMPLAINT

SAMUEL BECKER

I. INTRODUCTION

While prosecutorial discretion to institute criminal proceedings is subject to judicial review under certain circumstances, it has been recognized that there is no effective procedure for reviewing the decision not to prosecute.[1] Commentators and professional organizations have recognized that due to a lack of review, a risk arises that impermissible considerations may result in decisions not to prosecute, so they have suggested that some form of judicial review should be provided.[2]

The Wisconsin legislature shared this concern and attempted to provide such a system of review by enacting section 968.02 of the Wisconsin Statutes[3] and by repealing section 955.17 of the statutes[4] in a revision of the state criminal code.[5]

The session law which created section 968.02 included a Prefatory Note along with its explicit provisions, committee comments and notes.[6] The pertinent portions state:

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1. Miller & Remington, *Procedures Before Trial*, 339 ANNALS, ACADEMY OF POLITICAL AND SOCIAL SCIENCES 111 (1962).

2. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft No. 1 1966); *The Prosecuting Function, Commentary to Standard 3-2.1* (2d ed. 1980); Vorenberg, *Decent Restraint of Prosecutional Power*, 94 HARV. L. REV. 1521, 1546 (1981); Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209, 234 (1955); Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Statute* 97 YALE L.J. 488 (1987); *see also* State ex rel. Unnamed Petitioners v. Connors, 136 Wis. 2d 118, 144 n.2 and 147 n.5, 401 N.W.2d 782, 789 n.5 and 794 n.5 (1987) (Abrahamsom, J., concurring).

3. WIS. STAT. § 968.02 (1985-86).

4. WIS. STAT. § 955.17 (1967) (repealed 1969).

5. Act of Nov. 25, 1969, Ch. 255, 1969 WIS. LAWS 602 (codified at Wis. Stat. § 968.02 (1985-86)).

6. *Id.* The Prefatory Note in its entirety reads:

PREFATORY NOTE: In 1967 the Judicial Council established a Criminal Rules Committee to prepare a complete redraft of those statutes which deal with procedure in criminal cases. Funds for this project were made available by the legislature.

The Criminal Rules Committee had as its co-chairman [sic], Circuit Judges Herbert J. Steffes, Milwaukee, and Richard W. Orton, Lancaster. The other members of the Committee were County Judge Mark J. Farnum, Beloit, Assistant Attorney General William Platz, Madison, Professor Frank J. Remington of the University of Wisconsin Law School, Professor Michael Hogan of Marquette University Law School, Deputy District Attorney

968.02 ISSUANCE AND FILING OF COMPLAINTS. (1) Except as otherwise provided in this section, a complaint charging a person with an offense shall be issued *only by a district attorney* of the county where the crime is alleged to have been committed. A complaint is issued when it is approved for filing by the district at-

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Ben Wiener, Milwaukee, Attorneys Daniel Flaherty, LaCrosse, David Leichtfuss, Milwaukee, John H. Bowers, Madison and Attorney James E. Hough, Secretary to the Council. County Judges William Curran, Mauston and Warren Grady, Port Washington, served on the Committee for a portion of its work. The Reporter for the revision was Attorney Francis R. Croak, Milwaukee.

This bill represents a complete redraft of the statutes dealing with criminal procedure in the State of Wisconsin. It repeals Chapters 954 to 964 and creates Chapters 967 to 976. The bill attempts to codify statutory and case law in systematic form beginning with the initiation of the criminal process (the issuance of complaints and warrants) and ending with post conviction remedies. Procedural revisions of other states and the federal system have been studied as well as various model acts of such groups as the American Law Institute. Also considered wherever applicable were the recently published reports of the American Bar Association project of minimum standards for criminal justice.

968.01 COMPLAINT. The complaint is a written statement of the essential facts constituting the offense charged. It may be made on information and belief. It shall be made upon oath before a district attorney or judge as provided in this chapter.

NOTE: Restatement of present § 954.02(1) with the additional authorization for a complaint to be sworn to before a district attorney.

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(2) After a complaint has been issued, it shall be filed with a judge and either a warrant or summons shall be issued or the complaint shall be dismissed, pursuant to s. 968.03. Such filing commences the action.

(3) If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. Where the district attorney has refused to issue a complaint, he shall be informed of the hearing and may attend. The hearing shall be ex parte without the right of cross-examination.

Comments: This is a change from the present law designed to give the district attorney a greater voice in the initiating of criminal proceedings. Since his is the obligation of conducting the prosecution it is believed that he should have a voice in the screening out of unfounded complaints and in determining if there was sufficient evidence to warrant prosecution.

Sub. (3) provides a check upon the district attorney who fails to authorize the issuance of a complaint, when one should have been issued, by providing for a judge to authorize its issuance.

Sub. (3) also provides a vehicle for the issuance of complaints when the district attorney is unavailable.

The section is based upon s. 601 of the A.L.I. Model Code of Pre-Arraignment Procedure.

WIS. STAT. ANN. § 968.01-.02 (1969) (emphasis added).

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As a result of these provisions, only the district attorney could issue a criminal complaint, rather than permitting the district attorney or judge to issue a complaint. If the district attorney was unwilling or unable to issue a complaint, a judge could do so upon a finding of probable cause.

The repeal of section 955.17 of the Wisconsin Statutes abolished a practice that had been in effect for almost 100 years. The practice originated with the enactment of section 6, chapter 137, Laws of 1871,[8] following the amendment of article I, section 8 of the Wisconsin Constitution[9] which had eliminated the requirement of a grand jury indictment.[10] The provision was renumbered and re-enacted on several occasions, without change of substance, until its repeal in 1969.[11]

The repealed statute provided that if the district attorney, after examining all the facts and circumstances connected with the preliminary hearing, determined that an information should not be filed, then the district attorney had to file a statement of his reasons, both in fact and in law, for his decision. If the court was not satisfied with the statement of the district attorney, and it so stated in writing, the district attorney was required to file an information anyway.

The Criminal Rules Committee of the Judicial Council was not exaggerating when, in advocating the enactment of section 968.02 and the repeal of section 955.17, it stated "[t]his is a change from the present law designed to give the district attorney a greater voice in the initiation of criminal pro-

7. WIS. STAT. § 968.02(3) (1969) (emphasis added).

8. Act approved Mar. 23, 1871, ch. 137, § 36, 1871 Wis. Laws 201, 210.

9. WIS. CONST. art. I, § 8.

10. *See* State v. Leicham, 41 Wis. 565, 574 (1877).

11. WIS. STAT. ch. 190 (1875); WIS. STAT. § 4653 (1878); WIS. STAT. § 355.17 (1925); WIS. STAT. § 955.17 (1955) (repealed 1969).

ceedings."[12] The new law gave the district attorney the sole authority to file complaints and repealed the authority of the court to reject the district attorney's decision not to file an information. In exchange, section 968.02 retained for the court the discretion to file a complaint on the petition of a complainant if the district attorney was unwilling or unable to do so.

II. PROLOGUE

For almost twenty-five years, the enactment of section 968.02(3) and the accompanying repeal of section 955.17 created no professional or public stir. The attorney general even advised the district attorneys to seek a special prosecutor if the judge authorized the filing of the complaint.[13] Then in October, 1984, a highly publicized incident occurred.

Two professional football players allegedly assaulted a female dancer in a Milwaukee nightclub dressing room. She filed a complaint with the Milwaukee County District Attorney who, after conducting an investigation, decided not to issue a criminal complaint. The District Attorney issued a statement setting forth nineteen reasons for his decision in which he asserted that his decision was not based on the lack of probable cause. Rather, he did not issue a complaint because he did not believe he could prove guilt beyond a reasonable doubt at trial.

Following the district attorney's refusal to issue a complaint, the dancer filed a petition under section 968.02(3) in the Circuit Court of Milwaukee County requesting the assignment of a judge to issue a complaint. A judge was assigned to evaluate the petition.[14]

When the judge closed the proceedings to the public, various newspapers and radio and television stations petitioned the Wisconsin Court of Appeals to open the hearings.[15] After the court of appeals denied their request, the media appealed to the Wisconsin Supreme Court for relief.[16] The supreme court granted the media the sought relief. However, in the course of its decision, the supreme court alerted the parties charged in the

12. 1969 Wis. Laws ch. 255 (Criminal Rules Committee Note for Proposed § 968.02 Stats.).

13. B. BROWN, THE WISCONSIN DISTRICT ATTORNEY AND THE CRIMINAL CASE, 55 (rev. 2d ed. 1977).

14. *In re* K.M.: WISN-TV v. Unnamed Petitioners, No. 85-0172 (Wis. Ct. App. March 1, 1985).

15. State *ex rel.* Newspapers, Inc. v. Connors, No. 85-0155-W (Wis. Ct. App. Mar. 1, 1985) (order denying issuance of supervisory writ); State *ex rel.* WISN-TV v. Connors, No. 85-0149-W (Wis. Ct. App. March 1, 1985) (order denying issuance of supervisory writ).

16. State *ex rel.* Newspapers, Inc. v. Circuit Court for Milwaukee County, 124 Wis. 2d 499, 370 N.W.2d 209 (1985), *reconsideration denied*, 126 Wis. 2d 41, 374 N.W.2d 142 (1985), *cert. denied*, 474 U.S. 1061 (1986).

complaint that the constitutionality of the proceedings could be questioned under the separation of powers doctrine.[17]

Upon remand of the case to the Milwaukee County Circuit Court, the supreme court ordered a hearing on the petition to permit the circuit court to file a complaint after the refusal of the district attorney to do so. The parties to be charged then appealed to the Wisconsin Supreme Court to prohibit the judge from holding the hearing on the separation of powers basis previously suggested by the supreme court itself in the prior proceeding. The resulting relief that the court granted is the subject of this article.

III. THE *CONNORS* DECISION

In *State ex rel. Unnamed Petitioners v. Connors*,[18] the Wisconsin Supreme Court deemed section 986.02(3) unconstitutional as a violation of the doctrine of separation of powers. In doing so, the court asserted that "[u]nder sec. 968.02(3), Stats., executive power is voided and, at the siren call of the legislature, judicial power supersedes the executive discretion."[19]

The court construed the challenged provision to authorize the judiciary to make a *de novo* determination whether to prosecute. It reasoned that the district attorney performed an executive branch function in prosecuting criminal violations and that giving a judge the power to issue a criminal complaint materially impaired the executive function of prosecution, thus violating the separation of powers doctrine, even though the district attorney had refused to prosecute.[20]

However, the supreme court's determination of the issue was erroneous, and its analysis was flawed. It incorrectly assumed that the prosecutorial function constitutionally included the power to initiate a criminal proceeding by filing a complaint. In fact, the state constitution lodged this power in the circuit court, subject to the power of the legislature to prohibit or alter it. The court failed to consider the role and function of the legislature and judiciary in matters of criminal procedure. It failed to distinguish the

17. *Newspapers*, 124 Wis. 2d at 505 n.3, 370 N.W.2d at 213 n.3.

18. 136 Wis. 2d 118, 401 N.W.2d 782 (1987).

19. *Id.* at 141 n.9, 401 N.W.2d at 792 n.9. Section 968.02(3) was enacted by the legislature, not on its own initiative, but at the request of the Judicial Council acting through its Criminal Rules Committee. The Judicial Council acts in an advisory capacity to the supreme court to assist it in performing its duties to regulate practice and procedure in judicial proceedings. *See* WIS. STAT. § 751.12 (1985-86). The supreme court has not hesitated to be guided by the council's advice; *cf.* In the Matter of the Rules Of Criminal Procedure: Sec. 971.20, Stats., 110 Wis. 2d 242, 328 N.W.2d 284 (1983).

20. Blinka & Hammer, *Supreme Court Digest*, 60 WIS. B. BULL. 41, 47 (May 1987).

power to accuse from the power to prosecute, and in doing so overturned a practice "sanctioned by long usage and general recognition."[21]

IV. THE COMMENCEMENT OF CRIMINAL PROCEEDINGS IN WISCONSIN LAW

The authority to initiate a criminal proceeding historically has been a judicial function. It had never been within the authority of the district attorney until the legislature empowered district attorneys to share such authority with the courts in 1945. For more than 100 years of Wisconsin's existence as a political entity — from 1836 to 1848 as a territory and from 1848 to 1945 as a state — the commencement of criminal proceedings was the exclusive domain of the judiciary.

Criminal proceedings in this state traditionally have been initiated either by issuance of a criminal complaint or by grand jury indictment. Our supreme court has recognized both methods as the exercise of a judicial function. The grand jury indictment was so described because the entire proceeding is under the control of the court.[22] The supreme court has similarly described the issuance of a criminal complaint by a judicial officer which brings the proceeding under the control of the court.[23]

The commencement of a criminal proceeding by a magistrate's issuance of a complaint originated in Wisconsin in a statute entitled "An Act to Provide for the Arrest and Examination of Offenders, Commitment for Trial and Taking Bail."[24] These provisions were in force at the time of the

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21. State v. Washington, 83 Wis. 2d 808, 827, 266 N.W.2d 597, 606 (1978).

22. State *ex rel.* Caledonia v. Racine County Court, 78 Wis. 2d 429, 431-34, 254 N.W.2d 317, 319 (1977); Report of Grand Jury: Williams, 204 Wis. 409, 412, 235 N.W. 789, 790 (1931).

23. *Washington*, 83 Wis. 2d at 821-22, 266 N.W.2d at 605 (distinguishing commencement of John Doe proceeding from that of standard criminal action); State *ex rel.* Long v. Keyes, 75 Wis. 288, 44 N.W. 13 (1889). A judicial officer would include a magistrate, a judge of a court of record, a court commissioner or a justice of the peace.

24. 1839 STAT. OF THE TERRITORY OF WIS. 369, §§ 1-2 (1839). Section one provides as follows: "That for the apprehension of persons charged with offences, the justices of the supreme court, of the district courts in vacation as well as in term time, and all justices of the peace, are authorized to issue process to carry into effect the provisions of this statute."

Section two provides as follows:

> Upon complaint made to any such magistrate that a criminal offence has been committed, he shall examine on oath the complainant and any witnesses produced by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any such offence has been committed, the court or justice shall issue a warrant reciting the substance of the accusation, and requirng the officer to whom it shall be directed forthwith to take the person accused and bring him before the said court or justices, or before some other court or magistrate of the county, to be dealt with according to law; and in the same warrant may require the officer to summon such witnesses as shall be therein named, to appear and give evidence on the examination.

adoption of the Wisconsin Constitution in March of 1848. The first state legislature re-enacted these provisions verbatim at its second session on June 10, 1849.[25]

Although the district attorney is mentioned only once in chapters 145 and 146 of the Criminal Code of 1849, and though it may be unclear when the district attorney is required to become involved in the criminal process, section 64 of chapter 10 of the Revised Statutes of 1849 offers some insight. That section provides that if the magistrate so requests, the district attorney must appear for the state and conduct the examination of witnesses at any examination conducted by the magistrate.[26] Such examination included the original ex parte complaint hearing, any bail hearing requested by the accused, and the preliminary hearing at which the accused would be bound over for trial if the magistrate found probable cause to believe the accused guilty.

The district attorney was not entitled to attend such hearings unless the magistrate requested his presence for purposes of advice and assistance. In no case did the district attorney have any part in deciding whether a complaint should be issued.

The reasons for entrusting this authority to issue a complaint to a magistrate rather than to a prosecutor are probably the same as the policy considerations behind the decision of the Wisconsin Supreme Court in *State ex rel. White v. Simpson*.[27] In *Simpson*, the court held unconstitutional the provision of chapter 558, Laws of 1945, which authorized a district attorney to issue a warrant of arrest. The court based its decision on the ground that the district attorney is not the equivalent of a neutral and detached magistrate who may be constitutionally empowered to authorize the issuance of an arrest warrant.

Since the complaint hearing by the magistrate was an ex parte proceeding in which the accused was neither present nor represented, and because there was no cross-examination of the witnesses,[28] placement of this responsibility in the hands of an impartial judicial officer was believed to be more solicitous and protective of the rights of the innocent. The involvement of the district attorney would arise only when the accused was bound over for trial.

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25. *See* WIS. REV. STAT. ch. 145, §§ 1-2 (1849).

26. *See* State *ex rel.* Unnamed Petitioners v. Connors 136 Wis. 2d 118, 165-71, 401 N.W.2d 782, 802-03 (1987) (Steinmetz, J., dissenting).

27. 28 Wis. 2d 590, 137 N.W.2d 391 (1965).

28. *See* State v. McCredden, 33 Wis. 2d 661, 667, 148 N.W.2d 33, 38 (1967).

The provisions of sections 1 and 2 of chapter 145, Revised Statutes of 1849, have been recodified periodically and have remained substantially in unchanged form.[29] In 1945, for the first time under chapter 558, Laws of 1945 which created Wisconsin Statute section 361.02(1),[30] a complaint could be issued by the district attorney, as well as by a magistrate. If a magistrate issued a complaint, he was under a duty to issue a warrant, or later, a summons. If the district attorney issued a similar complaint, he was empowered, but not required, to issue such process. The authority of the district attorney to issue a warrant was repealed after the decision in *Simpson*.[31]

Although the authority to issue a criminal complaint came to be shared by the magistrate and the district attorney in 1945, apparently it was common practice only for the magistrate to issue complaints until 1949. In *State ex rel. Pflanz v. County Court of Dane County*,[32] the court stated that "[p]rior to 1949 . . .the practice was for the magistrate to examine the complainant and his witnesses on oath and to reduce the charge to writing in the complaint if he thought there was probable cause."[33] This practice of taking oral testimony to satisfy the magistrate that probable cause existed was held to meet constitutional standards.[34]

V. THE CONSTITUTIONAL AUTHORITY

The origin and early history of magistrates issuing criminal complaints was recounted in *State ex rel. Long v. Keyes*.[35] In that case, a witness who had been subpoenaed by the magistrate sought a writ of prohibition against the magistrate challenging his authority to issue the subpoena. The state contended that the power of the magistrate in such a proceeding was not judicial, but administrative or ministerial in nature, and therefore was not subject to a writ of prohibition.

The supreme court held that a magistrate proceeding under section 4776, Revised Statutes of 1889, which provided for the issuance of a criminal complaint by a magistrate, was exercising judicial powers not inquisitorial functions. Therefore, the court held that this was a proper case for

29. WIS. STAT. §§ 361.01-02 (1925); WIS. STAT. §§ 4775-76 (1898); WIS. STAT. §§ 4775-76 (1878).

30. WIS. STAT. § 361.02(1) (1945).

31. 28 Wis. 2d 590, 137 N.W.2d 391 (1965).

32. 36 Wis. 2d 550, 153 N.W.2d 559 (1967).

33. *Id.* at 554, 153 N.W.2d at 561.

34. *Id.* (citing State v. Davie, 62 Wis. 305, 22 N.W. 411 (1885) and Murphy v. State, 124 Wis. 635, 102 N.W. 1087 (1905)).

35. 75 Wis. 288, 44 N.W. 13 (1889).

invoking the writ. However, the court denied the writ holding that the magistrate was acting within his powers.[36] In *State ex rel. De Puy v. Evans*,[37] the Wisconsin Supreme Court cited the *Keyes* decision with approval in describing such proceedings as an exercise of judicial powers.[38]

Since the power to issue criminal complaints was within the jurisdiction of circuit courts at the time of the adoption of the Wisconsin Constitution and was not excluded by it, the legislature was constitutionally empowered to confer such power upon the courts by virtue of section 8, article VII of the constitution. This precise issue arose in *Faust v. State*.[39]

In *Faust*, the State proceeded against the defendant under sections 1 to 3, chapter 176, of the Revised Statutes 1858.[40] The defendant contended that the legislature had no authority to confer on magistrates the power to issue a criminal complaint or a warrant of arrest to conduct a preliminary investigation as provided by chapter 176. The court rejected this contention, stating:

> Again it is said by the counsel for the defendant, that under the constitution the legislature had no authority to confer upon judges of courts of record, or court commissioners, the power to issue process for the arrest and examination of persons charged with crimes; and that therefore sec. 1 of ch. 176, R. S. 1858, so far as it confers that power upon court commissioners and judges in vacation, is void. This power was conferred upon the judges in vacation by the revised statutes of 1849, and upon the court commissioners in 1858; and we have no knowledge that the right to do so was ever questioned until the trial of this action. This long acquiescence of courts and the bar in the validity of the law is strong reason for believing that it is not invalid. There is, however, another fact which is conclusive of the right to confer that power both upon the judges and the court commissioners. It will be found that the general statutes of Wisconsin passed in 1839, long before the adoption of our state constitution, conferred this power upon the judges of the courts of record in the territory, to be exercised both in term time and in vacation. This power of arrest and examination of offenders by process issued by the judges of the courts of record in vacation, was a known power, conferred upon and exercised by the judges of the courts of record at the time of the adoption of the constitution of

36. *Id.* at 299, 44 N.W. at 17.

37. 88 Wis. 255, 60 N.W. 433 (1894).

38. *Id.* at 263, 60 N.W. at 435; *see also* State v. Washington, 83 Wis. 2d at 820, 266 N.W.2d at 603.

39. 45 Wis. 273 (1878).

40. These sections were identical to sections 1 to 3 of chapter 145, Revised Statutes 1849.

> this state; and as the constitution of the state does not expressly take from the legislature the right to continue this power, it may, undoubtedly, confer it; and if it can be conferred upon the judges, then, under sec. 23, art. VII of the constitution, it can be conferred upon court commissioners.[41]

Section 8 of article VII provided as follows: "[t]he circuit courts shall have original jurisdiction in all matters, civil and criminal, within this state, not excepted in this constitution, and not hereafter prohibited by law . . . ."[42] This provision was amended in 1977 to read "[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state . . ."[43] No change was intended or effected by this amendment. In any case, the original provision was in force when the challenged provision was enacted in 1969. The language quoted from *Faust* was quoted with approval in *State ex rel. Perry v. Wolke*.[44]

Although the precise issue in *Faust* was the power of a court commissioner to conduct a preliminary hearing, the language and reasoning of the decision sustained the constitutional authority of the legislature to confer the power to issue criminal complaints upon the circuit court. This is justified because the power existed at the time of the adoption of the constitution and was not forbidden by it, and because of the long acquiescence of the bench and bar of its validity.

Since the constitution expressly authorized the legislature to continue this power in the circuit court, in whole or in part, the legislature could deny the power, restrict it or retain it for the court in the limited circumstances specified in section 968.02(3).[45]

The conclusive effect of *Faust* on this issue is buttressed by a series of decisions of the Wisconsin Supreme Court interpreting and applying section 4, article VI of the Wisconsin Constitution. Section 4(1) creates a number of county offices, including the sheriff, coroner and the district attorney among others, but it does not delineate their powers or duties. The court filled this void by holding that the framers of the constitution intended that the named offices should have such powers as were distinctive and characteristic of each office when the constitution was adopted as determined by

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41. *Faust*, 45 Wis. at 275-76.

42. WIS. CONST. art. VII, § 8 (1849, amended 1977).

43. *Id.*

44. 71 Wis. 2d 100, 107-08, 237 N.W.2d 678, 687 (1976).

45. E.B. v. State, 111 Wis. 2d 175, 181-84, 330 N.W.2d 584, 588-89 (1983); State v. Krause, 260 Wis. 313, 319, 50 N.W.2d 439, 442 (1951); *In re* Constitutionality of Section 251.18, WIS. STAT., 204 Wis. 501, 513, 236 N.W. 717, 722 (1931).

reference to the common law and the territorial statutes in effect at that time.

This doctrine was first pronounced in *State ex rel. Kennedy v. Brunst*.[46] In *Brunst*, the court held unconstitutional a statute replacing the sheriff of Milwaukee County as jailor of the county jail with the inspector of the House of Corrections on the ground that it deprived the sheriff of his constitutional power. The court stated:

> Now, it is quite true that the constitution nowhere defines what powers, rights and duties shall attach or belong to the office of sheriff. But there can be no doubt that the framers of the constitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted. Among those duties, one of the most characteristic and well acknowledged was the custody of the common jail and the prisoners therein. This is apparent from the statutes and authorities cited by counsel for the respondent.[47]

Brunst was followed in *State ex rel. Milwaukee County v. Buech*,[48] which sustained the validity of a statute making a civil service law applicable to the appointment of deputies in the office of the sheriff. Referring to *Brunst*, the *Buech* court opined:

> With no disposition to question the doctrine of that case, we do not think it should be extended to the extent here urged. We think it should be confined to those immemorial principal and important duties that characterized and distinguished the office. While, at common law, the sheriff possessed the power to appoint deputies, it was not a power or authority that gave character and distinction to the office. Many other officers as well as sheriffs possessed the power. It was more in the nature of a general power possessed by all officers to a more or less extent and was not peculiar to the office of sheriff.[49]

Brunst was followed again in *Wisconsin Professional Police Association v. Dane County*[50] where the Wisconsin Supreme Court held that the legislature could not constitutionally authorize a collective bargaining agreement which deprived the sheriff of his constitutional authority to select who among his deputies should act as court officers.[51] The court further held that attendance on a court was in the same category of powers inherent in the office of sheriff as running a jail, but it remanded the case to the trial

46. 26 Wis. 412 (1870).
47. *Id.* at 414.
48. 171 Wis. 474, 177 N.W. 781 (1920).
49. *Id.* at 482, 177 N.W. at 784.
50. 106 Wis. 2d 303, 316 N.W.2d 656 (1982) (on by-pass from court of appeals).
51. *Id.* at 317, 316 N.W.2d at 662-63.

court to determine the precise duties of the deputies assigned as court officers.[52] Justice Abrahamson, in her dissent, noted that while the powers and duties distinctive to and characterizing the office of the sheriff are constitutionally immune from legislative interference, such immunity was also applicable to deputies assigned to perform the duties of court officers.[53]

In *Schultz v. Milwaukee County*,[54] the Wisconsin Supreme Court applied the doctrine of *Brunst* to a statute transferring the function of holding inquests from the coroner to the office of medical examiner. The court analyzed the history of the office of the coroner and the territorial statutes in force at the time the constitution was adopted, and decided that the holding of an inquest was not such a distinctive and characteristic feature of the office of the coroner at that time to constitute a constitutional power immune from legislative invasion.[55] However, Justice Fairchild's dissenting opinion disputed the majority reading of the statutory history.[56]

In applying the doctrine of *Brunst* to the office of the coroner, the court noted that the constitution provided for the offices of sheriff and of coroner in the same section.[57] It may be further noted that the office of district attorney is also provided for in that section and that all three offices are involved in the criminal justice system.[58]

Thus, the rule in *Brunst* is applicable to the office of the district attorney. Its application requires the conclusion that the district attorney has no constitutional power to initiate a criminal proceeding by issuing a complaint or otherwise because the office had no such power at common law or under the territorial statutes in effect at the time of the adoption of the Wisconsin Constitution.

When the constitution was adopted, the authority to initiate a criminal proceeding, by complaint or otherwise, was the exclusive domain of the judiciary.[59] The powers and duties of the district attorney were defined in a statute enacted by the first territorial legislature which was in force when the constitution was adopted.[60] That statute provided that the district attorney shall prosecute or defend in all courts of the district to which he is appointed all matters civil and criminal, in which the United States, the

52. *Id.* at 319, 316 N.W.2d at 663.
53. *Id.* at 319-20, 316 N.W.2d at 664 (Abrahamson, J., dissenting).
54. 245 Wis. 111, 13 N.W.2d 580 (1944).
55. *Id.* at 121-22, 13 N.W.2d at 584.
56. *Id.* at 123, 13 N.W.2d at 585 (Fairchild, J., dissenting).
57. *Id.* at 113, 13 N.W.2d at 581 (citing WIS. CONST. art. VI, § 4).
58. WIS. CONST. art VI, § 4.
59. *See supra* text accompanying notes 22-40.
60. *An Act Concerning the Attorney — General and District-Attorneys*, STATS. OF THE TERRITORY OF WIS. at 94 (1839).

territory, the county or township is a party or is interested, and advise the civil officers of the district on any matter of public interest.[61]

The substance of this statute was re-enacted by the first state legislature at its second session on June 10, 1849, as sections 63 and 64 of chapter 10 of the Revised Statutes of 1849. The legislature added a provision that required the district attorney to conduct criminal examinations at the request of any magistrate.[62]

It is undisputed that the district attorney, or the public prosecutor, however named, had no power or authority to initiate a criminal prosecution at common law.[63] In Wisconsin, the common law is defined to include English decisions and statutes in force at the time of the American revolution, as well as customs, usages, legal maxims and principles in vogue in our colonial era or at the time of adoption of the state constitution.[64]

In light of the principles announced in *Faust* and *Brunst*, there is no basis for lodging any such constitutional power in the district attorney based on a concession by the attorney general "that the district attorney is an officer of the executive branch of state government, which branch, under the aegis of the governor, has the duty under the constitution to 'take care that the laws be faithfully executed.' "[65]

The attorney general is a constitutional officer under the Wisconsin Constitution[66] and has been conceded to be an officer of the executive branch.[67] Nevertheless, our state supreme court has consistently held that the powers of that office are only those conferred by the legislature because the constitution so sets forth.[68]

Precisely the same must be said of the district attorney. Article VI, section 4(1) of the Wisconsin Constitution, as interpreted in *Brunst* and its progeny, does not confer on the district attorney any powers the office did not exercise at common law or under the territorial statutes in force at the

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61. *Id.* at § 3.

62. WIS. REV. STAT. ch. 10, § 64 (1849).

63. Goldstein, *History of Public Prosecution*, 3 ENCYCLOPEDIA OF CRIM. JUST. 1286 (S. Kadish ed. 1983); Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME AND DELINQ. 568 (1984); Comment, *The District Attorney — A Historical Puzzle*, 1952 WIS. L. REV. 125, 125 n.1, 126, 137, 138.

64. Menne v. Fond du Lac, 273 Wis. 341, 345, 77 N.W.2d 703, 705 (1956).

65. State *ex rel.* Unnamed Petitioners v. Connors 136 Wis. 2d 118, 123-24, 401 N.W.2d 782, 784 (1987) (citing WIS. CONST. art. V, § 4).

66. WIS. CONST. art. VI, §§ 1, 3.

67. *Connors*, 136 Wis. 2d at 131, 401 N.W.2d at 787-88.

68. *Id.* WIS. CONST. art. VI, § 3 states that the powers of the attorney general should be those provided by law; *see also* Christenson, *The State Attorney General*, 1970 WIS. L. REV. 298, 301 and n. 21.

time of the adoption of the constitution. Nor were any such powers conferred under statutes enacted by the state legislature shortly after the adoption of the constitution.

Moreover, the constitutional duty of the governor to attend to the faithful execution of the laws has never been held to confer on the governor or the executive branch any specific powers not otherwise existing under the constitution. In a seminal opinion, Walter C. Owen, then the attorney general and later a supreme court justice, pointed out that the "take care" clause refers to general and supervisory powers, rather than conferring specific powers not otherwise granted in the constitution.[69] This view is held by a majority of the authorities that have considered the matter.[70] In any case, the general language of the "take care" clause must yield to the specific language of article VII, section 8 and article VI, section 4(1) to deny the district attorney or the executive branch the constitutional power to initiate criminal proceedings.[71]

An equally persuasive ground for denying the effect which the *Connors* majority ascribes to the "take care" clause is found in the decision of *State v. Beno*.[72] The *Beno* court reiterated the analysis which should be employed in interpreting provisions of the Wisconsin Constitution. The court expressed that it will examine: the plain meaning of words; the constitutional debates and practices in existence at the time of the adoption of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law passed following the adoption of the constitution.[73]

The plain language of the "take care" clause is not self-defining and the constitutional debates on this issue are non-existent. On the other hand, the practice in existence at the time of the adoption of the constitution which was set forth in the territorial statute enacted by the first territorial legislature, was adopted verbatim by the first state legislature.[74] Under the principles of interpretation pronounced in *Beno*, the interpretation of the first legislature must be controlling.

None of the cases relied upon by the *Connors* majority in support of the "near-limitless discretion of the prosecutor to charge or not" involve a decision to issue a complaint.[75] Each decision involves the discretionary au-

69. 3 Op. Att'y Gen. 804, 806 (1914).
70. *See generally* 81 C.J.S. *States* § 130 at 565-66 (1977 & Supp. 1987).
71. State *ex rel.* Bond. v. French, 2 Pin. 181, 1 Chand. 30 (1849).
72. 116 Wis. 2d 122, 341 N.W.2d 668 (1984).
73. *Id.* at 675. For the relevant legislation, see *supra* note 25 and accompanying text.
74. *See supra* notes 24-25 and accompanying text.
75. *Connors*, 136 Wis. 2d at 130, 401 N.W.2d at 787.

thority of the district attorney to convene an inquest; to file an information; to decide which persons, crimes or offenses to charge; or generally, to discharge the duty of the district attorney under Wisconsin Statute section 59.47(2) in the prosecution of all criminal actions in his county and the conduct of all criminal examinations when requested by the court.

State v. Karpinski[76] involved the issuance of a complaint by the district attorney, but arose after the statute gave the district attorney sole authority to issue complaints in 1969. The rhetoric in these cases concerning the unfettered discretion of the district attorney to prosecute does not deal with the issue in *Connors*, which is whether the legislature has constitutional authority to determine when the court, rather than the district attorney, may initiate a criminal proceeding by filing a complaint.

The assertion of the majority in *Connors* that "[t]he only limit that Wisconsin has recognized on a district attorney's initial charging discretion is charging that demonstrably violates general standards of equal protection" is belied by the 100 year history of section 955.17 and its predecessors.[77] As noted previously, these statutes empowered the circuit court or judge to reject the district attorney's refusal to file an information if not satisfied with his reasons for failing to do so, and require the district attorney to file an information. The bench and the bar had long acquiesced in this statute.[78] In 1969, the Wisconsin Supreme Court stated that "[i]t appears settled, therefore, in Wisconsin at least, that the prosecutor is subject to the enactments of the legislature."[79] For example, section 955.17 of the Wisconsin Statutes requires a district attorney to state in writing his reasons for not filing an information against a person who has been bound over for trial. If those reasons satisfy the judge, the district attorney endorses "approved" upon the statement, but if the judge finds the reasons insufficient, the district attorney is obliged to file the information and bring the case to trial.[80]

The doctrine of separation of powers forbids any intrusion by one branch of government upon a constitutional power expressly conferred upon another branch. In the case of shared powers, it forbids one branch from unduly burdening or substantially interfering with another branch's exercise of constitutional power.[81] The doctrine of separation of powers does not forbid the legislative abolition, transfer or limitation of a statutory

76. 92 Wis. 2d 599, 285 N.W.2d 729 (1979).
77. *Connors*, 136 Wis. 2d at 130, 401 N.W.2d at 787.
78. State v. Fish, 20 Wis. 2d 431, 437-38, 122 N.W.2d 381, 385 (1963).
79. State *ex rel.* Kurkierewicz v. Cannon, 42 Wis. 2d 368, 380, 166 N.W.2d 255, 261 (1969).
80. *See* State v. Coubal, 248 Wis. 247, 21 N.W.2d 381 (1946).
81. State v. Holmes, 106 Wis. 2d 31, 68, 315 N.W.2d 703, 721 (1982).

power.[82] Since section 8 of article VII of the Wisconsin Constitution expressly empowered the judiciary to initiate criminal prosecutions by complaint and granted the legislature the authority to alter this power, and section 4(1) of article VI of the Wisconsin Constitution did not confer this power on the district attorney, section 968.02(3) cannot constitute a violation of the doctrine of the separation of powers.

Moreover, the challenged provision does not substantially impair, unreasonably burden or frustrate the prosecutorial function whatever its source. It does not diminish the prosecutorial function at all. The provision actually grants the district attorney greater freedom in performing that function than he or she had before its enactment. Considered in connection with the simultaneous repeal of section 955.17, it contradicts the assertion of the *Connors* majority that section 968.02(3) enables the judge to "override and set at naught the district attorney's discretionary declination to prosecute."[83]

In Wisconsin law, the filing of an information is the operative act in the process of prosecuting a felony.[84] It represents the decision to prosecute whereas the refusal to file represents the decision not to prosecute. With the repeal of Wisconsin Statute section 955.17, the decision of the district attorney to decline to file an information is conclusive.

As regards misdemeanors, in which the complaint serves both to accuse and to charge, even if the court files the complaint when the district attorney declines to do so, the district attorney may still decline to prosecute and cannot be compelled to do so.[85] In fact, the enactment of the challenged provision did not change the practice as it existed prior to its enactment, for during the period from 1945 to 1969, the complainant had the option of applying either to the magistrate or to the district attorney to issue a complaint. If rejected by one, application could be made to the other.

If the magistrate found probable cause, either when the complaint was made to him in the first instance or after the district attorney's refusal to issue, it was the magistrate's obligation to issue the complaint and proceed against the accused. If the complaint was made to the district attorney, either in the first instance or after a refusal by the magistrate, the district

82. *See, e.g.*, Scarpaci v. Milwaukee County, 96 Wis. 2d 663, 676 n.9, 292 N.W.2d 816, 822 n.9 (1982).

83. *Connors*, 136 Wis. 2d at 139, 401 N.W.2d at 791.

84. *See generally* State v. Copening, 103 Wis. 2d 564, 309 N.W.2d 850 (1981); State v. Woehrer, 83 Wis. 2d 696, 266 N.W.2d 366 (1978); Pillsbury v. State, 31 Wis. 2d 87, 93, 142 N.W.2d 187, 190 (1966); WIS. STAT. §§ 971.01 - 971.03 (1985-86).

85. 63 AM. JUR. 2D *Prosecuting Attorneys* § 24, at 312 (1984).

attorney had the discretion to decline to issue the complaint, even if he found probable cause.

Section 968.02(3) simply strengthened the authority of the district attorney by providing that complaints could be issued only by the district attorney except where he refused or was unavailable to issue, in which case the court was empowered to do so. This procedure is constitutional because the constitution has preserved the original jurisdiction of the court to initiate a criminal proceeding unless the legislature provides otherwise. In short, the challenged provision does not alter the power to prosecute. It deals only with the authority to accuse which is a traditional judicial function.

Similar considerations make inappropriate a comparison of the prosecutorial functions of the district attorney with those of the United States Attorney. None of the federal cases cited by the *Connors* majority deal with the question of whether a United States Magistrate may issue a criminal complaint without the approval of the United States Attorney. Only *United States v. Cox*[86] contains the language that, as an incident of the constitutional separation of powers, the courts ought not interfere with the discretionary power of the United States Attorney to control prosecution. But even though *Cox* is frequently cited for that language the verbiage is irrelevant.

Cox involved a contempt order against a United States Attorney who refused to prepare and sign an indictment as issued by a grand jury and ordered by the district judge. The applicable federal statute requires that a valid indictment be signed by the United States Attorney.[87] The decision was rendered by an *en banc* court, three of whom decided that the United States Attorney had the discretion to refuse to prepare and sign the indictment, and three of whom decided to the contrary. The swing vote decided that the district attorney must prepare but need not sign the indictment because Federal Rule of Criminal Procedure 7 gave the district attorney discretion to refuse to sign.[88] The quotation cited by the *Connors* majority was taken from the opinion of the judges in the first group.

In fact, however, it is statutory regulation[89] and the administrative direction from the Judicial Conference of the United States, not the constitutional doctrine of separation of powers, which place control over the issuance of criminal complaints with the United States Attorney rather

86. 342 F.2d 167, 171 (5th Cir. 1965).

87. FED. R. CRIM. P. 7(c)(1).

88. *Id.*

89. *Id.*

than the United States Magistrate.[90] Sound principles of administration, not constitutional limitations, justify conceding authority to initiate a criminal proceeding in the federal courts to the United States Attorney, rather than to the United States Magistrate.[91]

VI. SUMMARY

The initiation of criminal proceedings has always been treated as a judicial function in Wisconsin. The prosecutorial function of the district attorney never included the authority to initiate a criminal proceeding until the legislature created it in 1945. The supreme court twice rejected attacks on the constitutional power of the legislature to authorize the court to exercise this function.

For more than 100 years, this power was recognized and accepted by the bench, bar and public officials. For almost 100 years with similar recognition, the court was empowered to reject the district attorney's refusal to file an information and the district attorney was then under a statutory obligation to file one.

Having been empowered by the constitution to confer the exclusive authority on the circuit court to initiate criminal proceedings, the legislature could retain it for the court, deny it or limit it, as it did in the challenged provision. It transferred this exclusive power to the district attorney in the same statute in which it reserved the power for the court when the district attorney declined to exercise it and in which it repealed the authority of the court to reject the district attorney's refusal to file an information.

One must therefore dispute the assertion of the *Connors* majority that "[w]e write upon a clean slate."[92] The author of the decision, Chief Justice Heffernan, was a member of the unanimous court in *State ex rel. Pflanz v. County Court of Dane County*[93] which recognized the authority of the magistrate to file a criminal complaint until 1949. Chief Justice Heffernan also wrote the opinion in *State ex rel. Perry v. Wolke*,[94] which quoted with ap-

90. Legal Manual for U.S. Magistrates ch. 5 (1979) (citing U.S. Judicial Conference Report of 1971)); *See* Manual for U.S. Commissioners 5 (1948); *see also* United States *ex rel.* Savage v. Arnold, 403 F. Supp. 172, 174 (E.D. Pa. 1975) (citing 8 MOORE'S FEDERAL PRACTICE § 305, at 3-7 (1st ed. 1965)); Annotation, *Power of Private Citizens to Institute Criminal Proceedings Without Authorization or Approval by Prosecuting Attorney*, 66 A.L.R. 3D 734 n.7 (1975).

91. Annotation, *Necessity and Sufficiency of Government Attorney's Signature on Indictment or Information (Rule 7(c) of Federal Rules of Criminal Procedure)*, 5 A.L.R. FED. 922, 931-33 (1970).

92. State *ex rel.* Unnamed Petitioners v. Connors, 136 Wis. 2d 118, 136, 401 N.W.2d 782, 788 (1987).

93. 36 Wis. 2d 550, 153 N.W.2d 559 (1967).

94. 71 Wis. 2d 100, 237 N.W.2d 678 (1976).

proval the language of the court in *Faust v. State*,[95] sustaining the constitutionality of the procedure first prescribed by sections 1 and 2 of the Act for the Arrest and Examination of Offenders of 1839.[96] He also wrote the opinion in *State ex rel. Kurkierewicz v. Cannon*[97] which cited section 955.17 with approval.

By limiting attention entirely to the role of the district attorney in prosecution, ignoring his historic absence from the accusatory process and disregarding the role of the legislature and the courts in the initiation of criminal proceedings, the *Connors* decision presents a distorted view of the effect of the challenged provision.

Section 968.02(3) does not unduly burden or substantially interfere with the prosecuting function, whether its source be legislative or constitutional. It does not affect that function at all. The district attorney is still empowered to decline to file an information or in the alternative to proceed with the prosecution. The charging function of the district attorney is unimpaired.

The only function that is affected is the accusatory function of filing a complaint which is legislative in origin. Since this role was conferred by the legislature it may constitutionally be limited as provided in section 968.02(3).

VII. CONCLUSION

This article is not intended to suggest that sound public policy should not recognize the wisdom of entrusting the initiation of criminal proceedings to the prosecutor. Rather its purpose is to show that it is not unconstitutional to subject the prosecutor's decision not to commence such proceedings to the judicial scrutiny contemplated by section 968.02(3).

The courts of some jurisdictions deferring to federal doctrine have based their objections to the validity of the grant of authority to the courts to review such exercise of prosecutorial discretion on the ground that such authority violates the doctrine of separation of powers.[98] However, their constitutional provisions, constitutional histories and subsequent pertinent

95. 45 Wis. 273 (1878).

96. *An Act to Provide for the Arrest and Examination of Offenders, Commitment for Trial and Taking Bail*, 1839 STAT. OF TERRITORY OF WIS. 369, § 102; *see supra* note 21.

97. 42 Wis. 2d 368, 166 N.W.2d 255 (1969).

98. *See* Vorenberg, *supra* note 2, at 1546-47; Note, *supra* note 2, at 489 n.6; *see also* People v. Municipal Court Ventura County, 27 Cal. App. 3d 193, 103 Cal. Rptr. 645 (Ct. App. 1972); Annotation, *supra* note 90, at 732.

decisions differ from ours in Wisconsin.[99] As one critic suggests, there is a substantial difference between restricting judicial review to the limited circumstances set forth in Section 968.02(3) and providing for it in all cases.[100] Besides, those decisions rest primarily on grounds of public policy rather than constitutional limitations.

Under all circumstances, *State ex rel. Unnamed Petitioners v. Connors*[101] should be overruled at the first opportunity and the statute should be amended to permit appellate review of a judge's refusal to allow the issuance of a complaint as recommended by the Wisconsin Court of Appeals in *Gavcus v. Maroney*.[102] If section 968.02(3) is deemed impractical or ineffective, it should be repealed.

99. *See* State v. Beno, 116 Wis. 2d 122, 135, 341 N.W.2d 668, 674 (1984). Our supreme court has admonished us to be guided by our own practices and traditions, not by that of others. *Id.*

100. *See* Vorenberg, *supra* note 2, at 1546.

101. 136 Wis. 2d 118, 401 N.W.2d 782 (1987).

102. 127 Wis. 2d 69, 71, 377 N.W.2d 200, 201 (Ct. App. 1985).