CIVIL AND CRIMINAL DIVIDE

The structure of the American legal system presupposes a clear distinction between civil and criminal wrongs in that the system provides distinctive legal processes and distinctive legal responses to the two kinds of wrongs. The clearest, strongest version of the civil/criminal distinction goes something like this: A civil action is brought by a private, injured party to seek compensation for an unintentional harm unlawfully caused by another party, whereas a criminal action is brought by the state to punish a defendant for a deliberate offense against the community. Civil actions are pursued in civil courts and are governed by rules of civil procedure and by a few special constitutional provisions relating to civil cases, whereas criminal actions are pursued in criminal courts and are governed by rules of criminal procedure and by a larger number of special constitutional provisions relating to criminal cases. Civil actions give rise to distinctive civil remedies like money damages or injunctions, whereas criminal actions give rise to distinctive criminal punishments like imprisonment or the death penalty.

As is the case with most generalities, in law and everywhere else, there is some truth to the clear, strong version of the civil/criminal divide, but the reality is much less clear and much more complex. Moreover, throughout the twentieth century, the movement was consistently away from clarity and toward complexity, even confusion, of the civil/criminal distinction. This destabilization of the distinction has taken place on both a conceptual and an institutional level; that is, the theoretical rationales for the distinction have been called into question, and the institutional structures that promoted the distinction have been altered. This entry will explore the many ways in which the clear, strong version of the civil/criminal distinction needs to be qualified and offer some explanations for the acceleration of these qualifications in the recent past.

Before "destabilization" of the civil/criminal distinction

To speak of the "destabilization" of anything is to imply that there was a time of stability. In the case of the civil/criminal distinction, this would be a somewhat misleading implication. The distinction between criminal and civil wrongs, and the nature of the processes used to address them, have never been static, but rather have continuously changed over time, often dramatically. For example, in Roman law, often cited by contemporary legal scholars as evidence of the ancient pedigree of the civil/criminal divide, robbery and theft were classified as (private) torts rather than as the (public) crimes we now consider them. And in early English common law, the civil/criminal distinction was neither a distinction between two intrinsically different wrongs, nor a bifurcation of procedural regimes, but rather was reflected in a choice among writs, of which there were at least four, that could be pursued by a victim of a wrong or by officers of the Crown. It was not until the mid-eighteenth century that any systematic defense of a civil/criminal distinction in English law was offered—by William Blackstone in his enormously influential *Commentaries on the Laws of England*, initially published as a series of lectures between 1765 and 1769, and now known simply as Blackstone's *Commentaries*. Blackstone divided English law generally into "private wrongs" and "public wrongs" and in turn divided legal sanctions into compensation (for private wrongs) and punishment (for public wrongs). Blackstone was the first to bifurcate the law into two such clearly distinct systems.

Despite this checkered history, the civil/criminal distinction was established enough by the time of the founding of the American republic to be written into the federal constitution—not once, but many times. The framers of theU.S. Constitution clearly did not find the distinction particularly ambiguous, because they made reference to it in numerous places throughout the Bill of Rights without feeling any need to explain what constituted, for example, "criminal cases" for purposes of the Sixth Amendment, "self-incrimination" for purposes of the Fifth Amendment, or "punishments" for the purposes of the Eighth Amendment. Early American judicial cases, too, assumed a sharp and knowable divide between the realms of civil and criminal law. For example, many American common law courts rejected early claims for "punitive" damages in civil tort cases, relying upon a clear distinction between the intrinsically punitive function of the criminal law and the intrinsically compensatory purpose of civil law. Asked one such court, "How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies?" (*Fay v. Parker,* 53 N.S. 342, 382 (1873)). While punitive damages eventually were accepted as part of the American tort system, courts throughout the nineteenth and early twentieth century continued to speak with assurance about the clear distinction between "criminal prosecutions" and "the enforcement of remedial sanctions," as the U.S. Supreme Court did as late as 1938. (*Helvering v. Mitchell,* 303 U.S. 391, 402 (1938)).

Current blurring or "destabilization" of the civil/criminal distinction

Despite such confident pronouncements of the clarity of the civil/criminal distinction, and despite the ease with which lawyers can delineate (or at least recognize) the clear, strong version of the distinction, even casual observers of the current U.S. legal regime would note at least the following five obvious qualifications.

First, the notion of civil actions as "private" and criminal actions as "public" is most clearly challenged by the many instances in which the government is cast in the role of plaintiff in civil suits. Starting with the New Deal policies of the 1930s, accelerating in the second half of the twentieth century, and continuing to the present, the federal government has been cast in the role of enforcer of a growing body of regulatory law, and this enforcement often takes the form of "civil enforcement actions" by government agencies against individuals or entities. For example, federal agencies such as the Environmental Protection Agency (EPA) and the Security and Exchange Commission (SEC) often bring civil suits, either alone or in conjunction with criminal charges, in order to address violations of extensive federal regulatory regimes in their areas. Such lawsuits challenge the paradigm of the civil suit initiated by a private party to redress individual injury. In addition, the government is also styled as a civil plaintiff when it seeks a delinquency determination against a wayward youth or when it seeks a civil commitment order against someone thought to be mentally ill and dangerous. Such cases demonstrate conclusively that civil lawsuits are not only an avenue of private redress, but also an important mode of governmental regulation.

The flip side of this qualification is the growing role of private parties in criminal actions. The victim's rights movement has called for a greater voice for individual victims in prosecutorial decision-making in criminal cases. The movement seeks rights for victims to be notified about the progress of criminal cases, to be present at all judicial proceedings, to have

a say in plea bargaining, and to be heard at sentencing. This call for growing participation by victims in the criminal process necessarily qualifies the concept of a criminal action as a wholly public one brought by the state on behalf of the collective; rather, it seeks to render the criminal process also as a mode of private redress or retribution on behalf of individual victims.

Second, and relatedly, the strong version of the civil/criminal distinction is likewise challenged by civil remedies that look "punitive" and by criminal punishments that look "remedial." As some early nineteenth-century courts recognized, "punitive" damages—civil awards beyond the amount necessary to make a plaintiff whole—are meant to deter future offenses rather than to compensate plaintiffs for injuries. The acceptance of punitive damages in the American tort system thus sits uneasily with the distinction between compensatory and retributive justice upon which the strong version of the civil/criminal distinction relies. Similarly, the growing use of civil fines and forfeitures by regulatory enforcement agencies as well as the growing use of civil forfeiture by ordinary criminal enforcement agencies, especially in drug cases, have begun to create what some scholars have called a "middle ground" between civil and criminal sanctions. In this middle ground, governmental agencies use putatively "civil" sanctions in ways that parallel, often intentionally, criminal punishments, with the goal of deterrence paramount, and the goal of compensation secondary or nonexistent. Similarly, the use of noncriminal incarceration for juveniles and the dangerous mentally ill likewise imports nonremedial goals into the civil justice system—this time incapacitation or rehabilitation—in settings that are strongly reminiscent of prisons. On the flip side, it is not unusual for criminal courts to order, as a part of a criminal defendant's punishment, that the defendant make restitution to the victim. The victims's rights movement urges greater resort to such awards, just as they urge an enhanced procedural role for victims in criminal cases. This use of the criminal justice system to promote compensation, like the use of civil sanctions to deter or incarcerate, must qualify the purported bright line between civil remediation and criminal punishment.

Third, the strong version of the civil/criminal distinction sees civil wrongs as unintentional, primarily negligent, while criminal wrongs are intentional, the product of a *mens rea* or "guilty mind." Once again, while this generalization contains some truth, there is more overlap in culpable mental states in civil and criminal cases than the strong version suggests. The general tort standard is one of negligence—that is, failing to act as a reasonable person would act under the circumstances, whether or not the harm caused was inflicted intentionally or unintentionally. Moreover, American tort law permits a fair amount of "strict liability"—that is, liability without regard to any fault at all, such as manufacturer's responsibility for faulty products even when they acted reasonably in producing and distributing them. But in addition to these standards of negligence and strict liability, American tort law also contains a substantial category of "intentional" torts, which require a more culpable mental state and thus move closer to the criminal category of mens rea. As for criminal cases, in general it is true that ordinary tort negligence is commonly deemed insufficient for criminal liability. Most criminal statutes that use negligence as a culpable mental state rely on the common law concept of *criminal negligence*, which denotes a greater deviation from reasonableness than mere tort negligence. Criminal negligence is often described as "gross" or "wanton" negligence; the Model Penal Code describes it as a "gross deviation" from the standard of care that a reasonable person would observe (MPC § 2.02 (2) (d)). However, while disfavored, ordinary tort negligence is occasionally incorporated into criminal statutes.

Moreover, even strict liability is no stranger to American criminal law. The doctrine of felony murder, which treats even unintentional killings during the course of a felony as murders, is the oldest and most famous form of strict criminal liability. But the twentieth century also saw the proliferation of so-called public welfare offenses, in which strict liability criminal sanctions are imposed for various kinds of unintentional regulatory offenses like the mislabeling of drugs or the adulteration of food offered for sale. Thus, there is no clear or absolute demarcation between the mental states sufficient for civil as opposed to criminal liability.

Fourth, the strong version of the civil/criminal distinction posits two distinct procedural systems, one for civil cases and one for criminal. Once again, there is a general truth here that needs to be qualified. It is true that there are separate rules of procedure for civil and criminal cases and that the federal constitution and most state constitutions contain a fairly long list of special procedural rights reserved for criminal cases, such as the protection against double jeopardy, the prohibition of ex post facto laws, the burden of proof beyond a reasonable doubt, the provision of free legal counsel, the exclusion of unconstitutionally seized evidence, the privilege against self-incrimination, and the proscription of cruel and unusual punishments and excessive fines. But some putatively civil suits have been held to require some or all of the special procedural regime reserved for criminal cases. Two paradigmatic examples: The Supreme Court held that a putatively civil statute imposing the sanction of forfeiture of citizenship in fact constituted punishment that required the application of the entire special criminal procedural regime in the federal constitution (*Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963)). In addition, the Court held that juvenile delinquency proceedings must receive almost all of the special constitutional criminal procedural protections with the exception of trial by jury (*In re Gault,* 387 U.S. 1 (1967)). Beginning in the late 1980s, there has been an explosion of litigation about whether civil fines and forfeitures or new forms of incapacitative incarceration are subject to any or all of the special criminal procedural protections. (See, e.g., *Kansas v. Hendricks,* 521 U.S. 346 (1997), holding that the double jeopardy prohibition does not apply to the indefinite civil commitment of "sexually violent predators" after the conclusion of their prison terms; *United States v. Ursery,* 518 U.S. 267 (1996), holding that the double jeopardy prohibition does not apply to civil forfeitures imposed in addition to criminal punishment; *Austin v. United States,* 509 U.S. 602 (1993), holding that the Eighth Amendment's prohibition of excessive fines applies to civil forfeitures that are "punitive"; *United States v. Halper,* 490 U.S. 435 (1988), holding that the double jeopardy prohibition does apply to noncompensatory civil fines imposed in addition to criminal punishment.) This litigation explosion has led a number of scholars to urge a procedural "middle ground" to accompany the "middle ground" of sanctioning that lies between "pure" civil and criminal sanctions.

Fifth and finally, the strong version of the civil/criminal distinction suggests that the two sorts of wrongs give rise to distinctive legal responses, with money damages being the paradigmatic civil remedy and imprisonment being the paradigmatic criminal punishment. At an earlier time in American history, before the widespread use of incarceration, criminal penalties were distinctive in that they were usually capital or corporal. However, the nineteenth century saw the waning of the gallows, the whipping post, and the stockade, and the concomitant growth of prisons and monetary fines as the predominant forms of criminal punishment. These forms of punishment are not as distinct from civil remedies because incarceration is widely used as a civil restraint (for juvenile delinquents, pretrial detainees, pre-deportation detainees, and the civilly committed), and monetary payouts are ubiquitous in

the civil system as either damages or fines. Thus, there is more overlap between criminal and civil sanctions than the strong version of the distinction would recognize.

In sum, the clear, strong version of the civil/criminal distinction is only generally or approximately true; it must be qualified by important overlaps—overlaps that are largely, though not exclusively, the product of the twentieth century.

Explanations for the current blurring or "destabilization" of the civil/criminal distinction

Of course, one would be hard pressed to find many bright-line distinctions, in law or elsewhere, that can be maintained with absolute clarity. The complexity of the world in general, and the legal world in particular, demands a certain degree of flexibility, particularly in sharp, binary divisions. However, the fuzziness at the edges of the civil/criminal distinction has definitely been increasing, and at an accelerating rate, throughout the last century and particularly throughout the last few decades. The causes of this accelerating increase are themselves complex and inter-dependent. They can usefully be divided into conceptual and institutional challenges to the civil/criminal distinction, each of which, in turn, has promoted and reinforced the other.

The two most significant conceptual or intellectual challenges to the civil/criminal distinction have their roots in the nineteenth century, but have become much more influential in the last two to three decades. The first big conceptual challenge has been the growing dominance of consequentialism or utilitarianism in legal thought—what has come to be known in recent times as "law and economics." Economic analysis of law has fundamentally recast the nature of civil and criminal sanctions in a way that portrays them as related parts of a unitary scheme of state control of private behavior. The clear, strong version of the civil/criminal distinction would make a sharp distinction between (private) compensatory justice and (public) retributive justice. However, the advent of utilitarianism and its application to jurisprudence in the eighteenth and nineteenth centuries—beginning with the famous work of Jeremy Bentham and Cesare Beccaria—led to a reconception of the civil sanction as forward-looking in addition to backward-looking, able to shape future choices through deterrence in addition to restoring some preexisting status quo. At the same time, economic analysis of criminal law also emphasized its deterrent function, in addition to its nonconsequential justification in placing blame and giving offenders their "just deserts." Indeed, the strong economic view of criminal law would reject the moral dimension of the criminal law altogether and conceptualize it as entirely derivative of civil law, offering a sanction when civil remedies are unavailing, primarily in the case of insolvent defendants. Economic analysis of law thus portrays civil and criminal law not as separate or independent, but rather as complementary means of promoting a unitary system of "optimal sanctioning." This convergence on deterrence as the unifying rationale of civil and criminal law presents a compelling intellectual challenge to the traditional civil/criminal distinction.

The second big intellectual challenge to the civil/criminal distinction has come not from economics, but rather from the cognitive and behavioral sciences. Just as economic analysis of law has blurred the distinction between civil penalties and criminal punishments with its focus on deterrence in both the civil and criminal contexts, so too the developing science of human behavior has made less salient the distinction between treatment and punishment with

its increasing emphasis on incapacitation (rather than rehabilitation) in both the civil and criminal contexts. In the nineteenth century—the century of the invention of the prison, the asylum for the mentally ill, and the home or school for the juvenile delinquent—there was widespread belief in rehabilitation as a plausible goal of all types of incarceration, though in quite different ways. Prisons were thought to have the potential to rehabilitate offenders through silence, work, discipline, and penitence (hence the name "penitentiary"). Prisoners were to wear degrading uniforms (the prisoner's "stripes"), walk in lockstep, and work, eat, and pray in silence. On the other hand, asylums for the mentally ill were thought to rehabilitate through a model of medical "treatment" and "cure," and homes or reform schools for juvenile delinquents were thought to rehabilitate by providing a family surrogate (hence the name "home"). The twentieth century saw a waning of this confident faith in the malleability of human character and behavior, especially by governmental intervention with such "total institutions" as the mental hospital, the juvenile home or reform school, and the prison. This waning of faith led to the widespread deinstitutionalization of the mentally ill in the 1960s and 1970s and to a de-emphasis on rehabilitation for those among the mentally ill who remained incarcerated. At the same time, the goal of rehabilitation was also de-emphasized for juvenile delinquents and for incarcerated prisoners of the criminal justice system. Instead, all of these institutions—the putatively "civil" institutions of mental hospital and juvenile home or reform school, and the "criminal" institution of prison—all emphasized a common goal: protecting society by incapacitating the "dangerous." In the twentieth century, it thus became less compelling to distinguish the "mad" in need of treatment from the "bad" in need of punishment; rather, it was more important to identify the "dangerous" in need of segregation. This convergence on dangerousness as the key determinant of incarceration parallels the convergence on deterrence as the key rationale for sanctions; both convergences threaten the idea of separate and distinct civil and criminal realms.

These two conceptual or intellectual shifts have been paralleled by two major shifts in the structure and uses of legal institutions. First, the twentieth century saw unprecedented growth in what has come to be known as "the administrative state"—the regulation of vast spheres of life by administrative agencies, which often have broad sanctioning authority that is both civil and criminal. This organizational structure challenges the civil/criminal distinction in two ways: it casts the government in the role of civil plaintiff as a regulatory strategy, and it merges civil and criminal authority in a single administrative unit. This structure thus reinforces the deterrence theory that is one of the primary conceptual challenges to the civil/criminal distinction and is, in turn, reinforced by that theory. Second, existing forms of "civil" incarceration have come to resemble much more the dominant form of "criminal" incarceration—the prison. In the 1970s, the juvenile justice system saw a shift away from indeterminate, rehabilitative commitment of delinquents, toward determinate, graduated commitments graded according to the seriousness of the juvenile's offense. In addition, during the last few decades, legislatures have made it progressively easier to commit juveniles to long periods of incarceration and to try juveniles as adults in criminal court. On the mental health side, legislatures have progressively narrowed the scope of the insanity defense, and some jurisdictions have even formally authorized verdicts of "guilty, but mentally ill" in order to ensure the long-term incarceration of those among the mentally ill who demonstrate their dangerousness through the commission of serious crimes. In addition, numerous jurisdictions have created new forms of "civil" incarceration to incapacitate dangerous offenders who might otherwise escape long-term criminal custody. The most common example of this development is the recent resurgence of interest in the civil

commitment of sex offenders, especially of those who are about to be released from criminal confine, as reflected in "sexually violent predator" statutes like the one upheld by the U.S. Supreme Court in *Kansas v. Hendricks*. These doctrinal and institutional trends subordinate the distinction between "mad" and "bad" to the need for protection from the "dangerous."

These trends thus reinforce—and are reinforced by—the conceptual change in perceptions about the possibility of rehabilitation.

The future of civil/criminal distinction

The conceptual and institutional challenges to the civil/criminal distinction show few signs of abating, and thus the question is raised of whether the distinction can or should survive. Economists openly urge a more global approach to sanctioning that would substantially reduce if not entirely eliminate the distinctiveness of civil and criminal sanctions and systems. Some other scholars openly advocate for the recognition of some "middle ground" of sanctioning in which there are mixed rationales for sanctions and a mixed procedural regime that is more protective than the civil one, but less restrictive than the criminal one. Yet other scholars urge that the civil/criminal distinction be more strongly maintained and policed, both to limit strategic avoidance by the government of the strict limitations on criminal sanctioning and in order to protect the distinctive moral voice of the criminal law. It is too early to say which, if any, of these approaches will prevail in legislatures and courts; but the choice will be an important one in the twenty-first century.

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See also Bail; Burden of Proof; Mens Rea; Punishment; Scientific Evidence; Sexual Predators.

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