ADMINISTRATIVE PROCESS ALTERNATIVES

to the

CRIMINAL PROCESS

A Study, funded by the

Florence V. Burden Foundation

December 1977

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THE CENTER FOR ADMINISTRATIVE JUSTICE was established in 1972 by the Board of Governors of the American Bar Association as an activity of the Section of Administrative Law. Its principal purpose is the advancement of administrative justice in society. This is carried out by conducting research studies of administrative decision making systems, continuing legal education programs related to such systems, and the publication of materials resulting from these activities.

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In July, 1977 steps were initiated to transfer the Center for Administrative Justice from the American Bar Association to the Consortium of Universities of the Washington Metropolitan Area, to become a division of the Consortium and known as the National Center for Administrative Justice. The study herein was completed by the Center as an entity of the American Bar Association.

FOREWORD

Mounting pressures for improving the administration of justice - criminal, civil and administrative - have impelled a search for new or borrowed mechanisms and a reexamination of attitudes and goals.

The present study comes within this framework. It was conceived on the hypothesis that some criminal offenses can be shifted from a criminal to an administrative justice system and thereby better achieve society's goals. This was not a shot in the dark because considerable resources have already been allocated to demonstration projects in traffic infraction and housing code violation administrative adjudication processes with some apparent success. (The Center participated in one of these projects.) It was thereby appropriate to inquire where else this might be done.

Exploratory investigations indicated that systematic evaluations of existing programs had not been made and that ideas for new areas were simply ideas, no more. Moreover, there were knotty legal and administrative problems which were unresolved and were stumbling blocks to further development.

It was, therefore, decided that what was needed most at the present time was a study of the basic issues underlying any attempt to adopt civil or administrative alternatives to the criminal justice system or to adapt administrative processes to the criminal process. It was also desired to identify specific areas where there were indications that further investigation might be fruitful. Professor Norman Abrams, of the University of California School of Law at Los Angeles, a recognized scholar in both the administrative law and criminal law fields, was selected as the project director to conduct the research and analysis. The present work is mainly the product of his effort.

Advisors for the project and commentators on a preliminary draft of the paper included Judge Marvin E. Frankel, of the United States District Court of the Southern District of New York; Professor Walter Gellhorn of the Columbia Law School; Professor Livingston Hall, formerly of Harvard Law School (representative of the Section of Criminal Justice of the American Bar Association); Dean Robert B. McKay, Director of the Program on Justice, Society and the Individual of the Aspen Institute for Humanistic Studies; Herbert S. Miller, Co-Director of the Institute of Criminal Law (representative of the Section of Criminal Justice of the American Bar Association); and Nicholas Scoppetta, Deputy Mayor for Criminal Justice of the City of New York.

The study was made possible by the funding support of the Florence V. Burden Foundation. The Center is particularly grateful to Robert F. Higgins, the Foundation's executive director, who participated in the development of the project, and to Harriet L. Warm, the successor executive director, who graciously cooperated in carrying it out to completion. Also acknowledged is the dedicated efforts of Ms. Barrie Frazier, of the Center staff, throughout the entire project.

The views expressed here are those of the project director. They should not be attributed to any of the persons whose assistance is acknowledged as advisors or commentators; to the directors or staff of the Center for Administrative Justice; or to the officers, governors or members of the American Bar Association.

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December 1977

Washington, D.C.

Table of Contents

I.	Introduction	1
II.	Background	6
	A. Administrative Process Reform in Other Fields	6
	B. Decriminalization	11
III.	Constitutional Limitations	14
IV.	Changes in the Components of an Enforcement Process	25
	A. Adjudication	25
	B. Prosecution	36
	C. Police	41
	D. Sanctions	48
	E. The Review Process	51
	F. Prosecutorial Diversion	53
V.	Illustrative Subject Matter Areas	59
	A. Overview	59
	B. Housing Code Violations	60
	C. Traffic Violations	66
	D. Non-support	71
	E. Marijuana	76
	F. Public Drunkenness	79
	G. Prostitution	82
	H. Strict Liability Offenses	84
VI.	Conclusion	87
	Footnotes	92

Administrative Process Alternatives to the Criminal Process

by

Norman Abrams*

> " . . . [C]riminal courts are today swamped with great floods of cases which they were never designed to handle; the machinery creaks under the strain. . . . What is badly needed is some form of administrative control which will prove quick, objective and comprehensive." Sayre, "Public Welfare Offenses," 33 Col. L. Rev. 55, 69 (1933).
>
> "One partial solution to the problem of minor offenses may well be to remove them from the court system." Mr. Justice Douglas speaking for the Court, Argersinger v. Hamlin, 407 U.S. 25, 38 at n. 9 (1971).

I: Introduction

Many different proposals for revamping the criminal process are being made today. Most of them are not really new. Yet, there is heightened interest in research on and implementation of innovative ideas in this field.[1] It would appear that we are finally getting serious about coming to grips with administrative weaknesses in the system of criminal prosecution.

This sudden surge of interest probably reflects a confluence of a number of different currents in law reform and

certain specific events. In the decades of the 50's and 60's scholarly and legislative attention focussed mainly on reform of the substantive criminal law,[2] issues such as the insanity defense,[3] and the general subject of decriminalization.[4] In the mid-60's, the President's Commission on Law Enforcement and the Administration of Justice focussed renewed attention on the need for reform of the processes of criminal justice as well as the substantive law.[5] One of the most striking observations of that Commission was how little systematic knowledge we had of the day to day operations of that process.[6] Its recommendations plus those of numerous commissions, task forces and advisory committees that followed led to more research, often federally financed, designed to provide such knowledge.[7] The results have now begun to percolate to the surface and are producing many more proposals for change.

Meanwhile particular developments have also contributed. Certain decisions of the Supreme Court--like those in Argersinger v. Hamlin[8] requiring that counsel be appointed in misdemeanor cases where the defendant is subject to a jail sentence and Duncan v. Louisiana[9] requiring the states to provide an opportunity for a jury trial in serious criminal cases--contribute to a further burdening of overloaded magisterial-level courts or, alternatively, make complete streamlining of the criminal process difficult. As suggested

by one group of researchers, decisions such as Argersinger will involve courts "which conventionally have depended for continued survival and 'effective' functioning on their capacity to process the bulk of their caseloads in a summary fashion . . . in increasingly time-consuming and time-intensive procedures."[10]

Also, we live in an age when the government is assuming greater responsibility for the health, safety and welfare of its citizens, and correspondingly there are many more minor offenses on the books subject to prosecution.[11] Undoubtedly, too, increased urbanization, a larger crime-prone population and, perhaps, higher crime rates have added considerably to the "floods of cases" and the problems of processing them.

All of this has combined to produce a climate ripe for innovation. Some of the proposals simply involve a tinkering with and streamlining of the criminal process; its essential features would not be changed. Procedures like the omnibus pre-trial hearing[12] and submitting a case for trial court adjudication on the transcript of the preliminary hearing[13] have been introduced. Some changes in the jury system have been deemed constitutionally permissible--e.g., permitting reduction of the number of jurors[14] and less than unanimous verdicts.[15] Statutory teeth have been put into speedy trial requirements.[16] Non-lawyer judges

have been approved for the trial of misdemeanors provided that there is a right to trial de novo before a court of general jurisdiction.[17]

All such changes are attempts to modify the criminal process from within. Other proposals, more far-reaching, call for substitution of another method of handling cases, still, however, using an enforcement approach. They would, for example, shift certain types of adjudications into civil courts or administrative agencies.[18] Those who make such proposals, of course, assume that the process will thereby be improved.

Too little thought has been given to the details of such proposals, the differing impact they would have on the several components of the criminal process and whether they would indeed improve the workings of the law enforcement system. Will they make the process more efficient and less costly? Will it be as fair and just? The purpose of this paper is to develop a perspective for thinking about such issues and to review the implications of such proposals for various substantive law areas.

Part II of this paper provides background for the inquiry by comparing current proposals with past administrative process reforms in other fields and relating such proposals to the general subject of decriminalization. In Part III, constitutional issues posed by the reform

proposals are briefly reviewed. Part IV examines the impact alternative systems would have on the several components of an enforcement system, while Part V considers in more detail the implications of such innovative systems for particular substantive law areas.

II. Background

A. Administrative Process Reform in Other Fields

The current wave of research and proposals for remodelling the criminal process are reminiscent of the numerous instances, particularly during this century, in which some type of administrative process was introduced into a substantive law area not previously administrative.[19] In many of the current proposals there are similarities to those earlier reform efforts, but there are also differences which are instructive.

The introduction of an administrative agency usually has signaled dissatisfaction with the legislative or judicial handling of the problems in a substantive law area. Sometimes new legal requirements were created by legislation, enforcement of which would have required many adjudicative decisions, and it was easier to create a new adjudicative agency rather than add to the burdens on the courts. In other instances, it was seen as desirable to be able to combine within a single agency both adjudicative and policy-making authority.

Since legislatures have difficulty in providing for detailed handling of a problem and courts deal with individual cases on a one-shot basis, where continuing attention to, and perhaps supervision of, details were required, administrative agencies were utilized; it was also thought that such

agencies would provide expertise, specialization and uniformity of treatment. Where new legal principles were introduced by the legislature, there was sometimes concern that the courts were too bound up with prior law, and it was easier to bring in a new set of decisionmakers via an administrative process.

It was also suggested that

> "the courts do not have as richly varied a panoply of sanctions from which to choose as do the agencies. . . . [C]urrently the choice of administrative sanction ranges from the conventional tools of monetary fine and injunctive relief to the grant or denial of a license, . . . seizure or destruction of goods; damaging by unfavorable publicity; . . . stoppage of mail; and a host of other techniques that are seldom administered through the courts, where they could be used, if at all, only awkwardly."[20]

Finally, the administrative process was thought by many to be speedier and less costly than judicial process. The issue was aptly commented upon by Professors Gellhorn and Byse:

> "The administrative agency is at least hypothetically capable of shaping itself in such a way as to avoid technicalities which are popularly associated with 'the law's delays' . . . . Alas, the expectation that the administrative process would provide quick and inexpensive justice has--to put the matter charitably--not always been fully realized."[21]

To suggest that there are parallels between proposals for reform of the criminal process and various earlier introductions of an administrative process into the legal system is not to say that present proposals call for the

creation of agencies like the Interstate Commerce Commission, the Federal Trade Commission, the National Labor Relations Board, Workmen's Compensation boards and similar bodies. True, some reasons similar to those described lie behind the current ferment. Almost universally there is unhappiness with the efficiency of the system, "the law's delays." Presumably procedural changes might be accompanied by some substantive law changes, and in at least a few instances, transfer of adjudicative authority to another decisionmaking body might be seen as a way to bring in a new group of adjudicators. Also, the introduction of expertise and specialization, the possibility for greater uniformity of decision and continuing supervision of people and problems all might prove beneficial to the criminal process.

Yet, there are peculiarities of the criminal law field that distinguish it from other substantive law contexts into which an administrative process has been introduced. The other instances have usually involved the substitution of an administrative process for judicial settlement of disputes between private parties. Government regulation was introduced through an administrative agency into fields like commerce (the ICC), labor relations (the NLRB) and business practices (the FTC) that were previously dealt with, if at all, through civil litigation between private parties in the courts. Obviously the government is already

involved in the existing criminal process, and portions of that process are already universally recognized as being administrative in nature--for example, prosecutorial[22] and parole agency decisionmaking.[23] What has not been generally observed is that the criminal process is a hybrid that in its totality is really an administrative process--that is, a system of governmental activity directly affecting the individual, one component of which happens to use the judiciary as a fact-finder, law-applier and sanction-imposer.[24] So viewed, the proposals for reform of the criminal process discussed herein are not exactly proposals to substitute an administrative process for judicial process but are more appropriately seen as suggestions for modifying an existing administrative process.

This perception enlarges the scope of what otherwise might have been a more limited focus for the inquiry. All of the components of the administrative process that we call a criminal process must be examined, not just the adjudication arm. Proposals to modify judicial procedures but leave the process in the courts also become relevant. We do not propose generally to treat such proposals, particularly when they simply involve tinkering with the existing judicial machinery— it would spread the net of this inquiry too wide; but it will be useful to view proposals for change in

the adjudicative and other components of the process as on a continuum and to consider some changes that would leave the adjudication function in the courts as well as those that would move it into an administrative agency.

Proposals for change of the criminal process differ in another crucial respect from earlier administrative process innovations in other fields. Special constitutional limitations must be complied with so long as the process remains criminal in effect. Due process notions apply to the ordinary administrative process, too, but they are not as detailed or restrictive. The relevance of the legal doctrines to proposals for change will be generally considered in the next section.

Administrative process innovation in some areas has not, in the end, always been seen as successful. For various reasons--because administrative regulation interferes inappropriately, it is said, with a competitive market mechanism; or because the administrative agency is thought to have been "captured" by those supposed to be regulated; or because it is perceived as having introduced massive paperwork, red tape and inefficiency--many existing agencies are frequently subjected to harsh criticism.[25] Many of these criticisms are irrelevant to this inquiry. Some, however, suggest concerns that we should have. It would be undesirable to create new agencies with their accompanying costs and

bureaucratic characteristics unless the benefits to be gained are reasonably certain to be substantial.

B. Decriminalization

The most common proposals for major reform of the criminal process contemplate its decriminalization.[26] Traditional proposals of this nature can be grouped into three categories - those that contemplate: no government intervention following decriminalization; civil intervention systems in a regulatory or social service mode; or the introduction of a non-criminal enforcement-sanction system, that is a system which prohibits certain conduct but imposes non-criminal sanctions on violators. The focus of this paper is on this third category, pursuing the implications of decriminalizing and substituting a civil enforcement system.[27]

At the outset, we should distinguish between claims that a subject should be decriminalized primarily because of societal ambivalence concerning the alleged evil involved and those based mainly upon inefficiencies of the criminal process in dealing with the prohibited conduct. We are concerned with the latter. For such offenses, it is argued that: police, prosecutor and judicial resources are overburdened; these matters could be handled less expensively and more efficiently under alternative systems; the criminal

process, both in the type of resources and the procedures it uses, is an expensive and cumbersome operation, and alternative systems are likely to be cheaper and more efficient; removing such offenses from the criminal process will free up these expensive resources for use in connection with more serious offenses; and finally the use of the criminal process for such minor offenses trivializes the process and its sanction and makes it a less effective tool in connection with more serious crimes.

The inquiry thus should make a cost-benefit assessment, with emphasis on identifying the various kinds of costs and benefits involved. To the extent that it can be determined that substitution of an alternative enforcement system avoids certain costs or obtains benefits, an important element of the analysis is supplied. It is also necessary, of course, to take account of both the additional costs involved in implementing the new system and loss of any benefits obtained under criminal processing.

For example, under an alternative system, there may conceivably be gains through a more flexible, enlightened enforcement involving specialization, continuing supervision, more sympathetic decisionmakers and a greater range of sanctions. But, may there also be a loss in deterrence and effectiveness if criminal process treatment in a field is abandoned?

As Kadish has suggested, "[I]t is easier to state what the costs and benefits may be than to measure their quantity with any degree of accuracy. . . ."[28] With that caveat in mind, the remainder of this paper is devoted to an examination of the advantages and disadvantages of adopting alternative administrative process enforcement systems.

III. Constitutional Limitations

Various constitutional questions are posed by proposals to shift criminal law enforcement to a civil mode involving the use of an administrative agency. Different procedural rights can be invoked - right to a jury trial or grand jury, counsel, free transcript, or not to be twice put in jeopardy; the nature of the issue may vary, depending on the type of claim.[29] We shall briefly review here the most frequently raised claims which challenge the very basis for an administrative process approach, based in the Sixth and Seventh Amendment jury trial provisions.

The constitutional questions raised by such contentions have been widely debated in the law journals in recent years,[30] with many commentators arguing in favor of applying one Amendment or the other, or both, to limit the power of administrative agencies to impose money penalties.[31] The scholarly comment has apparently not impressed the judiciary which, in a series of recent decisions, has consistently rejected constitutional attacks on statutory delegations to administrative agencies of the power to impose substantial "civil" money penalties.[32]

The most recent U.S. Supreme Court decision on the subject, Atlas Roofing Co. v. OSHRC[33] seems generally dispositive on the Seventh Amendment issue. The case involved the administrative imposition of sanctions under the

Occupational Safety and Health Act[34] which provides for the imposition of civil money penalties of up to $10,000 by the Occupational Safety and Health Review Commission. The Commission's order in such cases is subject to judicial review under the substantial evidence standard. If the employer fails to pay, a collection action may be brought in the federal district where issues relating to the violation and penalty may not be relitigated.

The Court ruled in Atlas Roofing that the Seventh Amendment does not bar the government from creating a new cause of action to be enforced in an administrative agency where there is no jury trial, concluding that where "public rights" created by Congress are involved, Congress may assign the primary adjudication function to an administrative agency. Some of the Court's language is particularly pertinent:

> "In sum, the cases discussed above stand clearly for the proposition that when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible. . . . Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation nor prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. . . .
>
> "[T]he assertion [is] that the right to jury trial was never intended to depend on the identity of the forum to which Congress has chosen to submit a dispute; otherwise, it is said, Congress could utterly destroy the right to a jury trial by always providing for administrative

> rather than judicial resolution of the vast range of cases that now arise in the courts. The argument is well put, but it overstates the holdings of our prior cases and is in any event unpersuasive."[35]

The Sixth Amendment challenge to the administrative imposition of sanctions has usually been deemed to turn on whether the penalty is deemed "civil" or "criminal". There were a few early cases in which the Supreme Court rejected a designation by Congress of a penalty as civil or as a tax and ruled that procedural protections afforded in criminal hearings had to be provided.[36] Generally, however, the Court has accepted the legislative description.[37] The prevailing view regarding the issue was summed up by Judge Friendly in United States v. J.B. Williams Co.[38] where the court ruled that an action to recover civil penalties (in the amount of $500,000) under the Federal Trade Commission Act (for violation of a cease and desist order) was not criminal in nature and therefore did not trigger Sixth Amendment protections:[39]

> "In many instances Congress has provided, as a sanction for the violation of a statute, a remedy consisting only of civil penalties or forfeitures; in others it has provided the usual criminal sanctions of a fine, imprisonment or both; in still others it has provided both criminal and civil sanctions. When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word. . . .[40]

A Sixth Amendment challenge against the administrative imposition of sanctions under the Occupational Health and Safety Act was made and rejected in a series of cases in the U.S. Courts of Appeals[41] that led to the decision in Atlas Roofing Co. v. OSHRC, supra. The petition for certiorari in that case had sought review of the Sixth as well as the Seventh Amendment issue, but the Supreme Court granted the petition to review only the latter contention.[42] Of course, no inference should be drawn from a denial of a petition for certiorari although the case for drawing inferences may be slightly stronger where the Court grants certiorari to review one of a pair of issues that seem like fraternal twins.

The Court in Atlas Roofing did, however, briefly address itself to a Sixth Amendment issue in a footnote,[43] the exact significance of which is unclear and slightly perplexing. The Court suggested that had the fines in these cases been labelled criminal, the Sixth Amendment, not the Seventh, would be applicable and no right to jury trial would attach, citing the Court's decision in Muniz v. Hoffman.[44] In that case, a five to four majority had ruled that a criminal contempt proceeding against a labor union resulting in the imposition of a $10,000 fine fell into the petty offense category and therefore did not require a jury trial under the Sixth Amendment.

Since for petty offenses, there is no right to trial by jury, or on the Federal level, to trial by an Article III judge,[45] treating an administrative offense as "criminal" but "petty" conceivably could provide a basis for concluding that administrative agencies, like Federal Magistrates, may be given authority to impose monetary sanctions for criminal offenses.[46] Is this what the Court was implying...in a footnote?

I doubt very much that the Court had this in mind. Otherwise it would have been passing on, in a footnote, the substantial Sixth Amendment question on which in that very case it had declined to grant certiorari. It would also have thereby undermined sub silentio a body of case law, including many of its own decisions, in which the Sixth Amendment issue was deemed to turn on whether a particular sanction, though labelled "civil", was really punitive. Interpreting the footnote in Atlas Roofing thusly would have made the really important issue in such cases whether even if a "civil" sanction was criminal, was it "petty".

The more likely interpretation of the footnote is that the Court was simply making a buttressing argument without considering all of its implications. It used the reference to Muniz v. Hoffman to lead into a statement that it would be odd to hold that Congress could avoid the jury trial requirement by labelling the matter a crime but not by

assigning it to an administrative agency. Of course, Muniz, only stands for the proposition that the jury trial requirement is not applicable to petty offense enforcement in a court; that a court may exercise a significant criminal fining power without jury trial and not run afoul of the Sixth Amendment.

It does not necessarily follow that the Court meant to imply that Congress can give administrative agencies authority to impose criminal fines on a petty offense theory. Further questions would have to be resolved before reaching that conclusion: whether the power to impose explicitly "criminal" sanctions is an inherent function of the judicial branch; whether such "judicial" power can be delegated to a non-judicial agency; the adequacy of procedural protections before the administrative tribunal, and the like.[47]

Despite this explanation, the Atlas Roofing footnote gives one pause. The petty offense theory has surfaced in the Supreme Court in an administrative process enforcement-sanction context. Might the Court by laying the foundation for its use in the future to support administrative power to impose criminal sanctions? That possibility seems very speculative but there have been other developments that could also be relevant.

In North v. Russell,[48] the Supreme Court recently sustained against a due process challenge a procedure in

which a person charged with a misdemeanor offense and subject to possible imprisonment was tried before a non-lawyer police judge, because the accused could, as of right, obtain a subsequent trial de novo before a lawyer-judge in a court of general jurisdiction. The fact that an adjudication is subject to de novo review in a regular court may also be relevant to the constitutional issues that would be raised were criminal sanction authority granted to an administrative agency.

It is conceivable that the petty offense or de novo review approaches, or perhaps in combination, might be deemed a way to grant criminal sanctioning authority to an administrative agency. Even were this to occur, it seems very unlikely that the courts would sustain the constitutionality of granting to an administrative agency the power to impose a jail term,[49] though North v. Russell might be thought even to cast some doubt on this otherwise undoubted conclusion.

As a practical matter, of course, such issues will probably never arise. It seems unlikely that legislatures will grant imprisoning authority to administrative agencies. When the power to impose money penalties is granted, it is likely that they will continue to be labelled civil. But the petty offense and de novo review arguments may be used as a rhetorical flourish to reinforce a rejection of Sixth

Amendment attacks on such civil penalty systems.

There is one further constitutional argument that might be raised were a civil administrative enforcement process substituted for criminal treatment. The Court in Atlas Roofing repeatedly mentioned and seemed to rely upon the fact that "new statutory 'public rights'," [50] "new statutory obligations" [51] and "a new cause of action" [52] were involved in the case. Does this suggest that the result might be different if a subject previously dealt with criminally, an "old" crime, [53] were designated civil and switched to administrative process treatment?

If there is a separate constitutional argument against shifting existing crimes to civil enforcement, it probably reflects the fear that such a shift might be used to circumvent constitutional protections. It would be particularly apparent in such a context that the purpose of the previous enforcement scheme was punishment and deterrence. The argument would be that the administrative enforcement scheme, though labelled civil, was still punitive and simply a subterfuge designed to accomplish the prior purpose while evading criminal procedural requirements. Judge Friendly expressed the concern thusly:

> "Congress could not permissibly undermine constitutional protections simply by appending the 'civil' label to traditionally criminal provisions." [54]

This concern about circumvention of the protections afforded by criminal procedure is undoubtedly greatest with respect to serious traditional crimes. It is not happenstance that Judge Friendly referred to "traditionally criminal provisions." Others have expressed concern that crimes like bank robbery,[55] sedition[56] and counterfeiting[57] might be shifted. The image of such serious offenses being treated administratively clearly runs against the grain.

Both as a matter of policy and constitutional doctrine, a shift of serious, traditional offenses to civil administrative process enforcement would be bad. In addition to the circumvention concern, such transfers would affect societal attitudes toward the concept of crime and dilute the moral condemnation normally implicit in the designation of conduct as criminal.[58]

The image of shifting serious offenses, however, is a strawman. No one has seriously contemplated shifting crimes like bank robbery to an administrative process. As a practical matter, proposals for such shifts are also not likely to be made in the future.[59] Criminal process treatment of such offenses is not particularly controversial, nor do such offenses impose as heavy costs on the criminal system as do minor offenses.

Serious proposals for shifting existing offenses

relate only to minor, fringe categories of criminal conduct-offenses whose very inclusion in the criminal process is itself controversial. Shifting such offenses should present no special constitutional difficulty; the issues posed would generally be those previously discussed, relating to use of an administrative process enforcement system to impose substantial civil penalties.

Because lesser penalties are involved, there should be less concern about affording criminal procedural protections for such minor offenses. There is a perceived relationship between the gravity of the offense and the need for strict procedures.[60]

Also, for such offenses, the motivation for the shift may fairly be characterized as based not on a desire to evade constitutional protections but rather to relieve an overburdened criminal process, particularly in areas where the costs of enforcement seem to outweigh the benefits.

Also, shifting such offenses and labelling them civil rather than criminal will not dilute the notion of crime. Rather, since these minor crimes are typically offenses with which moral condemnation is not intrinsically associated,[61] switching to a civil mode serves to preserve the use of the criminal label for cases where such condemnation is appropriate.

A persuasive case can therefore be made that in the present state of relevant constitutional doctrine,[62]

there should be no serious objection to a shift to civil administrative process enforcement of minor, non-traditional offenses, particularly those for which there are otherwise good reasons for decriminalization. Indeed, the Supreme Court has itself *in dictum* endorsed exactly this type of shift.[63]

IV. Changes in the Components of an Enforcement Process

In comparing alternative systems with the existing criminal process, it is useful to consider separately the changes that would be made in each of the components of the enforcement process.

Any enforcement approach normally will, like the present criminal system, have an intake component (performing investigation and perhaps apprehension functions); an initiation component (performing the prosecutorial or complaint-issuance function); and at least one disposition component (performing an adjudication function). It will involve the imposition of sanctions, and its adjudicative decisions will be subject to some sort of review process. In designing a non-criminal administrative process, shall we change and substitute for all, or just some of these components? The designs will be different depending on the peculiar problems of the various substantive areas.

A. Adjudication

In contemplating change from a criminal to a civil enforcement process, most writers assume changes in the adjudication component of the process but not necessarily in the police or prosecutor units. A range of different kinds of changes in the adjudicatory component are theoretically possible, once the enforcement process is decriminalized. These include leaving the basic prceedings in courts of general jurisdiction, tinkering with procedures such as

right to jury trial and counsel, burden of proof, presumptions and the preliminary stages, such as grand jury and preliminary hearing and modifying the rules of evidence, such as the rules relating to hearsay. Or the adjudicatory component may be moved into a specialized court or court part, again usually with some tinkering with procedures and rules of evidence; or the process of adjudication may be shifted from a judicial unit into one that is not a regular court.

Most desired procedural changes can be accomplished by changing the process into a civil mode and without shifting the adjudication phase from a judicial into an administrative agency. Certain types of modifications of procedures and evidentiary rules should permit cases to be handled more swiftly in the courts. In theory, then, the enforcement process can be made more efficient without shifting to administrative adjudication. Gains in efficiency vary, of course, with the particular reform.

For example, elimination of the intermediate stages that are part of the normal processing of criminal cases--such as the preliminary hearing or grand jury--obviously would help to speed a case through the enforcement process. But query whether a change such as modifying the burden of proof significantly increases efficiency. True, it probably makes it somewhat easier to obtain a conviction, but does it really speed up the process or in other ways make it more efficient.[64] Of course, if more convictions are the goal, such a change is a means to that end. Even the

significance of the elimination of the possibility of jury trial should not be overestimated. It would have a direct impact on that small percentage of cases now disposed of in that manner.

Shifting to civil adjudication would probably make the exclusionary rule inapplicable to the proceedings, whereas at present, it operates in criminal proceedings to exclude evidence obtained as a result of constitutional violations. Thus a recent decision of the Supreme Court suggests that the Constitution does not mandate application of the rule of exclusion to civil proceedings.[65] Of course, for some that might be a reason to view the shift to civil enforcement as undesirable.

If efficiency is the primary goal, care has to be taken that changes that appear to move the process in the direction of more efficiency do not turn out to be counter-productive. For example, although the core model in the criminal process is the relatively inefficient adversary trial, of course, once one passes through the preliminary stages of the criminal process, the vast majority of criminal cases are disposed of very quickly through pleas of guilty, often to lesser charges. How will a reduction of penalties from criminal to civil combined with more expeditious trials affect the dynamic of the plea bargain and guilty plea process? Perhaps lesser penalties, civil in nature, will encourage defendants not to contest the matter. But it is also possible that, not faced with the leverage of more serious charges,

more defendants will be inclined to contest and the result will be that more cases will go to trial than in the criminal process.[66] It is conceivable that in some instances the end result of procedural innovation and reduction of penalties could be more efficient trial process . . . and yet more trials. That might not be viewed as a bad result by those generally troubled by the plea bargain process. Such speculations merely emphasize that innovations may not always have their intended effect.

More extreme changes in methods of judicial disposition could make that process even more efficient. If the disposition hearing is handled in a cursory quasi-automatic fashion without any significant factual inquiry or any procedural niceties, more cases could be disposed of quickly. We already have such processing of minor cases even in the criminal system in some of our urban municipal courts,[67] and it has often been criticized. Whether the adoption of such "procedures" in civil enforcement proceedings where very minor fines are imposed would be similarly frowned upon remains to be seen. Some evidence that it would not is the fact that although traffic court enforcement proceedings frequently are of that type, criticism on this ground is rather muted. It may be that if the case load problem is obvious and the sanction is sufficiently inconsequential, we readily tolerate assembly line justice.

If particular offenses are to be dealt with civilly and through modified procedures, where in the court system will they be placed? Court systems vary in their handling

of civil and criminal matters. In some jurisdictions, the same court treats both types of matters as they arise. In others, separate courts or court parts have been established for each. In these last-mentioned jurisdictions, the new enforcement jurisdiction presumably would be placed on the civil court side.

If these matters are switched to the civil side, to that extent judicial resources previously devoted to minor criminal matters would become available and presumably allocated to more serious crimes. If certain categories of crimes, involving a particularly heavy incidence of prosecution were thus transferred, the criminal process resources thus freed up would be considerable. However, correspondingly, a significantly heavier load would be placed on the courts on the civil side which, too, are typically overloaded. The civil side could be left in its new state of overload, or additional judicial resources obtained, either by reborrowing them from the criminal side or by bringing in entirely new resources--more judges, clerks, bailiffs, etc. Perhaps it would be easier to obtain additional judges for civil courts by using lawyers as part-time judges.[68] Innovative methods of expanding resources should be explored whether the process is civil or criminal.

The point is that we do not get something for nothing. New resources must be provided, or we shall be approximately where we started, except for having shifted

cases from the criminal to the civil side. There will be no particular gain unless the new procedures do indeed make the processing of these cases more efficient than their present treatment in the criminal process. The efficiencies obtained must be considerable to justify, on this ground alone, the expense and inconvenience involved in the change.

We have indulged in speculation about the possibility that a general civil court might apply modified procedures, but if the offense has a high incidence of enforcement, it seems a more attractive possibility to place it in a specialized civil court or in a special court that handles various civil enforcement matters. An important issue in discussing alternative judicial methods of processing civil enforcement cases is whether to use specialized courts.[69]

Specialization, of course, fragments the judicial operation. Probably most judges prefer to have variety in their case load or, at least, to rotate periodically into a court or court part with a different subject matter. For most of the types of offenses that are our concern, it would be difficult to argue that the technical nature of the subject matter requires judicial specialization. The advantage of specialization is that it encourages in-depth consideration of policies and problems connected with law enforcement in the particular substantive area and makes it more likely that cases will be treated uniformly and penalties will be more consistent. It should be emphasized

that the fact that the court is specialized does not require that the investigative and prosecutorial agencies also specialize in their handling of the same cases (a subject separately treated, infra), although it makes it easier for the individual prosecutor to do so, simply by assigning him to the specialized court.

It clearly would not be feasible to establish specialized courts for all the relevant substantive areas; it makes sense only for areas such as traffic or housing, where there is a sufficient case load to justify devoting the resources of an entire court full-time. A partial specialization, by establishing a two- or three-area court--such as one for fish and game and health code violations--is an alternative, or finally, as suggested, a court might be established to deal only with civil penalty cases.

Apart from the possible efficiencies previously discussed, civil court processing of enforcement cases is likely to be as expensive as criminal handling. Generally the personnel on the civil side (if they are separate) do not have lower salaries than on the criminal side. Of course, expenses involved in the incarceration of defendants and convicted persons can be avoided.

Some significant procedural innovation and specialization can be achieved while leaving the adjudication component in the courts. Are there further advantages to be gained, then, by shifting this stage to an administrative agency? The desirability of the shift may depend in part

on decisions relating to the investigative and prosecutorial components. If the adjudication component and both of the latter are to be specialized, the case for combining all three components in an administrative agency becomes very powerful. The combination of the three responsibilities in a single agency, even with some internal separation, makes possible a more integrated approach to enforcement than is possible where one or more of the components is an independent agency. Police, prosecutorial and adjudicative functioning are less likely to be at cross-purposes; there would be some one or some body with the authority to require that all three components coordinate their activities. It would insure that all three components collaborate to develop coordinated enforcement policies.

In many instances it may also be possible to give the adjudicative body within the agency types of sanctioning authority that a court would normally not have--e.g., direct authority over licensing, including the authority to delicense in appropriate cases.[70] Finally, as previously noted, administrative agencies sometimes perform a role not assumed by separate police, prosecutor and court agencies--that of continuing supervision over a problem, using a preventive approach rather than merely after-the-fact sanctions. It might, of course, be possible to achieve some of these advantages while retaining adjudication in the courts, but they are clearly easier to accomplish through an administrative agency approach.

Although procedural reform can be achieved while retaining the courts as the adjudicative body, it can be argued that where significant procedural modification is desired, it is better to use an administrative agency. the image of the courts as the protector of our freedoms is better preserved if we maintain a notion of "judicial" procedure and do not introduce into the courts a watered down process. To the contrary, however, it can be argued that the different types of adjudication procedures are on a continuum, and the same continuum applies whether the courts or administrative agencies are involved. The key question, how much process is due, is the same for both. Each should be considered a flexible instrument adaptable to societal needs. How one resolves this issue may influence whether the choice is made simply to modify court procedures or to switch the adjudication component to the administrative process.

Another ground for transferring the adjudicative decision from the courts to an administrative agency is that it brings into the process wholly new personnel. There may be a concern that the courts, for whatever reason, are not in tune with enforcement policy, that the easiest way to deal with the problem is to substitute other decision-makers and that it is easier to do this by transferring adjudicatory authority to an administrative agency. There are probably only a few instances where this type of claim is relevant to our concerns,[71] but, to the extent that it is,

it provides a further ground for shifting the adjudication function to an administrative agency.

There are many questions relating to funding and costs that require resolution if an administrative agency approach is to be adopted. A shift to an administrative agency adjudication may change the source of funds within the government. Will the agency be city, county or state-connected? How does that compare with the court's position in the governmental structure? How many new agencies will be created or existing agencies expanded? Are we talking of shifting one or two crimes like traffic or housing or a great many more offenses? To how many agencies?

Administrative agency handling may be slightly less expensive, because the adjudicators (viz. hearing officers or administrative law judges) generally receive lower salaries than judges.[72] At best, however, this is a weak reed on which to justify a switch to an administrative adjudicative process. Apart from such simple comparisons regarding key personnel, cost comparisons are difficult to make.

Particular adjudicative personnel in the administrative process may have lower salaries, but--depending on the administrative arrangement--they may not be the only ones engaged in adjudication. If the traditional pattern is adopted, administrative law judges will make initial decisions and the agency the final decision. Under such an approach, the proportionate cost of the agency's role in the adjudicative

process must also be included in the calculation. Also the status and salaries of administrative law judges are on the rise.[73] Although they are not likely to catch up with judicial salaries, they are likely to close the gap, particularly if the comparison is made, as it should be, with the salaries of municipal court judges or magistrates.[74] On paper, at least, it seems doubtful that one can make a very strong case, as far as personnel are concerned, that administrative adjudication is going to be significantly less expensive than civil judicial disposition.

The attractiveness of switching to an administrative process may vary according to the substantive area and the availability of an existing agency to which the adjudicative function might be given. Sometimes there is an existing administrative agency already fulfilling the role of one of the components of the enforcement process, usually investigation and compliance. In such cases, the case can be made for integrating the different components into a single agency by expanding the existing agency to perform the prosecutorial and adjudication function. In other instances, there may be an administrative agency which has a related function in the area, usually licensing, but which does not have a direct role in the enforcement process.[75] Again, transfer of the enforcement function and expansion of the agency are possible, but the argument for integration of functions is weaker.

Finally, in some cases, there is no existing administrative agency to which the enforcement function can naturally be transferred. A new one must be created; capital investment and other start-up costs are likely to be significant. If there has previously been some specialization in one of the components, for example, in a department of the prosecutor's office, the expertise thereby accumulated is likely to be lost unless the personnel involved can be persuaded to join the new agency. Again, in introducing innovation we are not writing on a clean slate. The availability of an existing agency performing an interdependent or related function may strengthen the case for a shift to an administrative process approach. Absence of such an existing agency makes the case for the shift much more problematic.

B. Prosecution

Relatively little attention has been paid to the effects of a decriminalized enforcement approach on the prosecutorial component of the criminal process. Partly, this reflects the fact that concern over overload on prosecutorial offices has not been a primary motivation behind the drive for decriminalization; much more attention has been paid to police and court resources.[76]

If a decriminalization enforcement approach is adopted, how will it affect prosecutors' offices? Prosecutorial offices are always separate agencies--not part of the police or the courts. Often their budget is derived from a different

level of government than that of the police or courts. For example, in Los Angeles, the principal police department is a city agency, the main prosecutor and the trial courts are county. Often some minor offenses like traffic may not even be handled by the prosecutor's office; rather the police in many jurisdictions function in a quasi-prosecutorial role. In urban areas, too, there may be a division of the role between two prosecutorial officers--one which handles felonies, variously called the District Attorney, State's Attorney, County Prosecutor--and one which handles minor offenses like the City Attorney in Los Angeles.[77]

Prosecutors' offices are not specialized; they handle all kinds of offenses. But in the larger offices, there are often some specialized departments within the office, such as organized crime, fraud and non-support. In offices of any significant size, there also may be individual prosecutors who specialize in particular types of offenses--such as homicide or sex offenses. Finally, many prosecutorial offices have both a criminal and civil jurisdiction. The civil jurisdiction may include acting as counsel for the local government unit in civil matters as well as civil enforcement responsibility.

The impact of a change to a civil enforcement approach on the prosecutorial component of the criminal process is likely to be linked to how the adjudication component is treated. Specialized prosecutorial agencies that have a

prosecutorial role in the courts on the local level are rare. They could be created, of course, but it seems undesirable to establish such new one-dimensional agencies, absent a close connection with a police-compliance-function and an administrative adjudicative body. If the adjudication function is handled by a court--even a specialized court--it seems likely that we shall opt to have the prosecutorial function continue to be performed by the general prosecutor's office. If the office did not previously have authority to prosecute civil enforcement actions, an expansion of its authority would be required. Such an approach would not, of course, reduce overall prosecutorial case load.

More far-reaching innovations are possible, however, if the adjudication function is turned over to an administrative agency. One approach would have the general prosecutor's office pursue enforcement before the administrative agency. Since many prosecutor's offices already have some civil jurisdiction, giving them a role in administrative adjudication would probably not be seen as odd.

More likely is an approach that would carve out of the general prosecutor's authority those substantive areas whose enforcement is to be adjudicated by an administrative agency and establish a prosecutorial arm within the agency to handle such cases. Such an approach would have several features different from the existing criminal handling of the prosecution of those substantive areas. The new prosecutorial operation would only be civil; it would not have a

dual jurisdiction. It would be specialized in accord with the agency's jurisdiction.

The fact that the prosecutorial arm and the adjudicative body would be within the same agency departs from the traditional criminal law separation between court and prosecutor and makes the organization vulnerable to the familiar administrative law criticism that there is an improper combination of functions. There are traditional responses to such criticisms: The agency maintains an internal separation. The size of the agency and the nature of the separation might make a difference in the persuasiveness of this claim. Also, if an administrative law judge, from outside the agency sits as a fact finder and initial decisionmaker, an impartial buffer is thereby established between the prosecutor and the agency. Finally the gains in expertise outweigh the risks of any combination of functions.[78] Creation of a specialized prosecutorial agency separate from the adjudicating agency would, of course, be another way of meeting the concerns in this area.[79]

Just as with the adjudication component, it is questionable whether specialization of prosecutors can be justified on the ground that the tasks involved in initiating an enforcement complaint in the most of the substantive areas under consideration require an unusual degree of expertise. The legal issues involved are generally not particularly technical. In a few fields like traffic enforcement, some

technical issues like those raised by sobriety testing techniques arise, and the case might be made that such matters would be better handled by a prosecutor with some experience in the area, but that hardly makes the case for agency-connected prosecutors.

The argument for placing the prosecutor within the agency is similar to that made for establishing a specialized adjudication agency. Thereby more attention will be paid to enforcement in the area, a uniformity of approach in dealing with the particular category of conduct will be promoted; and finally greater harmony between the prosecutor and the adjudicative body will be assured.

We assume that the prosecutive and adjudicative components, though perhaps located within the same agency, nevertheless will be separate components and perform distinct functions. Separate treatment will be given, infra, to an increasingly popular model--namely, prosecutorial diversion--under which the prosecutorial arm begins to assume quasi-adjudicative functions.

There seem to be no significant cost advantages that depend on where the prosecutor is placed. Relieving the general prosecutor's office of a heavy minor offense case load will free up his manpower for more serious offenses, but again, the resources to handle such cases civilly will have to be found somewhere. Like the issue of transferring adjudicative authority to an agency, the case is much more

attractive if there is already in existence an enforcement or related agency whose role might appropriately be expanded. The case for proliferating new agencies is not strong.

The possibility of a general civil enforcement prosecutor to handle all civil penalty cases should be considered. In a sense some jurisdictions have something close to that arrangement where a city prosecutor, like the City Attorney of Los Angeles, has authority to prosecute civil penalty cases.[80]

C. Police

What effect would decriminalization accompanied by continuation of an enforcement approach have on the police component of the process? A point that though obvious nevertheless merits emphasis is that as long as an enforcement approach is taken, some type of police component is required. Indeed, even for some non-enforcement approaches--e.g., counselling or treatment--performance of some type of police-like function may be required to identify and, perhaps, bring in the target population.

Many of the issues regarding the police parallel those previously discussed in relation to the adjudication and prosecutor components. However, because of overall size, the number of personnel involved and the character of what police do, changes such as specializing police agencies or integrating them into other administrative agencies pose somewhat different problems.

One approach would modify the police role only slightly in relation to decriminalized offenses. The general police agency would still investigate and apprehend, but for the

offenses involved, they would no longer take into custody; citations would be issued instead. This would decrease the involvement of the police with minor offenses by reducing the amount of time the individual officer spends on a matter and would help to meet one criticism of the existing criminal process--that police allocate too much time to the enforcement of minor offenses.

A citation procedure saves the time of the arresting officer in taking the suspect to the stationhouse, saves resources otherwise involved in booking the arrested person and other incidents of the incarceration process. If the offense category is one that involves an enormous number of violations, as traffic, the cumulative savings accomplished may be substantial. Nevertheless, even under a citation system, there will still be substantial police resources devoted to some features of enforcement--patrol, investigation, identification of violators and related functions. Where the frequency of violations is much less, the resource-saving argument for this procedural change may not seem as persuasive.[81]

Substitution of a citation or summons approach in place of an arrest-booking-incarceration procedure for certain offenses may be viewed as the police analogue to a streamlining of procedures in the courtroom. Of course, it also saves the citizen involved the inconvenience and other burdens that attach to having been arrested. Such an approach, of course, is already in use for most traffic offenses and for other minor misdemeanors.[82] By dint of recent legislation

in some jurisdictions its use has also recently spread to marijuana law enforcement.[83]

Substituting citation for arrest procedures, though generally a desirable reform, would not effect as large savings in regular police time as might be attained by shifting of the intake function to other agencies. What form might such a shift take? We might create a new civil police agency with a role roughly paralleling that of the police, whose jurisdiction would cover the range of decriminalized activities toward which an enforcement approach is taken. Just to describe such an agency, however, suggests the oddness of it. It would be large, with limited functions and would duplicate many regular police activities. Another approach would be to establish particular specialized agencies (or to expand the role of existing agencies) to siphon off enforcement responsibilities for particular offenses from the regular police. In this connection, it is instructive to note the contrast between how we handle, on the one hand, traffic violations--by regular police--and, on the other, housing code violations--by a specialized enforcement unit called building inspectors.[84] Why have we chosen different approaches in those two areas? The answer is tied to notions of specialization, the nature of the police role in the two areas, judgments about resource allocation, police image, and particularly, historical development.

At present, one finds numerous examples of specialization in existing regular police agencies.[85] The experience with such specialized agencies, unfortunately, has not always been happy. On the federal level, there are certain traditional administrative agencies that have a police arm--e.g. Post Office Inspectors. There are also a variety of specialized regular police agencies such as the Secret Service, the intelligence arms of the various armed services, the CIA, and the like. On the state and local level, there are also examples. State police in some jurisdictions are essentially traffic enforcement agencies although they often have a residual general law enforcement authority.[86] The larger local police agencies have specialized units to handle certain types of investigative functions--such as burglary and homicide details. Many departments have been experimenting with specialized family disturbance units. Investigative police units in larger prosecution offices may be similarly specialized--e.g. handling such diverse areas as fraud, gambling, organized crime or non-support of children.[87]

There can be significant advantages in having police agencies whose personnel have specialized training geared to performance of particular tasks--whether the specialization is accomplished through special units within a large general police agency or involves an agency-by-agency approach. The advantages of specialization may peculiarly attach to many of those offenses deemed ripe for decriminalization. Thus it is useful to have units with some background

in psychology and counselling investigating family disputes or with relevant training involved in picking up drunks.

The idea of establishing specialized civil enforcement agencies for many of these substantive areas thus has a surface appeal. Specialization for the police seems more important than it does for either the adjudication or prosecution component. But it seems doubtful that we would be willing to create wholly new specialized police agencies for the many decriminalized offense categories. It would certainly not be appropriate to have a separate police agency to enforce every disparate form of prohibited decriminalized conduct.

The case for having specialized police agencies could be made more attractive if in each instance they were to be integrated into a total package--combined with prosecutorial and adjudicative units in a single agency. Even then, it seems an unlikely prospect for all but a few substantive areas. Or one can imagine a few such agencies being developed with jurisdiction over a number of related areas. One agency might handle domestic relations matters such as family disputes and non-support; a second might handle all the different aspects of traffic; a third, housing and health code violations;and a fourth, offenses relating to the use of intoxicants and drugs.

Removing matters from the jurisdiction of the regular police may have serious,undesirable side effects. First there

would inevitably be some jurisdictional overlap and problems arising therefrom. When, for example, does a family dispute or public drunkenness episode move from a minor counselling or medical problem into a major crime problem? Who should the neighbors call? There are advantages in having the same agency perform several different kinds of roles.

Second, performance of one type of role by the police may facilitate accomplishment of other roles. Police performance of their traffic enforcement function requires their presence throughout the geographic area encompassed by their jurisdiction and makes them more readily available for serious crime enforcement. Separating the traffic role and handing it over to a specialized civil agency would create a need for a large amount of duplicative patrol efforts by different police agencies--albeit for different enforcement purposes.

Third, there may be an advantage in having the same policy agency perform different kinds of roles particularly when the differences range from heavy law enforcement using a variety of different kinds of weaponry through counselling and performance of a quasi-medical role. The argument is that the regular police will be less militaristic and more humanistic if we diversify their tasks. However, a related argument can be made to support the contrary conclusion. The larger the police agency, the more danger it poses to the society; carving out separate enforcement agencies to

perform civil tasks fragments the police arm and thus reduces the dangers that would flow from having very large police agencies.

Other grounds for establishing civil enforcement agencies along the described lines can be offered. In addition to the advantages of specialization thereby attained, it would avoid the oddity of criminal police performing purely civil tasks. In some areas having regular police perform civil enforcement tasks--for example, picking up drunks for transportation to a medical facility--has created difficulties.[88]

Were we able to create such new agencies while leaving stable the size of existing police agencies, the effect would be to devote much greater regular police resources to serious crime law enforcement. Another alternative would be simply to increase the size of the regular police forces by a comparable amount. That would avoid the costs of setting up a new agency. It would not, however, guarantee how the additional police would be allocated.

A final advantage of separate specialized agencies would be that the police role in relation to the civil offenses would be handled at less cost. This assumes that the civil agency police, whose duties would involve less physical danger than regular police, would have a lower salary scale.

The practical case against establishing separate specialized police agencies is very strong. Since the police component of the criminal process is already the most

fragmented, represented by thousands of police agencies throughout the country,[89] accomplishing such a change on the local level--where most of the crimes with which we are concerned are prosecuted--would, on its face, be extraordinarily difficult. In most instances, there is no obvious existing agency whose functions might be expanded and adapted. Creation of new agencies would therefore be necessary, and it seems doubtful that adequate financial resources would be available for this purpose. The case would first have to be made very powerfully that such expenditures would have the effect of freeing up substantial regular police resources for serious crime enforcement.

D. Sanctions

In theory, a change from a criminal to a civil sanction system involves a reduction in the penalty. In deciding whether to substitute an administrative process enforcement system for the criminal process in particular substantive areas, a key issue is whether the alternative system will in practice be as effective. Will it deter persons from engaging in the prohibited conduct to the same extent as a criminal approach? If not, is the loss in deterrence tolerable, given other gains obtained?

There are a variety of sanctions that might be used in any civil enforcement system to be substituted for a criminal system. These include, for example, a money penalty, suspension or revocation of a relevant license, a cease and desist order, seizure of property, publicity and blacklisting.[90] Clearly, however, money penalties are

likely to be the most frequently used sanction since they are easy to impose, generate a source of revenue and have the potential for enormous flexibility in severity.

Professor Goldschmid has provided us with a comprehensive survey of the use of civil money penalties in the federal system.[91] The specific recommendation of the Administrative Conference that grew out of his Report merits quotation:

> "Each federal agency which administers laws that provide for criminal sanctions should review its experience with such sanctions to determine whether authorizing civil money penalties as another or substitute sanction would be in the public interest. Such authority for civil money penalties would be particularly appropriate, and generally should be sought, where offending behavior is not of a type readily recognizable as likely to warrant imprisonment." 92

Neither Goldschmid nor any other source definitively answers the question, however, of how deterrence under an administrative civil enforcement system compares with that under the criminal process. This should not surprise. We have very little hard evidence even to support the assumptions we make about the deterrent effect of criminal sanctions.[93]

A few limited observations can be made. In many of the areas under consideration, the actual penalties imposed are hardly more than a wrist slap anyway--probation or a minor criminal fine. Is it really worth using the criminal process to impose such sanctions? It may be, too, that we would be more willing to impose sanctions under the civil banner in some cases. Were civil enforcement to prove more efficient,

it might increase the certainty of punishment without significantly reducing its severity. In some circumstances, a civil penalty, e.g. license revocation or a high money penalty, would appear to the average person to be as harsh or harsher than many criminal penalties, including short terms of incarceration.

The comparative deterrence issue thus includes consideration of such factors as the particular civil sanctions to be employed and the prior criminal penalty practice. It also turns on whether using the label "crime" or "misdemeanor" adds significantly to the deterrence quotient of the enforcement system. Also, does the mere possibility of a jail term have an impact, even if the sanction is not, in normal course, imposed?

Regrettably, judgments about the comparative deterrence issue must be made in the absence of answers to such questions. In such a state of ignorance, process and cost advantages, if any, may loom larger. Or it may be that our ignorance should cause us to move with greater caution before adopting innovations. Of course, there may be no way to obtain even a semblance of an answer to the questions unless we are willing to experiment.

Suppose that instead of substituting a civil administrative enforcement process for criminal disposition, we simply added such a process as an alternative to criminal handling. Suppose, too, that a prosecutor could pursue either, but normally went civilly, using criminal sanctions only as a back-up where civil enforcement did not work or for particularly egregious violations. Such a system is not unfamiliar; many federal and some state

regulatory schemes reflect a similar pattern.[94]

Perhaps the deterrence quotient of such a penalty scheme would differ from one where only civil penalties were available. Such a system which gives prosecutors an additional option in deciding on the charge may effect how prosecutorial discretion is exercised.[95] Insofar as the dominant pattern of enforcement is civil under such a system, cost and related factors should be comparable to those applicable to the type of civil enforcement approach that entirely replaces criminal processing. There is, of course, the risk that where two tracks are available, the police and prosecutor may be tempted to continue to use the criminal process extensively. The only way to ensure effective decriminalization, with whatever advantages flow therefrom, is entirely to eliminate the possibility of criminal process enforcement.

E. The Review Process and Judicial Involvement

In calculating the costs of an administrative enforcement system, in addition to the components and elements previously discussed, account should also be taken of the provisions for review of the basic adjudicatory decision. In addition to the fact that the review stages of a system add to its total cost,[96] these provisions will affect the quality of the decisions made and the relation of the system to the courts.

A type of internal review is involved if an administrative law judge prepares an initial decision considered in turn by the agency which is formally responsible for the decision. Additionally, some systems may provide for a formal appellate review within the administrative process itself.[97] Finally,

provision is generally made for some sort of judicial review of the agency's decision.

Professor Goldschmid distinguishes between an administrative civil money penalty system where the penalized party has a right to de novo review in a court and a "[t]rue administrative imposition [that] takes place when an agency's decision is subject to only limited judicial review,"[98] and he argues forcefully for more extensive use of the latter system on the federal level. In support he cites the disadvantages of a de novo review system--either it involves the judiciary in duplicating the administrative processes and burdening further an overburdened court system, or by its very existence it encourages inappropriate compromise of the applicable penalties.[99] Now that the Supreme Court has held that administrative imposition of substantial money penalties in a framework of limited judicial review complies with the Seventh Amendment,[100] it is to be anticipated that such limited review systems will be used more frequently on the federal level.[101] It might also be expected to be a popular model for all administrative alternatives to the criminal process.

Such an administrative process alternative would involve at the review stage judicial resources comparable to those used for a similar purpose in the criminal system. Thus savings in judicial resources would be made only at the adjudication and not the review stage. A de novo judicial review system would decrease the savings otherwise to be achieved under an administrative process alternative.[102]

There is other possible judicial involvement in an administrative process sanction system. If the penalized party refuses to pay, it may be necessary to use a set of secondary sanctions. One approach would be directly to give the administrative agency the power to hold a person in civil contempt, and if necessary, incarcerate. Such a system would again raise constitutional questions. Most other approaches would require the agency to make use of the court system--through the use of a backup system of criminal sanctions or in a collection action, or by seeking to hold the party in contempt of court or, where appropriate, through an alternative sanction system such as license revocation that itself might also ultimately require a backup use of the courts.[103] In assessing the amount of court involvement in an administrative process enforcement system, account should also be taken of the possible use of the courts to provide such a backup enforcement power. In such secondary proceedings, judicial consideration of the merits of the issues should be extremely limited since it will have been preceded by an administrative determination and the opportunity for an initial judicial review.[104] Given such an approach, there should not be many instances where secondary enforcement actions are needed.

F. Prosecutorial Diversion

Prosecutorial diversion, an increasingly popular alternative,which has in recent years been generating a substantial literature,[105] merits some consideration since upon close analysis, it too involves a type of administrative process alternative to the traditional criminal process.

The mechanics of existing diversion schemes vary from jurisdiction to jurisdiction, but the usual pattern involves the prosecutor making a decision to apply a non-criminal, treatment-oriented disposition to a defendant after an initial investigation and recommendation by a support agency.[106] To qualify for such disposition, the crime and the defendant must meet certain basic criteria.[107] Typically today diversion is only available for a limited category of cases.[108]

Viewed from one perspective, diversion is an individualized form of decriminalization. Rather than proceeding by categories of crime, labeling them by statute non-criminal and subject only to non-criminal dispositions, diversion permits the prosecutor to make the decision to decriminalize in the particular case. Decriminalization focuses on particular categories of low-level criminal conduct. Diversion, however, may also be applied to more serious criminal conduct where the particular individual seems non-dangerous. There is, however, an increasing tendency of diversion programs to promulgate criteria to govern the applicability of the program,[109] and these are sometimes framed in terms of offense categories or whether the accused has a record of prior crimes.[110]

There are differences between diversion and decriminalization. Decisionmakers in diversion are criminal process personnel, sometimes assisted by a social service agency. Adjudicators in a decriminalized enforcement scheme are theoretically entirely outside of the criminal process. Under diversion, the defendant may be initially designated for non-criminal treatment

and then later, having failed to comply with the conditions imposed, be returned for criminal process handling. There thus seems to be more discretion and flexibility in a diversion system.[111] Authority to return the violator to the criminal process is normally not available under a straight decriminalization approach, although it could certainly be built into the system.[112]

Viewed from another perspective, diversion involves a fascinating manipulation of two components of criminal decision-making process. Under the traditional approach, the prosecutor decides whether to initiate a criminal prosecution, and the court then adjudicates the matter. Under diversion, the prosecutor's role is enlarged, and the court's role is short-circuited.[113] By deciding whether the defendant should be diverted into an alternative track and having a role in deciding on the type of disposition, the prosecutor may be seen as having assumed an adjudicative function. In fact, even in the traditional criminal process, he has some such role, albeit informal, since the decision to prosecute is itself an informal adjudicative action.[114] By giving him a third option--adding the power to divert the suspect into a civil disposition setting to his power not to proceed at all or to presecute criminally--the diversion system highlights the adjudicative nature of the prosecutor's decision. Under diversion, the prosecutor can cause a whole set of dispositional consequences to happen to the suspect. The court is relegated to being involved only where the prosecutor

initially decides to proceed criminally or where, after the defendant is diverted, a subsequent decision is made to return him to the criminal process.

Diversion systems have been criticized on the ground that the prosecutor's usual discretionary powers are, if anything, enlarged and not subject to any significant outside check,[115] unless the decision made is not to divert and to prosecute criminally. The argument is made that giving the prosecutor the power to make such a dispositional decision should be subject to some type of adversary proceeding or judicial consideration.[116] The prosecutor's response is that the new decisional authority is encompassed within the scope of prosecutorial discretion--traditionally unchecked by any formal procedures or judicial review.

A diversion system constitutes another form of administrative process alternative to a straight criminal processing of a criminal charge. Rather than using a new or existing non-criminal administrative process external to the criminal process, it uses a component of the criminal process, expands its authority to include a non-criminal disposition and supplements it with new support agencies to perform investigation, advice and counselling functions. An alternative approach, of course, would be to make the court the prime decisionmaker in the diversion process, giving it a similar non-criminal dispositional authority, subject to appropriate procedures perhaps less stringent than for a criminal disposition.[117]

Those who advocate diversion argue that its advantages include the fact that it saves court time and permits the tailoring of a disposition to the needs of the particular defendant and some continuing supervision without stigmatizing him with a criminal conviction. As it presently operates, however, diversion is available in a relatively small part of the prosecutor's caseload.

Initially, diversion seemed a relatively inexpensive administrative process alternative since it uses an established component of the criminal process. A good diversion system, however, requires a not inexpensive, competently staffed support agency, and thus apparent cost savings under present low-level systems may turn out to be illusory.

Pressures to control the enlarged authority of the prosecutor will probably eventually lead to the introduction of procedures that will make the diversion process itself more costly than at present. The function of the investigative advice and counselling agencies may be expanded for this purpose to provide hearings on the question of the appropriateness of diversion.[118] The processing of diversion cases would, of course, be delayed thereby, and we might find ourselves with a fairly complex procedural structure--diversion providing one procedural track and criminal processing a second. In effect a new, full-fledged administrative agency would be created as an appendage to the criminal process. Absent such procedures, diversion looks like a process that does not afford to the

affected party very much procedural protection. With such procedures added, diversion begins to look like just another type of administrative process alternative.

V. Illustrative Subject Matter Areas

A. Overview

The substantial literature on decriminalization is a useful source to which to refer in developing a preliminary list of offenses that may be candidates for administrative process treatment.[119] As previously noted, it is contemplated that for some offenses decriminalization would result in no government intervention; for others a regulatory, social service or related approach may be appropriate; and only for a limited number would there be an enforcement approach. Our focus is on this last-mentioned category.

The list of offenses thus compiled is not intended to be exhaustive, and surely for some of the offenses listed there may be controversy whether decriminalization would be appropriate, and if so, whether a civil enforcement approach should be adopted. In the following sections, a number of these offense categories are used to develop in more detail and in specific contexts the types of issues discussed in Part IV.

Offense Categories

1. Animal control
2. Consumer protection
3. Deception, e.g. deceptive advertising
4. Drunkenness
5. Drugs--particularly marijuana

6. Environmental control, including air pollution
7. Family disputes
8. Fish and game violations
9. Gambling
10. Health and safety code, including e.g., food standards
11. Housing code
12. Insufficient fund bad check charges
13. Liquor, manufacturing and sale
14. Non-support
15. Price control
16. Prostitution
17. Public disorder
18. Sex offenses - particularly consensual offenses and deviancy not involving violence or imposition on children
19. Shoplifting
20. Traffic offenses
21. Certain general categories of offenses such as --
    a. petty offenses
    b. strict liability offenses
    c. sumptuary offenses

B. Housing Code Violations

Criminal process treatment of housing code violations

takes different forms, but a typical pattern may be described as follows: Several administrative agencies (e.g., Department of Health, Department of Buildings) may share overlapping inspection jurisdiction. Inspection for code violations by a member of the inspection staff follows a complaint or may be initiated by the agency. If a violation is discovered, a notice ordering correction within a specified time period is sent. Some jurisdictions provide for an administrative appeal of the compliance order before a housing board of appeals or for an administrative hearing to inquire into reasons for noncompliance. If the issue is not resolved administratively a decision is made whether to prosecute criminally and, if so, the matter is turned over to the prosecutor's office. The prosecution is brought in a specialized housing court. Defense counsel may use dilatory tactics. Many cases are finally resolved by guilty pleas or summary dispositions. Fines, when imposed, tend to be light. Other possible sanctions include jail terms which are seldom imposed; probation without a judgment of guilt to induce compliance; or requiring the convicted person to attend a housing clinic.[120]

Those who have studied housing code enforcement in the criminal process have identified a large number of weaknesses in the operation of the criminal process

machinery. The most significant for our purposes are: (a) courts unable to handle the caseload; (b) susceptibility of the criminal process to procedural manipulation and dilatory tactics; and (c) unwillingness of judges to impose heavy fines. One type of response to these problems has been to develop alternative civil judicial remedies including mandatory injunctions, receiverships and consent decrees.[121] But judicial handling of these remedies, too, has been criticized:

> "When present judicial remedies are surveyed one is impressed by the degree to which the judicial process hinders adequate code enforcement. The courts seem unable to process violations efficiently."[122]

Still newer judicial approaches designed to remedy the pitfalls of past approaches have been proposed. Gribetz and Grad advocated a mandatory penalty cumulated on a fixed penalty per day basis, to be imposed by a consolidated civil housing court.[123]

The question has been raised, however, whether the judicial process can effectively be used to solve the problems of housing code enforcement.[124] Walter Gellhorn in commenting on the Gribetz-Grad proposal suggested rather than "the creation of a new court (or the further burdening of already heavily overburdened civil courts) . . . creation of a fair hearing procedure within the administrative agency itself. . . ."[125] Others, however, have

argued that

> "an agency would solve none of the problems plaguing housing courts. . . . An agency staffed with experts appointed for long terms might more competently determine appropriate fines than many courts as presently operated. Yet there are no inherent reasons why experienced judges cannot supply expertise to the fining process. Moreover, it seems unlikely that an administrative agency could better resolve problems of court backlog than existing proposals to expand and streamline housing courts."[126]

We see here the same issue: The criminal-judicial process is not working effectively. Is the proper remedy to convert that process from criminal to civil? Will conversion to an administrative process improve its effectiveness?

The process, of course, is already largely administrative in nature using inspectors, and in some jurisdictions, administrative compliance hearings and housing boards of appeals.[127] In these latter jurisdictions, the use of the criminal process to impose sanctions may be viewed as essentially a backup technique, although as a practical matter, it turns out to be necessary in a large percentage of cases. Another way to characterize such procedures is that they involve the equivalent of an informal determination of a violation by an administrative agency followed by de novo consideration of the matter by a court in the context of a criminal prosecution. Gellhorn

would also give that agency the authority to conduct adjudicative hearings and impose sanctions, presumably followed by limited judicial review. When the matter is put that way and there is an administrative agency already in the picture, the Gellhorn proposal appears much less revolutionary.

Would such reform solve the overload problem? There is some question whether the problem in housing courts is that they, like traffic courts, are overloaded or whether housing is different. To the extent that overload is indeed the problem, it might be thought that adoption of an administrative process approach could provide a solution, although it might be just as easy to add additional resources to the judicial machinery, particularly if it is already specialized. As a political matter, however, it may be easy to get new administrative decisionmakers since they receive somewhat lower salaries than judges.

Those who see the primary evil in the present criminal enforcement system in the housing area to be procedural manipulation and dilatory tactics by defendants do not necessarily favor an administrative process approach as a solution. Experience with the traffic area suggests, however, that a significant streamlining of procedures can be accomplished, either by the use of civil court

enforcement or through an administrative process.

Under many existing systems, the policing and prosecutorial officials - inspectors, compliance officers and prosecutors - work out of separate offices, often not in coordinated fashion. An administrative process approach could be a way to bring these different functionaries together into a single agency, permitting greater coordination and more attention to the individual case while avoiding duplication of efforts.[128]

If, as some perceive, there is a need to inject new decisionmakers into housing code enforcement, this might be deemed the capping argument in favor of a switch to administrative process enforcement. But even on this issue, the conclusion is far from clear. It has been suggested that:

> "[m]any judges are unsympathetic to housing code prosecutions. They may feel that a landlord should not be forced to make repairs that his tenants will immediately destroy; or that it is unfair to penalize a landlord when his building varies little from the neighborhood norm. . . . the background of some judges may make them unresponsive to the seriousness of slum conditions. . . . judges may be reluctant to impose penalties politically offensive to property owners."[129]

Such a description of the attitudes of judges is reminiscent of some of the concerns that in part led to the transfer of jurisdiction over employer-employee relations to the NLRB,[130] but unlike that area, no marked change in the

substantive law is contemplated here. Moreover, low fines and indulgence of procedural manipulation in housing code matters could result from factors other than the sympathies of the judges. Nor is it certain that newly appointed administrative law judges would be markedly different than existing judges in their backgrounds or values.

Thus a case can be made for transferring housing enforcement to administrative agency adjudication, but it is by no means clear and overwhelming. It might make additional resources easier to obtain; it might give greater procedural flexibility; it might more efficiently coordinate functions of certain participants in the enforcement process; and it might provide more enforcement-minded decisionmakers. But many of these changes conceivably could be accomplished within the confines of the judicial system, although probably not under a criminal process system. Unless there is an existing administrative agency that can be easily expanded and adapted, it might be preferable to use a civil court enforcement approach, tinkering only with procedures and sanctions.

C. Traffic Violations

Of the substantive areas concerning which there has been a call for decriminalization and a shift to civil

court or administrative process treatment, the field of traffic violations probably has had the most interesting and lengthy history, generated the largest literature[131] and been the subject of more proposals for innovation and new projects than any other. Given the extensive literature on the subject, the treatment of this subject will be brief and simply highlight certain relevant issues.

As long ago as 1933, the Wickersham Commission advocated dealing with traffic violations through an administrative process.[132] It is a field where there has been virtual unanimity of the relevant authorities in advocating decriminalization. Practically no one, however, has proposed abandonment of an enforcement approach.[133]

The principal justification for decriminalization of this field is the enormous caseload and resulting overburdening of the lower criminal courts. The practical pressures have been enormous for innovative changes designed to simplify and expedite procedures and speed up the sanction-imposition process so as to ease the caseload. Many new systems have resulted, most of which in many ways resemble each other although the details vary.

Most of the attention regarding alternative systems have focused on the need to substitute for or modify the court component; most treatments assume continued police involvement. An alternative that should at least be

mentioned would be the development of a new civil agency to perform the traffic enforcement tasks now being performed by regular police. We have the beginnings of such a system with the use of crossing guards, parking meter maids and men and, in some states, state police forces whose principal assignment is traffic enforcement.[134] But generally traffic law enforcement has not been withdrawn entirely from the regular local police and assigned to a new agency. The reasons why calls for decriminalization have not also led to modification of the police role have been previously discussed.[135] The following discussion assumes that decriminalization approaches in this field will not have a significant impact on the workload and related burdens of the police component of the criminal process.

Innovations that have been introduced into the judicial handling of traffic violations include: establishment of a specialized court to deal only with traffic matters; some sort of decriminalization involving a change in the labelling of the offense (e.g., "infraction") and reduction of penalty; authorizing decisions to be made within the framework of the court system by a parajudicial officer variously called referee, commissioner or the like; elimination of jury trials; change in the burden of proof (from beyond a reasonable doubt to clear and convincing evidence);

elimination of provision for appointment of counsel to represent the indigent; diversification of sanctions to include mandatory participation in training programs; and simplification of many incidental procedures relating to bail and appearances.[136]

The field of traffic violations is one of the few substantive areas where proposals to switch from judicial criminal treatment to an administrative process enforcement system have been implemented. Perhaps, surprisingly, even in this field there are very few examples - the most notable is in New York City - of what we have termed an administrative process approach.

A recent Department of Transportation study describes and compares three models implemented in different jurisdictions, labelling them: judicial, modified judicial and administrative.[137] The study leads one to the conclusion that differences between an administrative process and the streamlined versions of a judicial process are not great.[138] Most of the innovations previously discussed are as achievable (and in fact have been achieved) under the streamlined judicial process model as under an administrative process approach. What difference then does it make to adopt an administrative process approach in the field of traffic?

Most importantly, changeover to an administrative

process for traffic violations makes it possible for the same body to have plenary authority over both the licensing of drivers and the imposition of monetary sanctions.[139] It also relocates the sanction-imposing agency to a different position in the governmental structure, changing the lines of bureaucratic authority. It affects budgeting concerns and the source of funding for the sanction-imposing agency. It substitutes somewhat less expensive administrative agency decisionmakers for more expensive judges.[140] The Department of Transportation study indicates that the New York administrative process is somewhat less costly than the several judicial approaches, but the principal explanation for the differential is the fact that the salaries of the administrative hearing officers are lower than those of judges.[141]

Ordinarily, switching a particular substantive area from a judicial to an administrative process involves large start-up costs, particularly if a new agency is to be created or an existing agency significantly enlarged. In the case of traffic violations, the fact that all jurisdictions have a motor vehicle department administering a licensing system provides a ready-made agency that can be adapted, as it was in New York, to perform tasks formerly assigned to the judicial system. Even then, some specific questions arise regarding start-up

costs, and the New York experience may yet provide relevant information not included in the DOT study.

D. Non-support

The offense of failure to support one's child may be thought to be a rather unusual subject to consider for administrative process treatment. Not all of those who have written on decriminalization have included non-support cases as ripe for such treatment.[142] Nor is it entirely clear that the criminal process is ineffective in this area or that unusual disadvantages flow from its involvement.

Kadish has proposed removing non-support cases from criminal jurisdiction and turning them over to "a civil agency especially designed to handle the service."[143] At present, failure to make required support payments is usually made a crime, and police and prosecutors collaborate to find the parent and use, inter alia, the leverage of the criminal justice system to obtain the support payments. Kadish believes that "it makes little sense to provide . . . [this service] through the already overburdened criminal processes although indisputably, the state has an obligation to provide [it]."[144] He suggests that in the criminal process "it is done reluctantly and usually less effectively than by a civil agency. . . ."[145]

Kadish's argument poses again the recurring theme of this paper. Would a civil agency approach be an improvement over existing criminal process handling? Is an administrative agency the answer? The specific weaknesses that he identifies are a diversion of law enforcement from their main business of protecting the public against dangerous conduct and a further burdening of overburdened criminal processes. To this one might add the claim that treating non-support as a crime may result in trivialization of the criminal sanction.

On the face of it, these concerns seem legitimate; on closer analysis, one may begin to wonder. It is not clear how much of a burden non-support cases add to the several components of the criminal process. Certainly the incidence of actual prosecutions is not unduly high; in most cases the threat of prosecution has the desired effect. On the other hand, the burden on prosecutorial resources in some jurisdictions is considerable, particularly where the prosecutor handles both civil enforcement and criminal prosecution matters. In Los Angeles County, for example, the District Attorney's office appears in any proceeding to enforce a child support order where the custodial parent is receiving welfare money on the child's behalf, and the Superior Court may direct him to enforce the order even in non-welfare cases. The District Attorney

also acts civilly in responding to petitions from other states under the Uniform Reciprocal Enforcement of Support Act and in initiating petitions to other states. Finally, staff in his office perform some of the police functions of investigating criminal non-support complaints, trying to locate the absent parent and, if necessary, prosecuting the parent criminally.[146]

Would a civil agency approach be as effective? Part of the answer depends on the type of civil agency set up. If an enforcement agency with authority to impose civil sanctions were established, it would be desirable that it have as much leverage as a criminal prosecutor using criminal penalties. Perhaps Kadish has in mind a social service agency approach involving caseworkers, counselling and the like. It is difficult to gauge the comparative effectiveness of such an approach without more of the details, but one must be skeptical about the possibility that it will be as effective as the present system.

Innovative proposals have also been mentioned by others:

> [O]ther proposals have been made, including the suggested establishment of an omnibus family law court to process both civil and criminal actions to enforce child support. A still more novel proposal has been that domestic relations matters be altogether removed from the courts, in favor of other agencies which would specialize exclusively in these matters . . . . hopefully the laws ultimately will be changed to at least give the District Attorney better enforcement capabilities.[147]

There is one advantage of the criminal process approach in this area that would be hard to duplicate in an administrative agency. There are several problems that must be dealt with in enforcing a support order against an errant parent: finding the parent, holding on to him once he has been found and giving him a sufficient incentive to make the support payments. Criminal process investigatory resources are a particularly useful adjunct where the parent has disappeared. It also makes it easier to prevent flight once he has been found. It may be, however, that cases where the whereabouts of the parent are entirely unknown are not a large part of the case load and that to deal with such cases a small investigatory staff could be added to the civil agency, or it could, under appropriate restrictions, engage private investigatory bodies. Also, since 1975 there has been a federal parent locator service that makes available information contained in federal files to help locate errant parents for purposes of enforcing support obligations.[148]

Another advantage of the present system is that under the terms of the Uniform Act, a judicial determination in jurisdiction A that a parent is behind in his support payments may be forwarded for enforcement to the prosecutor in jurisdiction B where the parent is located.[149] To implement a similar approach once administrative agencies

were used in some jurisdictions, it would be necessary to make it possible for a civil agency in one jurisdiction to call on a criminal prosecutor in another and vice versa.

It would be rather odd to establish a civil enforcement agency with only the non-support mission. An approach mentioned above that has some attractive features might be to establish a civil agency with a more encompassing domestic relations jurisdiction -- divorce, child custody, disputes regarding visitation and the raising of the children, all non-support issues and perhaps other related matters.

Cost factors again may be relevant in deciding finally whether to adopt a new approach. A civil enforcement agency may be less expensive to operate than the child support components of the criminal process although the fact that a separate agency and administrative staff is required will probably reduce the cost advantages. There would again be start-up costs associated with establishment of a new agency. Perhaps an existing agency could be utilized, but it is hard to see which one.

Closer examination of Kadish's proposal thus suggests that an administrative process alternative in this area is not out of the question. Its desirability and advantages, however, taking into account the way in which the present

system operates and the problems involved in creating a new agency, are far from clear. It may be that as much can be accomplished by a candid acknowledgment of the special nature of the role of the criminal process in this area and adoption of improvement measures within the confines of the existing system.

E. Marijuana

Proposals for decriminalization of the handling of drugs, particularly marijuana, are a central theme in the decriminalization literature, but no one really advocates an alternative system of governmental intervention that would involve an administrative agency enforcement approach. Our interest in the subject thus is limited to contrasting it with some of the other areas reviewed here and to dealing briefly with issues relating to a different type of administrative process alternative, a licensing-regulation approach.

Some jurisdictions have already reduced the penalties for marijuana possession to the point where they amount to a civil penalty system, establishing an approach that superficially resembles that taken for traffic violations.[150] There are differences, however, that suggest that the field of traffic violations is not an apt comparison. It has been suggested that the police will not bother to enforce minor marijuana infractions; they do enforce traffic laws. Because many people are ambivalent

about the need for sanctioning marijuana use, a scaled down penalty approach may be seen as an intermediate step toward one that eliminates all government intervention. That is clearly not the case with traffic enforcement. Viewed from this perspective, it might make sense to use a civil enforcement approach in the courts for a time but not go to the expense that would be involved in shifting enforcement from the courts to an administrative agency.

The most thorough study of alternatives to the present criminal law approach is that done by Kaplan.[152] He describes several models, none of which would involve the substitution for the courts of an administrative enforcement agency. He does describe a licensing, taxing, regulatory approach to the subject similar to that which is taken in this country regarding alcoholic beverages.[153] Such a system includes, of course, an important administrative process component--the licensing or taxing agency. As Kaplan notes, such a system would permit the government to maintain some quality control of the drug and influence the price through its taxing power.[154] The administrative process components--which would require the creation of an additional governmental bureaucratic arm, unless the existing alcoholic beverage agencies were adapted and expanded--would make the quality and taxing determinations

and administer the licensing system.

Even under such a system, it would still be necessary, as Packer suggests, to use the criminal process and law enforcement agencies as a supplement or back-up--primarily to deal with black market operations.[155] In Packer's words, "Criminal punishment would cease to be the first-line sanction and would become the sanction of last resort. . . . The use of criminal punishment would simply be postponed one step rather than avoided."[156] Packer further argues that in some areas application through the administrative process of a sanction will not have the desired effect of even reducing the role of the criminal process.[157] He makes this point, for example, with respect to drunk driving. License revocation will not necessarily keep revoked drivers off the streets. To make the system effective, the criminal process is still needed as the sanction of last resort.

A partial response to this point may be that the issues in the criminal trial of one charged with driving without a valid license would be simple and that therefore some of the burden on the courts (but not, necessarily, on the police) will be eased by the licensing-sanction system. But Packer's general point is an important one. Establishment of a regulatory approach does not eliminate the involvement of the criminal process in enforcement. It merely

postpones the stage of involvement, and it may reduce the degree of involvement. How much will turn on the amount of compliance with the regulatory scheme.

F. Public Drunkenness

There is universal dissatisfaction with the criminal process handling of those arrested for public drunkenness. Typical criticisms focus on the diversion from serious crime enforcement of the law enforcement personnel who "clean up" the streets, the distortions of the criminal process involved in the way drunkenness prosecutions are handled in court; the unfortunate stigmatization of the drunk; the clogging of the lower courts by such cases; and the fact that the criminal process is simply a revolving door operation--no medical or rehabilitative function is built into the system.[158]

This is another area where in recent years alternative approaches have actually been tried. In a few jurisdictions non-criminal intervention systems have been implemented. Drunks are picked up and sent to detoxification centers.[159] The systems vary in their details, but they all involve some degree of governmental intervention. No jurisdiction has opted to abandon drunks and derelicts and leave them where they lie.[160] The alternative intervention systems adopted all require some type of policing activity--i.e., picking up the drunk and taking him,

perhaps against his will, to some other place; a few cities have experimented with turning this function over to civilian teams,[161] while others have left it in the hands of special police squads.

These alternative systems for dealing with the public drunk do not involve the type of administrative adjudicative sanction-imposing agencies that are the principal concern of this paper. Yet there may be lessons to be learned from the experience some jurisdictions have had in trying to develop this alternative to the criminal process. First, there is not necessarily a saving in police time. As Nimmer notes,

> "[A] point that is seldom emphasized is that where the police are retained to remove the patients from the street, the reform program ensures that at least one part of the system burden and perhaps the most important part--the use of police resources--is perpetuated."[162]

If civil teams are used to perform the pickup function there may be savings in regular police time, but even here the picture is mixed.[163] The police are relieved of this duty but the cost savings may not be great. Again, a new agency must be created with its operatives perhaps receiving lower salaries; there are start-up costs and additional administrative overhead. One must wonder whether, as far as costs are concerned, it would be as efficient simply to add comparable resources to the police. There are,

however, also indications that the use of regular police as an adjunct to a civil detoxification program causes undesirable strains on the program, primarily because of police resistance to the programs.[164]

In at least one jurisdiction, the cost savings effected overall in the criminal process by changing to a detoxification approach were more than offset by the costs attributable to the alternative processing of the cases. In some jurisdictions where cost savings appeared to have been effected, they resulted from a reduced rate of police contact with inebriates rather than less expensive processing.[165] Overall it is difficult to justify alternative systems in this area in purely monetary terms. Of course, if the handling of these cases is improved, additional expenditures may be worthwhile.

Nimmer suggests that the burdens connected with criminal processing of these cases can be relieved simply by discontinuing arrests and prosecutions of inebriates; that the need for new and expensive civil systems should be viewed as a separate issue, not particularly as a replacement for a system that did nothing but harass the inebriate.[166] In effect he suggests that a system of no governmental intervention at all may be preferable to the present system or the alternatives and that if the government does provide facilities, most of the "intervention" features of the

system--police involvement, involuntary pickups, etc.--should be eliminated.

The problem of the inebriate may be unique in this survey. It appears to be an area where total non-involvement by the government may be undesirable but yet nothing that can fairly be called a governmental intervention system or administrative process will work appropriately. Police functioning in an arrest role in the context of a civilian program does not seem to be very effective. Anticipated savings of money and time by switching from criminal to civil treatment have generally turned out to be illusory. The criminal processing of drunks is clearly a bad system, but we have not yet devised a civil processing system that is significantly better.

G. Prostitution

There is ambivalence in our attitude toward prostitution. However one feels about treating the underlying conduct as a crime, a case can be made for some system of intervention to deal with streetwalking, the public nuisance aspect of prostitution. An important function of the criminal processing of prostitution is to remove the offending persons from the streets for a period of time.

The drawbacks of criminal process involvement are the familiar ones. Valuable police time is diverted from serious offenses. The lower courts are clogged with these

cases to no good effect. If anything, they demean the courts and trivialize the criminal sanction. Moreover, criminal law handling is largely ineffective. Periods of incarceration - whether pending trial or by way of penalty - are limited. Fines that are imposed are viewed by the offenders simply as a cost of doing business.

Proposals for alternative systems for dealing with streetwalking and prostitution generally do not include a civil enforcement administrative process approach.[167] Is this a realistic alternative? The principal advantage would be the removal of these cases from the crowded lower criminal courts. Additional resources, civil in nature, would thus be allocated to enforcement in this area. Under such a system, fines labelled civil would be imposed. They would be no more and probably no less effective than existing criminal fines. Civil fines would provide a way to continue the expression of societal disapproval of the conduct. Perhaps too, the flexibility of administrative process sanctions like publicity might be utilized.

Specialized civil enforcement teams or the regular police might perform the police role under an administrative approach. Use of the latter would, of course, not result in any savings on regular police time. Would the police agency have the power to arrest for a civil offense, or only to issue a summons? Would a summons-citation approach work

in this field? A specialized administrative agency in this field might perform counselling and medical functions under the umbrella of the enforcement process. Such an agency could be a way to devote specialized[168] and expert resources to a problem area that is frequently lost today in the shuffle of a non-specialized assembly line approach in the lower criminal courts.

Problems relating to anti-prostitution enforcement have long been with us. They are unlikely to be solved simply by a change in the nature of the sanction process. Yet the cost of criminal processing in this field comes very high,[169] and some experimentation along these lines may be merited.

H. Strict Liability Offenses

Here we focus not on a single offense but a class of offenses which includes some of those crimes previously discussed, such as traffic and housing code violations. We have in mind any regulatory offenses subject to relatively minor penalties and conviction of which does not require proof of mens rea.[170] Many have suggested that one way of dealing with the troubling features of a no-mens-rea offense category is by converting it to a civil infraction, subject to a money penalty.[171] If this approach is taken, where should such civil violations be prosecuted?

If the offense is truly regulatory in nature there will usually be a well developed enforcement agency like a housing inspection unit on the state level or the Food and Drug Administration on the Federal. However, for some strict liability offenses; e.g., fish and game violations, there may not be such an agency, although there may be specialized police such as game wardens. Where there is an appropriate agency, its authority can be expanded to include performance of prosecutorial and adjudicatory functions subject to limited judicial review.

Where there is no such agency, it will usually not be worthwhile to create one just to enforce a particular offense category. There are several options: prosecute the offense civilly: a) in a court of general jurisdiction; b) in a court or court part specialized to deal with civil offenses; or c) in an administrative agency with jurisdiction over civil offense cases.

This third option should be explored. It would require creation of a new type of administrative adjudicative agency. If enough civil penalty offenses were funnelled to this agency, it would have a sufficient caseload to keep it busy. It might function with slightly less expensive personnel than the regular court system. Presumably, it would only have jurisdiction over civil enforcement in subject matter areas not dealt with through specialized

agencies.

The idea of such an agency runs counter to an observation of Walter Gellhorn:

> "The use of administrative sanctions is justifiable mainly in respect of matters already or typically committed to administrative supervision and control (e.g. workmen's compensation, taxation, public utility regulation). Even if possibly valid, the power to impose penalties for anti-social behavior (e.g. disorderly conduct, sedition, counterfeiting) should not be committed to administrative hands. In short, the administrative power to penalize should be an incident of other functions rather than activity standing alone."[172]

In general, Gellhorn's position seems sound and is supported by the type of practical considerations repeatedly mentioned in this paper. The attractiveness of an administrative process alternative may be significantly increased if there is an administrative agency already in the picture, either already directly carrying part of the enforcement load or in a related regulatory role.

Yet, a general civil enforcement agency not otherwise having administrative functions might fill an important residual role. It would provide in effect an alternative adjudicative system to lighten the load of the regular courts. Although there would be start-up costs, once established it would be available for any appropriate civil offense category. It would be an interesting new version of an older, much criticized idea--an administrative court.[173]

VI. Conclusion

A conclusion that flows from this survey is that in addressing issues relating to a shift to an administrative process approach one cannot automatically reason from the problems of areas like traffic law to housing code violations or non-support. Each particular substantive law area has enforcement problems that are sui generis. Nonetheless it is possible to formulate some general propositions and conclusions that can provide a basis for thinking about these problems:

A. It is helpful to define what is meant by an administrative process enforcement alternative--viz., retention of an enforcement approach; civil penalties; substitution of an alternative for one or more of the components of the criminal process.

B. Relative advantages involved in adopting an administrative process enforcement alternative differ markedly, depending on which component of the criminal process is addressed.

C. Constitutional objections to most forms of administratively imposed civil penalty systems have generally not been sustained. There have, however, been few court cases testing a change from criminal process treatment to a civil penalty scheme. It seems likely, however, that such switches, too, will be upheld provided

they are limited to minor offenses otherwise deemed ripe for decriminalization.

D. Before adopting an alternative enforcement system, it is useful to undertake as comprehensive a cost-benefit assessment as possible.

E. In making that assessment, the following questions should be asked:

1) Is the offense category one that we are otherwise prepared to decriminalize?
2) what reasons are offered for decriminalization, e.g.,:
   a) large caseload
   b) societal ambivalence about sanctioning the conduct involved
   c) practical difficulties and side effects associated with enforcement
   d) trivilization of the criminal sanction by its use in this field
   e) "inappropriateness" of the use of criminal process enforcement for this category of conduct
   f) ineffectiveness of criminal process enforcement, e.g. because of procedural manipulation; unsympathetic judges; lack of specialization.

3) Does it seem likely that a civil penalty will deter as effectively as a criminal sanction? What was the prior experience with criminal penalties?

4) Is there a sufficient caseload to justify specialized treatment?

5) Is there an existing administrative agency to which enforcement responsibilities (police; prosecutor; adjudicator) could be transferred?

6) Assuming there is such an agency, can one identify advantages that would flow from giving this agency additional enforcement responsibilities (e.g., combining licensing with general enforcement responsibilities)?

7) Does it appear that the traditional advantages of administrative process handling -- viz. application of specialization and expertise to a field; development of uniformity and continuing supervision; change in the decisionmakers etc. -- might be particularly useful in this field?

8) Would civil court treatment-- perhaps specialized--be as effective as an administrative enforcement system?

9) Does it seem desirable to shift the locus of

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the governmental unit dealing with the problem from the courts to the executive branch, with the implications that would follow-e.g., budgeting from a different source, location perhaps in a different level of government?

10) Will any of these shifts significantly reduce personnel costs by reducing the number of personnel involved, by reducing salary levels?

11) Will there be large start-up or transition costs associated with the change?

Until now there have been very few substantive law areas where an administrative process enforcement approach has in fact been substituted for the criminal process. Rather than being in a position to evaluate existing alternative approaches, we have been relegated mainly to speculating about as-yet untested systems. Such speculation does not make us especially sanguine about the possibilities for improvement through adoption of alternative systems. Administrative process innovation is not likely to be a panacea for all of the ills of the criminal justice system.

Yet in particular contexts, a change to civil administrative process enforcement could turn out to be desirable. Despite all the reservations that have been raised, at the least further study and selective demonstrations of alternative systems ought to be undertaken. In this connection, a comment made on an earlier draft of this paper seems

particularly pertinent:

> ". . .If reformers realized all the things that could go wrong, they would not attempt any reforms. But they don't, so they do. And the things do go wrong. But . . . man's ingenuity when pressed intervenes, and the projects are saved by factors which could not have been foreseen in the beginning." [174]

Footnotes - Administrative Process Alternatives to the Criminal Process

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1. Numerous studies and projects have been undertaken in recent years relating to alternatives to criminal process enforcement for particular crimes. See, e.g., infra notes 105-118 relating to prosecutorial diversion. Relevant recent studies somewhat different in approach and emphasis to the instant research are: Aaronson, et al., Alternatives to Conventional Adjudication: A Research Report (1975); Felstiner & Drew, European Alternatives to Criminal Trials and Their Applicability in the U.S. (Social Science Research Institute, University of Southern California, 1976).

2. The precipitating work, of course, was the American Law Institute's, Model Penal Code (Proposed Official Draft, 1962).

3. See, e.g. A. Goldstein, The Insanity Defense (1967)

4. Examples of the general literature on decriminalization are listed infra, note 26.

5. Consult Pres' Comm'n. on Law Enf. and Admin. of J., Task Force Rept: The Courts 1 (1967).

6. Consult generally Pres' Comm'n on Law Enf. and Admin. of J., Task Force Rept: Crime and Its Impact (1967).

7. For a list of illustrative research funded by the Law Enforcement Assistance Administration, see Research Highlights (Office of Research Programs, Nat. Instit. of L.E. and C.J., LEAA, 1976); 3 LEAA Newsletter, No. 12, p. 8 et seq. (1974); 5 LEAA Newsletter, No. 10, p. 7 et seq. (1976).

8. 407 U.S. 25 (1972).

9. 391 U.S. 145 (1968).

10. Aaronson, et al., Alternatives to Conventional Adjudication, Vol. III App. IV, p. A-14-13.

11. See, e.g., Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55 (1933).

12. See, e.g. Miller, The Omnibus Hearing - an Experiment in Federal Criminal Discovery, 5 San Diego L. Rev. 293 (1968); Nimmer, The Omnibus Hearing (1970); Clark, The Omnibus Hearing in State and Federal Courts, 59 Cornell L. Rev. 701 (1974).

13. See Graham and Letwin, The Preliminary Hearing in Los Angeles, Some Field Findings and Legal Policy Observations, 18 UCLA L. Rev. 635 (1971).

14. Williams v. Florida, 399 U.S. 78 (1970).

15. Johnson v. Louisiana, 406 U.S. 356, Apodaca v. Oregon, 406 U.S. 404 (1972).

16. See The Federal Speedy Trial Act of 1974, 18 U.S.C. § 1361 et seq.

17. North v. Russell, 965. Ct. 2709 (1976).

18. See e.g. Nat. Advisory Com'n on Crim. J. Standards and Goals, Rept on the Courts, Standard 8.2 (Administrative Dispostion of Certain Matters Now Treated as Criminal Offenses) (1973).

19. Consult Gellhorn and Byse, Administrative Law, 2-7, 9-11 (6th ed. 1974).

20. McKay, Sanctions in Motion: The Administrative Process, 49 Ia. L. Rev. 441, 443 (1964). Also see Administrative Sanctions: Regulation and Adjudication, 16 Stan L. Rev. 630 (1964).

21. Gellhorn and Byse, op. cit. supra, note 19 at 7.

22. See, e.g., Abrams, Prosecutorial Charge Decision Systems, 23 UCLA L. Rev. 1 (1975).

23. See, e.g. Kadish, The Advocate and the Expert-Councel in the Penno-Correctional Process, 45 Minn. L. Rev. 803 (1961).

24. Indeed it is not unusual for an administrative agency to be required to use the courts to enforce its decisions.

25. Gellhorn and Byse, op. cit. supra note 19 at 29-36.

26. Consult generally Packer, The Limits of the Criminal Sanction (1968); Kadish, The Crisis of Overcriminalization, The Annals 157 (1967); Skolnick, Coercion to Virtue, 41 S. Calif. L. Rev. 588 (1968); Devlin, The Enforcement of Morals (1965); H.L.A. Hart, The Morality of the Criminal

Law (1964). And see the authorities cited in Kadish and Paulsen, Criminal Law and Its Processes, 39 et seq. (3d ed., 1975).

27. One might have anticipated that the decriminalization literature would be helpful on two counts. First, it could be expected to, and does provide a useful preliminary list of crimes that, because ripe for non-criminal treatment, may also be candidates for disposition through an administrative process. Second, it might have been expected also to provide a detailed examination of governmental intervention systems, if any, to be adopted following decriminalization. A few of the specialized articles or books do examine the details of alternative systems that might be introduced after decriminalization, see e.g. Kaplan, Marijuana--The New Prohibition (1970), but generally most of the writing in this field pays limited attention to such details.

Other useful studies have been done from an administrative law perspective of different aspects of administrative process sanction systems. These, however, have generally been addressed only to the federal system and the kinds of conduct prohibited under federal law or at least to areas already regulated through an administrative process. They have not focused on the implications of adopting an administrative process alternative for the multitude of minor crimes covered by state law. See e.g. Goldschmid, An Evaluation of the Present and Potential Use of Civil Money Penalties as

a Sanction by Federal Administrative Agencies, 2 Rpt. Admin. Conf. of U.S. 896 (1972). Compare W. Gellhorn, Administrative Prescription and Imposition of Penalties, 1970, Wash. U.L.Q. 265.

This paper may be viewed as a kind of addendum to the general literature on administrative process sanction systems and to that on decriminalization, surveying certain types of alternative systems of governmental intervention that might be used in place of the criminal process in particular subject matter areas, particularly with respect to offenses made criminal under state law.

28. Kadish, More on Overcriminalization: A Reply to Professor Junker, 19 UCLA L. Rev. 719, 722 (1972).

29. Consult Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 Minn. L. Rev. 379 (1976).

30. Consult Gellhorn, op. cit. supra, note 27., Goldschmid, op. cit.supra, note 27.; Charney, The Need for Constitutional Protections for Defendants in Civil Penalty cases, 59 Cornell L. Rev. 478 (1974); Comment, Imposition of Administrative Penalties and the Right to Trial by Jury, 65 J. of Crim. L. and Criminol. 345 (1974); Comment, The Constitutional Rights to Trial by Jury and Administrative Imposition of Money Penalties, 1976, Duke L.J. 723; Force, Administrative Adjudication of Traffic Violations Confronts the Doctrine of Separation of Powers, 49 Tulane L. Rev. 84

(1974); Marshall, Environmental Protection and the Role of the Civil Money Penalty: Some Practical and Legal Considerations, 4 Environmental Affairs 323 (1975); Abrahams and Snowden, Separation of Powers and Administrative Crimes, A Study of Irreconcilables,1 S. Ill. U.L.J. 1 (1976).

31. Generally, Charney, and the commentators in Duke and the Journal of Criminal Law and Criminology take this position. Force and Abrahams and Snowden make related separation of powers arguments. Gellhorn, Goldschmid and Marshall generally support administrative imposition of civil penalties.

32. For example, Atlas Roofing v. OSHRC, 518 F. 2d 990 (5th Cir. 1975); Irey v. OSHRC, 519 F. 2d 1205, rehearing en banc (3rd Cir. 1975); Beall Construction Co. v OSHRC, 507 F. 2nd 1041 (8th Cir. 1974); American Smelting and Refining Co. v. OSHRC, 501 F. 2d 504 (8th Cir. 1974); Clarkson Construction Co. v. OSHRC, 531 F. 2d 451 (10th Cir. 1976); Underhill Construction Co. v. OSHRC, 526 F. 2d 53, n. 10 (2d Cir. 1975).

33. 97 S. Ct. 1261 (1977).

34. 29 U.S.C. §651.

35. 97 S. Ct. 1261, 1269, 1270 (1977).

36. E.g. Lipke v. Lederer, 259 U.S. 557 (1922).

37. E.G. Hepner v. United States, 231 U.S. 103 (1909); Helvering v. United States, 303 U.S. 391 (1938).

38. 498 F. 2d 414 (2d Cir. 1974).

39. The court also, however, construed the statutory scheme to require a civil jury determination of disputed facts regarding the violation.

40. 498 F. 2d 414, 421 (2d Cir. 1974).

41. See cases cited in note 32, supra. Different analytical routes were utilized. In Atlas Roofing in the Court of Appeals, for example, the court applied the test of Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), on the issue of whether the sanction was criminal:

> "Whether the sanction involves an affirmative disability for restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . ."

372 U.S. 144, 168-169 (1963).

In Irey in the Court of Appeals (Irey was the companion case to Atlas Roofing in the Supreme Court), the court dealt with the Sixth Amendment issue by applying the test of Helvering v. Mitchell, 303 U.S. 391 (1935), concluding that the penalty was "remedial" rather than punitive.

42. 96 S. Ct. 1458 (1976).

43. 97 S. Ct. 1261, 1271 at N. 15 (1977).

44. 422 U.S. 454 (1975).

45. Consult Frankfurter and Corcoran, Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury,

39 H.L.R. 917 (1926); Daub and Kestenbaum, Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality, 197 U. of Pa. L. Rev. 443 (1959).

46. Consult Comment, The Constitutional Rights to Trial by Jury and Administrative Imposition of Money Penalties, 1976 Duke L.J. 723, 731.

47. For extensive argument on this issue, consult the Force and Abrahams-Snowden articles supra, note 30. See also e.g. People v. Grant, 275 N.Y.S. 74 (1934), aff'd per curiam 267 N.Y. 508, 196 N.E. 553 (1935); Tite v. State Tax Commission, 89 Utah 404, 57 P. 2d 734 (1936); State v. Osborn, 32 N.J. 117, 160A.2d 42 (1960). Also consult Schwenk, The Administrative Crime, Its Creation and Punishment by Administrative Agencies, 42 Mich. L. Rev. 51 (1943). Note, Administrative Penalty Regulations, 43 Col. L. Rev. 213 (1943).

48. 96 S. Ct. 2709 (1976).

49. Most authorities assume that Wong Wing v. United States, 163 U.S. 228 (1896) bars any imprisonment decision by an administrative offical although that decision was limited by subsequent authority. See United States v. Moreland, 258 U.S. 433, 439-440 (1922). Consult W. Gellhorn, op. cit. supra note 27 at 283-284.

50. 97 S. Ct. 1261, 1269 (1977).

51. Ibid. at 1266.

52. Ibid. at 1272.

53. Compare Justice Jackson's argument in Morisette v. United States, 342 U.S. 246 (1952), that the Court should be hesitant to interpret a crime as one of strict liability where it is a traditional offense.

54. United States v. J.B. Williams Co., 498 F. 2d 414, 421 (2d Cir. 1974).

55. Comment, The Constitutional Rights to Trial by Jury and Administrative Imposition of Money Penalties, 1976 Duke C.J. 723, 730.

56. W. Gellhorn, op. cit. supra note 27 at 285.

57. Ibid.

58. Consult ALI Model Penal Code Tent. Draft No. 4, Comment at 140 (1955).

59. Inter alia, Legislatures are not likely to be willing to reduce penalties for serious offenses to the extent necessary to permit them to be enforced consistently with the Constitution through an administrative process.

60. See e.g. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

61. Consult generally Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55 (1933).

62. State constitutional doctrine on these issues is more uncertain than the federal. See authorities cited supra, note 47. For a further listing of relevant state decisions, consult W. Gellhorn, op. cit. supra note 27.

An important recent state case sustaining the constitutionality of a transfer of adjudicative penalty-imposition authority to an administrative agency in the field of traffic is Rosenthal v. Harnett, 36 N.Y. 2d 26, 326 N.E. 2d 811 (1975). That case led Bernard Schwartz to comment:

> "The Rosenthal ruling should give impetus to efforts to transfer other lesser offenses notably those involving violations of sumptuary laws, from the courts to administrative agencies." Schwartz, Administrative Law Cases During 1975, 28 Admin. L. Rev. 131, 132 (1976).

63. Mr. Justice Douglas, speaking for the Court in Argersinger v. Hamlin, 407 U.S. 25, 38 at n. 9 (1971). He went on to quote the ABA Special Committee on Crime Prevention and Control as follows:

> "Regulation of various types of conduct which harm no one other than those involved (e.g. public drunkenness, narcotics addiction, vagrancy, and deviant sexual behavior) should be taken out of the courts. The handling of these matters should be transferred to non-judicial entities such as detoxification centers, narcotics treatment centers and social service agencies. The handling of other non-serious offenses, such as housing code and traffic violations, should be transferred to specialized administrative bodies." ABA Rept, New Perspectives on Urban Crime IV (1972).

64. Increasing the likelihood of conviction might be viewed as a way to avoid "wasting" process time by conducting a proceeding that results in no conviction. That view, however, fails to consider the fact that the prosecutor takes into account the applicable burden of proof in deciding to prosecute.

65. United States v. Janis 96 S. Ct. 3021 (1976).

Also see Mountain View School Dist. v. Metcalf, 36 Cal. App. 3d. 546 (1974) holding the exclusionary rule inapplicable to an administrative proceeding. Consult Note, Constitutional Exclusion of Evidence in Civil Litigation, 55 Va.L.Rev. 1484 (1969).

66. Of course, the level of civil penalties could be high enough to continue to encourage compromise by defendants.

67. See Argersinger v. Hamlin, 407 U.S. 25, 34-36 (1971).

68. Cf. North v. Russell, 96 S. Ct. 2709 (1976).

69. Compare Leventhal, Book Review, 75 Col. L. Rev. 1009, 1016 (1975) where Judge Leventhal generally rejects the notion of specialized courts.

70. Consult Carrow and Reese, State Problems of Mass Adjudicative Justice: The Administrative Adjudication of Traffic Violations - A Case Study, 28 Admin. L. Rev. 223, 246 (1976).

71. See, e.g. infra text at note.

72. See e.g. Effective Highway Safety Traffic Offense Adjudication (D.O.T. HS 123-2-442) Vol. II, 66 (1974).

73. Consult Abrams, Administrative Law Judge Sytems: The California View, 1977 Admin. L. Rev.

74. Richardson, A Comparative Study of Legal Examiners, Hearing Officers and Referees (Monograph, 1964).

75. In New York City, the role of the Department of Motor Vehicles was thus expanded through the creation of the Administrative Adjudication Bureau. Consult Carrow and Reese, op. cit. supra, note 70.

76. But compare the discussion in Pres' Comm'n on L. Enf. and Admin. of Justice, Task Force Rept: The Courts 72-78 (1967).

77. Ibid.

78. Consult Gellhorn and Byse, op. cit. supra, note 19 at 1035-1042.

79. For a description of the history of one "experiment" of this nature, consult Gellhorn and Byse, op. cit. supra, note 19 at 1041-1042.

80. In the City of Los Angeles, the City's Health Department cites violators of health laws -- e.g. restaurants -- and the City Attorney's office prosecutes the cases in civil penalty suits. For a description of a disagreement between the two agencies, see L. A. Times, Pt. VII, p. 1, March 10, 1977.

81. The police may not be persuaded for other reasons too. Elimination of arrest removes some enforcement advantages, e.g. authority to search incident to arrest.

82. See Pres' Comm'n on L. Enf.and Admin. of Justice, Task Force Rept: The Courts 40-41 (1967).

83. See e.g. § 11357, Calif. Health and Safety Code (1977).

84. See Note, Enforcement of Municipal Housing Codes, op. cit. supra, note at 804-806.

85. See Pres' Comm'n on L. Enf and Admin. of Justice, Task Force Rept: The Police 8 (1967).

86. Ibid.

87. For example, "The District Attorney's office maintains 11 Child Support Division Regional Offices. . . staffed by investigators,. . ."Busch, The Role of the District Attorney in Civil and Criminal Child Support Enforcement , 47 L.A. Bar Bull. 56, 59 (1971).

88. See Nimmer, Two Million Unnecessary Arrests, 116-117 (1971).

89. Pres' Comm'n on L. Enf. and Admin. of Justice, Task Force Rept: The Police 7 (1967): "There are today in the United States 40,000 separate agencies responsible for enforcing laws on the Federal, State, and local levels of government."

90. See McKay, op. cit. supra, note 20 at 443.

91. Goldschmid, op. cit. supra, note 27.

92. 2 Rept. of Admin. Conf. of U.S. 67 (1972).

93. Consult Zimring and Hawkins, Deterrence: The Legal Threat in Crime Control (1973); Misner and Ward, Severe Penalties for Driving Offenses: A Deterrence Analysis, 4 Ariz. St. L.J. 677; Cramton, Driver Behavior and Legal Sanctions, A Study of Deterrence, 67 Mich. L. Rev. 421 (1969); and see generally authorities cited in Kadish and Paulsen, Criminal Law and Its Processes 55-63 (1975).

94. See the excerpt from an Administrative Conference Report quoted text at note 92, supra, which recommends authorizing civil money penalties as "another or substitute sanction" (emphasis added).

95. See Rabin, Agency Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion 1036 1059-1061 (1972). Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 U.C.L.A. L. Rev. 1, (1971).

96. Consider: "[H]e [Judge Friendly] does not address

himself to the overall increase in government litigating time and resources that would result if agency hearings are piled on top of court review." Leventhal, Book Review, 75 Col. L. Rev. 1009, 1012 (1975).

97. See Rosenthal v. Harnett, 36 N.Y. 2d 26, 326 N.E. 2d 811 (1975) which describes the New York system.

98. Goldschmid, op. cit. supra, note 27 at 907.

99. Ibid. at 919-921.

100. Atlas Roofing v. OSHRC, 97 S. Ct. 1261 (1977)

101. See Recommendation 72-6, B. 1, Civil Money Penalties as a Sanction, 2 Recs. and Rpts. of Admin. Conf. of U.S. (1972).

102. Of course this assumes that there is a significant difference in the amount of judicial time depending on whether a de novo or substantial evidence standard of review is applied.

103. Compare Packer, op. cit. supra, note 26 at 254-255 with Goldschmid, op. cit. supra note 27 at 901.

104. Goldschmid, ibid.

105. See authorities cited in Nimmer, Diversion, The Search for Alternative Forms of Prosecution, 109-119 (1974).

106. Ibid. at 14-16.

107. See Testimony of R.T. Nimmer, Hearings, Subcommittee on Cts. Civil Lib. and Admin. of Justice, Committee on the Judiciary, 93rd Cong. 2d Sess. on H.R. 9007 137, 140 (1974).

108. Ibid.

109. Ibid. Also see Nimmer, op. cit. supra, note 105 at 54-57.

110. Ibid.

111. See Testimony of D. Freed, Hearings, op. cit. supra, note at 151-152.

112. Compare the option that many juvenile courts have of referring the juvenile for prosecution in the regular criminal courts. Also see text supra at notes 94 and 95.

113. Whether the court's role is in fact short-circuited is the subject of some dispute. If the cases chosen for diversion are those which would anyway not have gone to trial, there is no saving of court time. Consult Zimring, Measuring the Impact of Pretrial Diversion from the Criminal Justice System, 41 U. Chi. l Rev. 224 (1974); Note, 83 Yale L.J. 827 (1974).

114. Consult generally Abrams, op. cit. supra, note 22.

115. See testimony of D. Freed, op. cit. supra, note 111; Skoler, Protecting the Rights of Defendants in Pretrial Intervention Programs, 10 Crim. L. Bull. 473 (1974).

116. Ibid.

117. The use by a court of probation subject to conditions or other innovative sentencing dispositions may begin to approach such a system.

118. Some jurisdictions do provide for hearings in connection with the diversion of family dispute matters. In

Minneapolis in connection with a citizen dispute settlement project, if diversion is deemed appropriate and both the victim and the defendant are willing to participate, a mediation session is held and if successful, a contract is entered into between the defendant and the victim.

119. Proposals regarding decriminalization for each of the categories listed in the text are found in one or more of the following sources: Packer, The Limits of the Criminal Sanction (1968); Kadish, The Crisis of Overcriminalization, The Annals 157 (1967); Skolnick, Coercion to Virtue, 41 S. Calif. L. Rev. 588 (1968); Stern, Public Drunkenness: Crime or Health Problem, The Annals 147 (1967); Kaplan, Marijuana: The New Prohibition (1970); Felstiner and Drew, European Alternatives to Criminal Trials and Their Applicability in the United States (1976); Krantz et al., The Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin (Exec. Summary) 1975.

120. Consult generally Note, Enforcement of Municipal Housing Codes, 78 H.L.R. 801 (1965). Gribetz and Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Col. L. Rev. 1054 (1966); Housing Codes and Their Enforcement in Six Connecticut Cities (1967).

121. Note, Enforcement of Housing Codes at 819, 823, 824, 826, 830.

122. Ibid at .

123. Gribetz and Grad at 1281 et seq.

124. Gellhorn, op. cit. supra, note 27 at 279. A question has also been raised whether any enforcement approach can solve the problem of deteriorating housing. Note, Enforcement of Municipal Housing Codes, at . That proposition can only be fairly tested if the enforcement machinery is made as effective as possible.

125. Gellhorn, op. cit. supra note 27 at 279.

126. Note, Enforcement of Municipal Housing Codes at 831.

127. Ibid. at 814-815.

128. Note, Enforcement of Municipal Housing Codes at 817.

129. Ibid at 822-823.

130. See Gellhorn and Byse, op. cit. supra, note 19 at 6.

131. The most recent studies are those prepared by Arthur Young and Company commissioned by the U.S. Department of Transportation entitled, Effective Highway Safety Traffic Offense Adjudication, Vols. I-III (Contract No. DOT-HS-123-2-442, 1974). See also Carrow and Reese, op. cit. supra, note 70; Cramton, Driver Behavior and Legal Sanctions, A Study of Deterrence, 67 Mich. L. Rev. 421 (1969); Force, op. cit. supra, note 30 and authorities cited therein. For some earlier studies, see A Report to the State of Oklahoma on the System of Courts Which Adjudicated Traffic Cases (1958); A Report to the City Council, Los Angeles

Regarding the Handling of Traffic Cases (1953).

132. Nat. Comm'n. on Law Observance and Enforcement, Rept. No. 8 at 14 (1931).

133. This is perhaps the most salient characteristic of the traffic area. It is universally assumed that an enforcement approach is to be retained and that significant police resources will be devoted to the area.

134. Pres' Comm'n on Law Enf. and Admin. of Justice, Task Force Rept: The Police 8 (1967).

135. See text supra, Part IVC.

136. Consult generally Carrow and Reese, op. cit. supra, note 70.

137. Effective Highway Safety Traffic Offense Adjudication, op. cit supra, note 131 at Vol I, 3.

138. Ibid. Also see generally Carrow and Reese, op. cit supra, note 70.

139. See Carrow and Reese, op. cit. supra note 70. Also consult Basner, Some Comments on Practical Aspects in the Functioning of the Administrative Adjudication Bureau, 35 Albany L. Rev. 443 (1971).

140. Effective Highway Safety Traffic Offense Adjudication, op. cit. supra, note 131, at Vol. II, 66.

141. Ibid.

142. Professor Kadish is one proponent. Kadish, op. cit. supra, note 119.

143. Kadish, op. cit. supra note 119 at 167. He also advocates removing bad check cases from the criminal process and

relegating the merchant to self-protective measures or his civil remedies.

144. Ibid.

145. Ibid.

146. Busch, op. cit. supra, note 87 at 59.

147. Ibid at .

148. 42 U.S.C. § 653.

149. Busch, op. cit. supra, note 87 at 58-59.

150. For a relatively current list of statutes on the subject, see Bonnie and Whitebread, The Marijuana Conviction (1974). The California statute which was enacted in 1976 is found in California Health and Safety Code, § 11357 (1977).

151. Kaplan, Marijuana - The New Prohibition, 323 (1970).

152. Kaplan, op. cit. supra, note 151.

153. Ibid., at 332 et seq.

154. Ibid.

155. Packer op. cit. supra, note 119 at 253-255.

156. Ibid at 255.

157 Ibid. at 254-255.

158. Consult generally Nimmer, op. cit. supra, note 88.

159. Ibid.

160. Packer seemed to favor simply discontinuing arrests and prosecutions. Packer at 346-347. See also Nimmer, op. cit. supra, note 88 at 142-143.

161. Nimmer, op. cit. supra, note 88 at 129 et seq.

162. Ibid. at 81.

163. Ibid. at 97.

164. Ibid. at 125.

165. Ibid.

166. Ibid.

167. Consult generally Committee on Homosexual Offenses and Prostitution (The Wolfenden Report) (1963); Benjamin and Masters, Prostitution and Morality (1914).

168. The idea of specialized courts in the area of sex offenses is not new. Consult Worthington and Topping, Specialized Courts Dealing with Sex Delinquency (1925).

169. For an attempt to quantify such costs, see Bevan, An Analysis of the Direct and Indirect Costs of Prostitution to the Taxpayer of the City and County of San Francisco (1969) (Student paper available in the Stanford Law Library).

170. Consult generally Kadish and Paulsen, op. cit supra, note 93 at 128-151 and authorities cited therein.

171. See ALI, Model Penal Code § 2.05 (Proposed Official Draft 1962).

172. Gellhorn, op. cit supra, note 27 at

173. Compare Leventhal, Book Review, 75 Col. L. Rev. 1009, 1015-1017 (1975).

174. Letter from William Felstiner, a former colleague and fellow researcher in the field, see note 1 supra, paraphrasing "The Principle of the Hiding Hand" developed in Hirschman, Development Projects Observed (Brookings, 1967) pp. 9-34.

END