STATE INTERVENTION AND THE CIVIL OFFENSE

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The growth of state interventionism, especially in the post-war era, has been associated with the proliferation of legal innovations. This paper examines the development of novel hybridizations of civil and criminal forms, developed largely to facilitate state regulation. Such hybrids, referred to here as civil offenses, combine civil proceedings, often referred to as prosecutions, with notions of convictions for which penalties are imposed. The advantages accruing to the state from such "ambiguous" forms include favorable standards of proof, rules of interpretation, extending responsibility, retroactivity, suspension of *mens rea*, and a wide array of novel sanctions.

Over the past few years, there has been an explosion of research and theorizing that has examined the impact of monopoly capitalism and the interventionist state on traditional categories, principles, and forms of legal order. Indeed, there is hardly a major feature of law that has not been examined recently in this respect and found to be undergoing major change, if not complete metamorphosis. Thus, the once-clear distinction between private law and public law has been eroded by the interpenetration of state and economy as the state increasingly constrains corporate decision-making and as private corporations become actively involved in the administration and implementation of public policies (Fraser, 1976; Winkler, 1975). Similarly, the field of policing has become progressively transformed as the police function is diversified and dispersed among an array of agencies, some private, others public, some geared to civil regulation, others to criminal, and still others to both (Shearing and Stenning, 1981; Carson, 1980). Even the system of legal remedies and sanctions has seen a blurring of old distinctions. Cohen (1979), for example, argues that the immense array of emerging community corrections often renders it difficult to apply conceptions of punishment or therapy, coercion or persuasion, locked-up or free.

One of the most pervasive themes in work dealing with the effect of burgeoning state interventionism on law has been that

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novel forms of legal order facilitate the expansion and effectiveness of regulation, while simultaneously rendering this expanded control less obtrusive or visible. While this theme is dealt with at length in analyses of the areas noted above, it has been particularly prominent in discussions of innovations in adjudication and dispute resolution (e.g., Heydebrand, 1979; O'Malley, 1983). This emerges most clearly in a recent collection of essays on informal justice (Abel, 1982a), in which informalism is seen as a means of expanding a state's legitimacy and surveillance capacity. Abel (1982b: 270-71), for example, argues that

> Informalism permits this expansion, in the first instance, by reducing or disguising the coercion that both stimulates resistance and justifies the demand for protection of formal due process. . . . The lower level of coercion (whether real or apparent) also obviates the need for the full panoply of procedural and constitutional protections, making it both easier and less expensive to extend control.

Much of this recent work on legal change implicitly recognizes the erosion or collapse of one of the most fundamental distinctions in legal thought and practice, the civil-criminal dichotomy. Yet this issue has received surprisingly little explicit attention from sociologists of law. Carson (1980) has recently argued that sociologists have failed to recognize in the ambiguity between civil and criminal law a subject for sociological inquiry, and have instead treated it as merely a terminological confusion that had to be sorted out conceptually with respect to particular offenses. However, even Carson seems unaware of the extent and significance of this "institutionalized ambiguity" in law, regarding it as a peculiarity of the white collar crime issue. In fact, the blurring of the civil-criminal distinction is increasingly prevalent over a wide range of legal ordering, and legislators and policy-makers are actively exploiting it in order to facilitate and disguise state regulation. In this, they draw on a history of the hybridization of civil and criminal law that reaches well back into the last century but has accelerated dramatically over the past few decades in conjunction with expanding state regulation.

I. STATE INTERVENTION AND THE RISE OF THE CIVIL OFFENSE

While *laissez-faire* capitalism never appeared in any "pure" form, the productive, political, and ideological orders of the 1800s were much more in keeping with the world of competitive

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capitalism than is presently the case. Ideals of competition, acquisitive individualism, and faith in the beneficence of the market and the pursuit of self-interest still dominated the major institutions of the advanced capitalist nations. This has changed, however, as a host of commentators have observed (Atiyah, 1979; Winkler, 1975; Fraser, 1976; Newman, 1981). The growth of massive capitalist corporations and the parallel development of large-scale labor unions have rendered institutional arrangements consistent with competitive individualism obsolete and inadequate. On the one hand, the practices of corporations have such deeply ramifying consequences for all aspects of national order that generalized state intervention in the economic order has become unavoidable. The corporations and the state penetrate each other as the planning and functioning of each becomes more and more interdependent. On the other hand, the scale and organization of labor unions render confrontation in the economy increasingly destabilizing for the whole political economy, thus drawing the state into the sphere of capitalist-worker relations in a fashion that, at least ostensibly, is conciliatory rather than favoring the business sector. With the beginnings of such shifts in the nineteenth century, and the emerging state regulation of the business sector, the inadequacy of purely criminal or purely civil approaches soon became clear.

The civil law was the epitome of the individualistic legal and political philosophy of the early nineteenth century, masking the real inequalities among people under the ideology of formal legal equality. As such, it was poorly suited to controlling newly powerful corporate entities. Access to justice was limited: the individual consumer or worker was too weak to redress widespread inequities and abuses (Glassman, 1962: 39). For example, the doctrine of *caveat emptor* left the consumer without redress since it was almost impossible to prove the fault of the manufacturer. The doctrine of privity of contract inhibited the extension of a manufacturer's liability for harm caused to third parties by negligently manufactured products. The doctrine of assumption of risk ensured that employees injured at work were uncompensated. Under the law of torts, compensation was inadequate, deterrent effects were minimal, and the distribution of loss was inequitable (Veitch and Miers, 1975: 139).

On the other hand, the criminal law was even less efficacious. Traditionally associated with the control of the less

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respectable and poorer classes, it seemed an inappropriate weapon to turn upon the new entrepreneurial classes (Glassman, 1962: 38). Since it required proof of *mens rea*, convictions were difficult to obtain, not only because of the difficulty of locating fault when confronting a large industrial concern but because of the reluctance of the magistracy to label its social peers as criminals (Paulus, 1974: 96; Carson, 1980: 163).

Though in the short term such conditions favored the manufacturing classes, in the long term inadequate legal control could prove disastrous. An economic system that produced an unfit, diseased, discontented, illiterate, and undisciplined work force was an unstable base upon which to build a new social order. The evidence of injury and misery occasioned by poisonous foods, unsanitary living conditions, and oppressive working conditions accumulated. With the intensifying pressure for change from the newly created industrial working class and the humanitarian groups their condition inspired (Gunningham and Creighton, 1980: 154-55), state intervention became almost inevitable. Since the existing civil and criminal laws were inadequate, legislation created new, and perhaps more efficient, forms of legal control.

In the early nineteenth century, at least until the 1870s, there was some awareness of the strategic advantages accruing to regulators from blending civil and criminal law (Carson, 1980; Paulus, 1974: 24). However, it was in the post-World War II era, with the burgeoning of the interventionist state, that there emerged an acute sensitivity to the symbolic and instrumental differences between criminal and civil procedures. This is reflected in continual debate about when it is appropriate to prefer one mode of regulation to the other. The debate recurs in discussions of how to cope with such modern social problems as environmental protection (Marshall, 1975; Morris, 1972), occupational health and safety (Levin, 1977; Glasbeek and Rowland, 1979), corporate crime (*Harvard Law Review*, 1979), consumer protection (Bickart, 1977; Topol, 1975), and trade practices (Hopkins, 1978). Often the debate is resolved not by choosing one pure type but by a willingness to manipulate the differences between civil and criminal procedures for various ends. The *civil offense* is a central facet of this phenomenon.

The term "civil offense" is a paradoxical one that defies precise definition. In the present context it broadly denotes a hybrid legal form in which civil proceedings, often statutorily

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referred to as prosecutions, result (if successful) in convictions for which penalties are imposed. While the term "civil offense" is used in this paper, the hybrid offense goes under several names in scholarly discourse. "Quasi-crime," "public tort," "public welfare offense," "regulatory offense," "administrative crime," "contravention," or "violation" are all terms that have been used, with varying degrees of imprecision, to refer to such hybrids. Indeed, it is the array of innovations that falls under one or other of these rubrics that renders an exact definition impossible. Initially, the form of hybridization was the creation of strict liability offenses, i.e., offenses that could be established without showing *mens rea*. However, subsequent innovations have gone far beyond this limited development. A plethora of new procedures, sanctions, and administrative practices do not fit within the traditional dimensions of the civil-criminal dichotomy.

The hybrid offense has been regarded by many as simply a branch of administrative law. In *Regina v. City of Saulte Ste. Marie*, 85 D.L.R. 3rd 161, 165 (Can. 1978), the Supreme Court of Canada said of regulatory offenses:

> Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application.

This idea is carried to an extreme in the United States, where some administrative agencies have been granted the power not only to enforce and adjudicate, but to impose penalties sometimes subject to only limited judicial review.[1] By 1979 there were some 348 statutory civil penalties in the United States enforced by 27 federal departments and independent agencies (Diver, 1979: 1438). In both the United Kingdom and Australia the longstanding tradition is "that the Executive should have no powers to impose penalties on the citizen without the intervention of the Courts" (Justice, 1980: 25). For this reason, and perhaps for constitutional reasons, there are apparently no agencies authorized to impose monetary penalties. Instead, agencies tend to prosecute offenders through the courts.

[1] See, in particular, *Lloyd Sabardo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 335 (1932); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 329 (1909).

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II. STRATEGIC USE OF THE CIVIL-CRIMINAL HYBRID

Charney (1974: 480) writes that in the United States:

> legislators and prosecutors have tried to devise various methods of circumventing the requirement of providing constitutional protections to criminal defendants. One increasingly popular technique to avoid this duty is to change the labels of the statutes under which individuals are prosecuted from criminal to civil. The defendants then are not tried criminally. Rather, they are subjected to administrative proceedings or civil actions, brought by the agency responsible for enforcement of the statute. In these proceedings the defendants are accorded only the safeguards applicable in civil suits.

Dession (1955: 27) has made the point succinctly: "We still lack any consistently adhered-to objective and operationally formulated set of criteria for distinguishing between 'criminal' and 'civil' sanctions, or between 'sanctions' and 'non-sanctions'. [This] . . . leaves an avenue for evasion of the safeguards of the accused prescribed in any constitution and any code of criminal procedure."

The pressure to pursue the line that allocates fewer rights and thus allows the least resistance is intense and, if the social object is deemed worthy enough, often proves irresistible. The President's Commission on Law Enforcement and the Administration of Justice was open in its preference for techniques that could strengthen the government's hand. Referring to the problem of organized crime, the Commission (1967: 208) recommended an increased use of regulatory techniques primarily because of the lower standard of proof and the greater powers of inspection afforded to investigating agencies. Its call was heeded in 1970 when Congress passed Title IX of the Organized Crime Control Act, also known as the Racketeer Influenced and Corrupt Organizations Act (RICO), which was specifically designed to give the government advantages that it would not have in a criminal case (*Texas Law Review*, 1975: 1055). The Act provided for both civil and criminal action against organized crime. In *United States v. Cappetto* the Supreme Court declined to review a case that upheld the right of Congress to choose *both* civil and criminal proceedings in the regulation of commerce even though the former required a lower standard of proof in relation to acts which, elsewhere in the same Act, were made criminal (*Texas Law Review*, 1975: 1057).

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In Florida a decision was made to combat organized crime through the civil rather than the criminal courts because of the frustration that criminal law enforcers felt when faced with the procedural safeguards of the criminal law. A civil statute was framed with a view to taking advantage of the important procedural and evidentiary standards that would not be available in a criminal case (Cronin and Brassard, 1970: 985-86). Even more explicit recognition of the advantages that accrue to the state by "civilizing" crimes appears in recent moves to introduce RICO-like legislation in Australia. Commenting on the potential of American-style laws in the Australian context, Meagher (1983: 75) has pointed out that

> The wide scope of remedies given to the Attorney-General allows considerable damage to be inflicted on criminal organisations through divestiture, through reorganisation and by prohibiting the employment of certain individuals. The inherent advantages of the civil trial, (including a lesser burden of proof, discovery of documents and witnesses and compulsory testimony) enable the Attorney-General to obtain information about an individual that might be difficult to obtain otherwise. This information becomes public information and need not be relegated to a restricted "intelligence" file. The lesser burden of proof in a civil trial enables the government to take action to "clean up" a bar or hotel frequented by criminals. For example, a nightclub owner who encouraged narcotic dealers to frequent his club and took a share of their profits might be forced to divest himself of his ownership of the nightclub. This remedy may be obtained even if there is insufficient evidence upon which a jury would convict an accused of a narcotics offense.

The comparative advantages of civil and criminal proceedings, with regard to such matters as cost, standards of proof, type of sanction, speed of litigation, and investigatory powers have been the subject of extensive debate. The proliferation of regulatory agencies with responsibility for pollution (Drayton, 1980: 51; Olds *et al.*, 1978-79: 17), consumer protection (Gold and Cohan, 1977: 949), and economic regulation, to name but a few, has focused attention upon the nature and extent of their powers and upon the effect that the granting of broad powers to such agencies has on the balance of power between the state and the individual. The debate is in a state of flux, but as one commentator (*Northwestern University Law Review*, 1973: 568) upon the status of municipal

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ordinances in Illinois has noted in an observation of general application:

> Amid the confusion and uncertainty caused by the lack of legislative or judicial standards in this area, however, one clear pattern has emerged. The choice made between civil or criminal rules always seems to be to the advantage of the municipality and to the disadvantage of the defendant. Municipalities are given the powers of criminal enforcement in ordinance violations without having to provide the defendant with his procedural *quid pro quo.*

III. DIMENSIONS OF HYBRIDIZATION

To a certain extent, this paper thus far has taken for granted the fact that the development of the civil offense has facilitated state intervention. While we have presented illustrations along with statements from legislators and policy-makers which indicate the role that this consideration has had in their decision-making, we have not systematically canvassed the array of advantages involved. In this section we shall attempt to do this by specifying some of the principal dimensions along which hybridization has occurred and focusing on the manner in which changes along each dimension have facilitated state intervention.

Mens Rea

Mens rea refers to the (evil) intent to do a forbidden act. It has traditionally been regarded as an essential feature of the criminal law, indeed as the central feature that distinguishes criminal from non-criminal law. When a crime is created, there is a presumption that *mens rea* must be proved (see *Cameron v. Holt*). In the civil law, by contrast, where compensation is the stated object, the focus is upon the injury to the plaintiff rather than the mental state of the defendant.

The creation and existence of the offense without *mens rea*, the strict liability offense, has been primarily justified by the need for efficiency in the modern regulated age. The Industrial Revolution, it is argued, multiplied the sources of harm and injury to such a degree that safety and related abuses could only be remedied if the requirement of *mens rea* were suspended (Paulus, 1978: 451; Sayre, 1933). The reason is that proof of *mens rea* on a case-by-case basis would require substantial court time and create tremendous pressure on the judicial system, which would, by reason of the immense number of cases, slowly grind to a halt, leaving the public

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unprotected. The efficiency of the system and the vindication of the public interest, it is argued, outweigh the detriment to defendants, who, in any case, suffer only mild sanctions (Sayre, 1933: 69).

The Supreme Court of the United States has recognized both the implications of abolishing *mens rea* and the reasons why a state may urge such action:

> The government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose and to circumscribe the freedom heretofore allowed injuries (*Morissette v. United States*, 342 U.S. 246, 263 [1952]).

Yet *mens rea* has been removed as a protection in many statutes of a penal nature. A striking example of offenses with severe sanctions which have been held not to require *mens rea* is found in Part V of the Australian Trade Practices Act of 1974, which establishes certain rules for consumer protection punishable by maximum penalties of $50,000 for corporations and $10,000 for individuals.[2] The removal of *mens rea* makes the moral status of the offenses unclear (cf. Carson, 1980). This very fact can be used to justify the civil approach. As the Australian Attorney-General commented in the debate on the 1974 Trade Practices Act:

> The nature of the penal provisions are such as to create what are called civil offences rather than criminal offences. . . . We thought it was important not to import the atmosphere of criminality into the commercial area in which offences committed would not be criminal offences but what could be properly described as civil offences (*Comm. Parl. Deb.* [Hansard] Vol. S.61: 985).

Burden of Proof

The distinction between the ordinary civil and criminal standards of proof is a distinction between proof by the balance of probabilities, on the one hand, and proof beyond reasonable doubt, on the other. It is obvious that where a lower standard of proof is required, judgments will be easier to obtain. Legislators have not been slow to recognize this fact, and the civil standard of proof is found in many statutes that threaten

[2] Parliament will soon consider proposals to double these penalties.

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violators with severe sanctions. In the restrictive practices provisions of Part IV of the Australian Trade Practices Act of 1974, where "pecuniary penalties" of up to $250,000[3] can be imposed, only the civil standard of proof is required.

The civil offense strategy has been adopted with some vigor in the United States, where the lower quantum of proof is regarded as being of considerable advantage to the prosecution. In the area of occupational health and safety, civil offenses have been used precisely for this reason. In debating the Occupational Safety and Health Act, which contains these provisions, one senator said of the strategy:

> We did it this way because . . . most of us know how difficult it is to get an enforceable criminal penalty in these types of cases. Over and over again, the burden of proof under criminal-type allegations is so strong that you simply cannot get there, so you might as well have a civil penalty instead of the criminal penalty and get the employer by the pocketbook if you cannot get him anywhere else (Quoted in Levin, 1977: 720).

The same legislative intent was evident in the passing of the RICO Act, which deals with organized crime. Realizing the difficulties of convicting racketeers, aware of the precedent set by anti-trust laws, and with an eye to the President's Commission which recommended the use of regulatory techniques to control the infiltration of business, the United States Congress provided for a range of civil actions that could be decided merely on "the preponderance of evidence." These were alternatives to, or in addition to, criminal actions (Koenig and Godinez-Taylor, 1982: 767-69).

Rules of Interpretation

The desire to avoid the severe, even barbaric, sanctions inflicted upon convicted criminals was one of the reasons for the rule of statutory interpretation which holds that penal provisions are to be strictly construed in favor of the defendant. The traditional rule is stated in *The King v. Adams*, 53 C.L.R. 563, 567-68 (Austl. 1935):

> No doubt, in determining whether an offence has been created or enlarged, the Court must be guided, as in other questions of interpretation, by the fair meaning of the language of the enactment, but when that language is capable of more than one meaning, or is vague or cloudy so that its denotation is uncertain and no sure conclusion can be reached by a consideration

[3] These penalties may also be doubled under proposed legislation.

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> of the provisions and subject matter of the legislation, then it ought not to be construed as extending any penal category.

This principle expresses an attitude toward the creation of crimes and the importance of not labeling as criminal those who in good faith could claim that the behavior they engaged in was not forbidden. Such attitudes can make conviction more difficult and impede the state's regulating efforts. However, this canon of judicial construction has never been a defining characteristic of the civil-criminal distinction. Thus:

> The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences. . . . The rule is perhaps one of last resort (*Beckwith v. R*, 12 Austl. L.R. 333, 339 [Austl. 1976]).

Offenses against the Australian Customs Act of 1901, though generally deemed to be civil, have been held to require the adoption of the approach set out in *Adams*. RICO, by contrast, contains a provision which holds with respect to both civil and criminal proceedings that the Act is to be "liberally construed to effectuate its remedial purposes" (Blakey and Gettings, 1980: 1031, Koenig and Godinez-Taylor, 1982: 771).

Extending Responsibility

The criminal law paradigm rests upon the principle that punishment is personal and should only be imposed upon those who have willfully, or perhaps negligently, inflicted a harm. Liability must therefore not be extended beyond the actor. The civil law paradigm of privately initiated compensatory actions allows a person only indirectly connected with the infliction of harm to be held liable for the consequent damage because, it is said, the civil law is concerned with settling the incidence of loss. Thus, employers may be held responsible for the harmful acts of their employees. Damages are not considered severe enough sanctions to warrant protection from vicarious responsibility. The basis of the modern doctrine is, essentially, economic. Fleming (1983: 339) summarizes a number of the policy reasons:

> Most important of these is the feeling that a person who employs others to advance his own economic

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> interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source for recompense than his servant . . . ; and that the rule promotes wide distribution of tort losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices.

In recent years there has been an explosion of regulatory or civil offenses which, either expressly or by implication, make a master or principal criminally liable for the acts of his servant or agent. The existence of such vicarious liability, whether based on the principle of delegation (Fisse, 1968) or on the attribution of the servant's act to the master (Smith and Hogan, 1983: 149), represents a serious inroad into what was regarded as one of the most basic principles of the criminal law: personal responsibility. It was the emergence of the civil offense that allowed the concept of vicarious liability to reenter the criminal law and extend the basis of responsibility. This extension of responsibility was viewed as non-penal and unrelated to moral guilt and so was thought harmless. If it was acceptable to dispense with *mens rea* in pursuit of the social interest, it was, for the same reason, acceptable to dispense with the requirement of "individual and personal participation as a condition of legal guilt" (Sayre, 1930).[4] Through this device the individualistic, atomistic approach began to give way to a new form of collective responsibility, which this time was enforced by the state. The growth of insurance, of corporations, cooperatives, and unions has dramatically altered the traditional notions of responsibility by changing the assumption that the individual is the basis of society. The development of corporatism, with its emphasis on national economic well-being, means that the welfare of the individual *qua* individual is considered to be less important than the

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[4] Sayre (1930: 716) writes:

> Just as during the eighteenth and nineteenth centuries the growth of industry and the consequent vast increase of business carried on by agents and subordinates necessitated new adjustments in the law of civil liability to meet intensified commercial needs, resulting in a doctrine of *respondant superior* attaching civil liability to a responsible superior even though no authorization or knowledge on his part could be proved so today when the sphere of criminal administration is being extended into commercial fields and widened to include many regulatory and essentially non-criminal matters such as violation of pure food laws, the building laws, traffic ordinances, child labor laws and the like, a similar commercial pressure is making itself felt in the administration of the criminal law. . . . The danger is that criminal courts may forget the fundamental distinctions between criminal and civil liability for another's acts. . . .

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welfare of the individual as a member of a larger community (Winkler, 1975: 47).

Trial by Jury

Trial by jury has always been considered to be the cornerstone in the defense of individual liberty. It has been regarded as "more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives" (Devlin, 1956: 164). Until recent years trial by jury was the standard procedure in both civil and criminal trials. Its decline has been rapid, aided to a large degree by the manipulation of legal labels.

In the United States the right to trial by jury in civil cases is guaranteed by the Constitution. The Seventh Amendment provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by a jury shall be preserved. . . ." However, it has been held that not all civil actions require a trial by jury. Regulatory agencies have been given powers to investigate violations of public rights created by statute, to adjudicate them, and to impose civil penalties. In creating these new public rights, the Supreme Court has decided that it is permissible for Congress to use administrative adjudication without violating the Seventh Amendment (see *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*). Thus, by creating the civil offenses, enforced through administrative proceedings, the Congress can restrict the use of jury trial and smooth the path to the imposition of sanctions (Kirst, 1978: 1281; Levinson, 1980: 825).

In Australia, in the Commonwealth arena, there is a right to jury trial for prosecutions commenced by indictment, but even in criminal cases nothing compels the Commonwealth to proceed by indictment. Hence, for serious offenses such as those under the Trade Practices Act of 1974 or the Customs Act of 1901 trial may take place summarily even though penalties in the former instance, for example, range up to $50,000 per offense.

Retroactivity

Central to the jurisprudence of most contemporary legal systems is the principle *nullum crimen sine lege*, which, narrowly employed, means that no conduct may be held criminal unless it is precisely described in a penal form (Hall, 1960: 28). A corollary of that principle is that penal statutes

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must not be given retroactive effect. As Hall notes, "there has probably been no more widely held value judgment in the entire history of human thought than the condemnation of retroactive penal law" (Hall, 1960: 59). It is enshrined in two sections of the United States Constitution[5] and is deeply embedded in the common law (see *The Queen v. Griffiths*, [1891] 2 Q.B. 145, 148). It is recognized, however, in both England and Australia that Parliament has the power to pass laws with retroactive effect and has done so in the past (see *The King v. Kidman*, *Millner v. Raith*).[6]

The problem of what, if anything, to do about past conduct that is regarded as immoral though legal is most likely to arise where that conduct has wreaked some serious damage to the state. This problem arose in Australia, where tax avoidance and evasion in the early 1980s reached such a degree that not only were the fiscal interests of the state in jeopardy, but the tenuous consensus with respect to the very validity of taxation was seriously threatened.

To legislate retroactive criminal sanctions would be to strike at the center of the legal ethos and would be politically impossible, despite probable public support for revenge against large-scale tax avoiders who, through contrived, artificial, and sometimes fraudulent schemes, fail to pay any taxes at all. However, the creation of retroactive civil liability, with quasi-penal sanctions such as penal rates of interest or excess tax payments, does not carry the opprobrium that retroactive criminal liability does. This was the course adopted by the Federal Liberal government of Australia in its recent taxation legislation which sought to recoup taxes avoided, allegedly because the tax was actually owed. This reasoning is significant since it reveals the importance of civil law symbolism in state practice. The labeling of the liability as civil does not alter the functional effect of the legislation but merely diverts public attention. As Maher (1983: 191) notes:

> "recouping" money said to be owing is not much different from imposing a fine for a criminal offence (though one is called "criminal" and the other "civil"). Both involve a kind of penalty. The principle is the same. If one regards the "evaders" or avoiders as enemies of society in either respect, it does not, of course, matter. But if, as governments allege, it is not a "criminal" procedure, but a means of *restitution*, the

[5] U.S. CONST. art. I, § 9, cl. 3 and § 10, cl. 1.

[6] For examples outside the criminal law field see Maher (1983). All case law, in a sense, operates retrospectively.

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> principle is quite important, although legally the Parliament can be retroactive in either case.

Civil or Criminal: A Choice of Sanctions

At the heart of the legal system lies the sanction, the purpose and ultimate expression of the legal process. Ball and Friedman (1965: 223) write:

> The sanctions (positive and negative) which are available to a legal system range in a continuum from cash grants on one end to death in the electric chair on the other. Historical and social realities dictate the authorization and application of sanctions (criminal and civil) in legal regulations, depending upon the ends to be achieved, the class of persons to be affected, and the behavior sought to be influenced. At every point in the process of choosing and using sanctions questions are raised—moral questions, empirical questions, questions of ends and means.

The ready acceptance of the traditional division of sanctions into civil and criminal has tended to obscure the process of choice to which Ball and Friedman refer. A ready acceptance of the idea that civil sanctions are non-punitive or less onerous has led to the creation of a system where few safeguards are available to a civil defendant. For example, one of the justifications for the introduction of the strict liability offense was that the slightness of the penalty warranted the removal of *mens rea* (Sayre, 1933: 68; Paulus, 1978: 463). In practice, however, civil sanctions, or remedies, cover a wide range of court orders. Civil monetary penalties differ little if at all from criminal fines. Damages, whether compensatory or punitive, are another economic sanction. Treble damages, which clearly have a punitive component, are often provided for by anti-trust legislation in the United States. Civil courts have the power to order the recission, reformation, or specific performance of contracts. They may order the divestiture of property, its restitution, forfeiture, confiscation, or attachment. Corporations may be dissolved by court action, or their corporate franchises may be suspended or forfeited. Civil courts and administrative agencies may restrict the future behavior of individuals and corporations by enjoining certain activities or by issuing cease and desist or discontinuance orders. They may close premises and revoke, suspend, cancel, change, or add conditions to various licenses. They may order that premises or activities be monitored through programs of inspection, they may issue warnings, and they may, in some cases, order people to undergo compulsory education or

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reeducation. In some cases a defendant may be required to publicly correct misleading statements or issue an apology.

The list of civil sanctions presented is large, diverse, and incomplete, but it does give some idea of the possible scope of action available to courts and agencies. It also suggests one major advantage of civil sanctions—their flexibility. An example of the creative sanctions that the civil offense allows is found in the Clean Air Act's (1977 U.S.) mandatory administrative non-compliance penalty, which is a penalty assessed on the capital and operating costs "saved" by a polluter as a result of non-compliance. The range of criminal sanctions is, in comparison, narrow and inflexible.

The fundamental criminal sanctions are death, imprisonment or probation, corporal punishment, and the fine. In addition, criminal statutes may provide for forfeiture of property, release on recognizance, community service orders, restitution, and perhaps the cancellation or suspension of licenses. These latter are usually subsidiary or consequential orders. The list is surprisingly short.

The greater flexibility and range of civil sanctions make them the preferred mode of social control where persuasion, negotiation, and voluntary compliance are viewed as the techniques most likely to achieve desired results. The criminal sanction is thought suitable for the deterrence and punishment of isolated or instantaneous conduct, but the civil sanction is better adapted to cases where continuous surveillance is desired. Thus, it is not surprising that civil offenses figure prominently in the regulation of such matters as pollution, occupational health and safety, consumer protection, and the production of food. All involve ongoing activities. In such areas the definition of civil offenses and the sanctions they provide complement efforts to control behavior through inspections, reports, licensing, and similar techniques. Since the economic impact of civil sanctions may be far greater than the impact of criminal sanctions and since they may be better tailored to the offender's circumstances, they are formidable weapons and valuable bargaining chips. For these reasons there has been a vast growth in the use of the civil sanction in circumstances where, previously, only criminal sanctions would have been considered.

Access to Information

In the civil courts techniques for obtaining information from the opposing side are widely used, for this may be the key

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to victory in an adversary proceeding. The possible sanctions or remedies imposed or granted by such courts as the result of civil litigation are considered too slight to warrant the protection of a party from an act of self-condemnation, despite the fact that some civil sanctions may be far more burdensome than many criminal sanctions.

The criminal law, however, with its perceived severe sanctions, has traditionally prevented the state from requiring persons to incriminate themselves. In the United States the privilege against self-incrimination is enshrined in the Fifth Amendment to the Constitution. One consequence of the privilege is that it is more difficult for prosecutors to secure convictions. Civil offenses limit the circumstances in which the privilege may be claimed. Indeed, record keeping requirements that attach to certain civil statutes or administrative regulations may mean that certain types of information must be routinely offered to authorities and will not be immune to disclosure even in criminal cases. Administrative regulation may carry with it access to information that could be withheld if the state confined itself to criminal modes of regulation.

The situation is similar with respect to searches. Searches seeking information to be used in criminal prosecutions require, in the United States at least, probable cause and often search warrants. Searches to ascertain compliance with administrative regulations or civil statutes often do not require the same level of reasonable suspicion or legal formality. People may be convicted of civil offenses on evidence which, if acquired as part of a criminal investigation, would be inadmissible. Thus, by defining offenses as civil or by giving administrative agencies authority to regulate certain aspects of social life, a legislature may increase substantially the ability of the state to penetrate the private affairs of corporate bodies and individuals who become the targets of state surveillance. Under a host of legislative provisions officials of the state can gain entry into restaurants, shops, schools, offices, factories, and warehouses, transforming private places into public places, rendering people and corporations vulnerable to substantial civil sanctions and, in some circumstances, where the information was not gathered for the purpose of criminal law enforcement, to substantial criminal penalties as well.

IV. CONCLUSIONS

While this paper has attempted to expose the strategic position that the hybridization of civil and criminal forms has

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occupied in expanding state regulation, it is important to recognize that there are contradictory elements involved in the process. On the one hand, hybridization tends to weaken or collapse the civil-criminal dichotomy, while on the other hand, the viability of this process depends upon the symbolism of civil law and hence upon the preservation of the dichotomy. In particular, civil law imagery plays a key role in disguising the expansion of state control and the imposition of sanctions. Hence, while hybridization is likely to continue, it does not necessarily follow that the ideological distinction between civil and criminal law will slide into oblivion. Indeed, the continuing importance of specifically *private* actions in civil law is recognized in areas such as press regulation where direct state intervention, even via civil or hybrid forms, would create major ideological crises (O'Malley, 1982). In such instances, we see what Winkler (1975) refers to as "mediated control"—the delegation of control functions by the state to autonomous or "private" sources. With respect to the law of libel, it has been argued that

> state policy with respect to civil law exists in setting the scope of social relations and the forms of social action which may be exposed to litigation. In so doing it opens or closes opportunities for private individuals to inflict financial penalties on parties which contravene what thereby become legally enforceable standards (O'Malley, 1982: 333).

Insofar as the state permits private individuals to sue for damages, it delegates regulatory authority over behavior which, since it is actionable at law, is implicitly a deviation from some preferred pattern. In this respect private plaintiffs, despite their autonomy, act as agents of the state. Indeed, their effectiveness as surrogates for the state derives directly from the voluntary and independent—"private"—nature of their decision (O'Malley, 1982: 335). Now if this argument is correct, it has at some level been true for as long as the civil-criminal dichotomy itself has been extant. However, the explicit acknowledgment of the regulatory aspects of "private" civil actions by state legislators, policy-makers, and the judiciary appears to be a relatively recent and increasingly common phenomenon that is often associated with hybridization strategies. This relationship is explicitly recognized in a number of court decisions in the United States that relaxed traditional limitations on standing in part because the litigants who sought standing would be serving as "private attorneys general" (*J.I. Case Co. v. Borak*; Sunstein, 1982). Congressional

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recognition of this relationship is also evident in recent United States statutes that reverse the usual practice in that country by providing that in certain types of litigation prevailing plaintiffs will receive their attorneys' fees from defendants. Interestingly, this applies even when the defendant is the government, which suggests that Congress is willing to rely, in part, on private action to ensure that government bureaucrats comply with the law. In his comments upon the regulatory advantages of RICO-like legislation, Meagher (1983: 76) notes that:

> By providing for triple damages the civil provisions provide a strong incentive to sue. Aside from the obvious desirability of compensating the victim, they have a hidden advantage. There is no additional taxing of government resources (through the use of government lawyers) involved in inflicting economic "punishment" on a person who has been involved in racketeering activities. All private civil actions are taken by the use of lawyers in private practice.

In the same vein, the United States Congress in 1980 amended the Clayton Act, an anti-trust law, which includes a provision (§ 5(a)) stating that a judgment for the government in an anti-trust suit constitutes *prima facie* evidence in subsequent private suits, by adding that the provision was not to be construed as limiting the application of collateral estoppel (Thau, 1982: 1098).

Thus, we see that to some extent both private law and criminal law have been co-opted by modern corporate states regulating in the "public interest." While the effect of this is to institutionalize ambiguity in many areas of law, we are not necessarily about to witness the total collapse of the dichotomy. As we have already noted, the obliteration of the civil-criminal distinction would seriously undermine what are currently major incentives for the adoption of hybrid forms that incorporate civil procedures and nomenclature. In the face of this, what appears to be occurring is a set of practices that manage this contradiction by emphasizing the symbolic aspects of the distinction, while in practice eroding important differences. The distinction between the civil and the criminal is for the moment further preserved by the adaptation of civil forms, such as the "private" civil action, for novel, public purposes.

In the longer term, this blurring of longstanding distinctions may well result in the demise of the civil-criminal dichotomy, as the new hybrid forms begin to develop their own

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symbolic meanings and modes of legitimation. Indeed, this process is already well under way, notably with respect to the expanding conception of "public purposes," which is the justification for many of the contemporary changes outlined in this paper. As Winkler (1975) noted almost a decade ago, emerging corporatist legality is legitimated increasingly in terms of its social effects, rather than in terms of its formal procedures. Substantive justice displaces formal justice not only as a mode of legal thought but also as the basic justification for the exercise of state power (Weber, 1954). As public purpose displaces due process in the hierarchy of legitimations of law, the significance of legalistic distinctions, such as the criminal-civil dichotomy, must be expected to wither accordingly.

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