

Fordham Law School
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THE CROSSROADS OF CRIMINAL AND CIVIL LAW

Criminal and civil law are traditionally separate disciplines. They remedy different types of wrongs: civil law refers to private wrongs and criminal law to public ones. But increasingly, the line between these disciplines has blurred. Criminal penalties may be monetary and involve restitution to victims, who are often private parties. Strict liability criminal statutes require no *mens rea*. These are more than definitional or theoretical issues, and this seminar explores the practical problems that arise at the crossroads of criminal and civil law.

Today, every high profile criminal matter – whether Rajaratnam, Madoff or Strauss-Kahn – involves parallel civil litigation, such as an SEC enforcement action, a state attorney general lawsuit, a private class action or a tort claim. For many defendants caught up in a criminal investigation, the consequences of companion civil litigation or regulatory proceedings may be as serious as the criminal investigation; companies may be barred from lines of business, or put out of business entirely, and individuals may face loss of a law, accounting or securities license.

No lawyer can competently represent a client confronting cases at these crossroads without analyzing the ramifications of an action taken in one context for the other. What are the consequences, for a related civil case, of asserting Fifth Amendment rights in the context of a criminal prosecution? What are the consequences, for related civil litigation, of entering a guilty plea in a criminal proceeding? Can a party provide the government with an internal investigation report, but withhold that report from adversaries in civil discovery?

This class addresses these sorts of issues each week, taking into account perspectives of government prosecutors and regulators, private civil and criminal counsel, and the court.

Week 1: Introduction to the Theoretical Framework and Practical Problems

A. Traditional conceptual differences

private versus public wrongs; remedies, restitution and victims' rights; corporate criminal liability, RICO

B. Common procedural settings

street crimes and white collar crimes
simultaneous proceedings by different branches of the
government.

how does the government decide if a matter is criminal or civil?
United States v. Goyal, 629 F.3d 912 (9th Cir. 2010)

C. Practical problems

defending in multiple forums
concurrent criminal and civil jurisdiction
civil investigative demands and administrative subpoenas
balancing issues relating to discovery and privilege

Week 2: Case Study: The civil and criminal proceedings relating to Pfizer's drug Bextra

This case study touches on almost every issue in the class. The readings discuss criminal cases, civil cases brought by states and the federal government, a *qui tam* action, a shareholder derivative lawsuit and products liability actions.

- A. Consolidated, Amended and verified Shareholder Derivative Complaint In re Pfizer Shareholder Derivative Action, 09-CV-7822 (JSR) (S.D.N.Y. Nov. 18, 2009)
- B. Press Release, USAO, District of Massachusetts, June 18, 2009
- C. Bextra and Celebrex Settlement, Settlement Information Website, <http://www.bextracelebrexsettlement.com>
- D. Griffin and A. Segal, *Feds found Pfizer too big to nail*, CNN.com <http://www.cnn.com/2010/HEALTH/04/02/pfizer.bextra/index.html>

Week 3: Basic background: The Importance of Cooperation, and its implication for the Government, a Company and Company Employees

United States Attorneys' Manual, 9-28.720

United States v. Stein, 541 F.3d 130 (2d Cir. 2008)

Week 4: The Blurred Line between Criminal and Civil law

The line between criminal and civil law blurs when criminal liability can be imposed even absent *mens rea*. And can corporations, which are legal "persons", ever have criminal intent?

- A. What happened to *mens rea*?
 - 1. The Food Drug and Cosmetic Act
United States v. Park, 421 U.S. 658 (1975)

Off-label promotion of pharmaceutical products
Purdue Pharma's press releases concerning agreement with the government regarding OxyContin.

B. Meier, *In Guilty Plea, OxyContin Maker to Pay \$600 Million*, The New York Times, May 10, 2007.

2. The Clean Water Act: *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993) (en banc)

- B. *Respondeat Superior* and corporate criminal conduct

Commonwealth v. Life Care Center of Action, 456 Mass. 826 (2010)

Week 5: More Readings on the Blurred Line:

These readings raise the question of the relation between criminal and civil consequences. When can a defendant buy his way out of jail? When are civil penalties so great that they approach criminal penalties? When are civil consequences more onerous than criminal ones?

- A. Civil “fines” as criminal punishment

Hudson v. United States, 522 U.S. 93 (1997)

- B. Civil consequences that may outweigh criminal penalties

1. Deportation

Padilla v. Kentucky, 559 U.S. 356 (2010)

2. Loss of license

Matter of Stewart, 74 A.D.3d 51 (1st Dep’t 2010)

3. Paying tuition, but not getting the license

Rosenthal v. New York Univ., 08 Civ. 5338 (LAK) (S.D.N.Y. Sept. 13, 2010), *aff’d*, No. 10-4168-CV, 2012 WL 1700843 (2d Cir. May 16, 2012)

Week 6: “Parallel” Civil and Criminal Proceedings

Often the government brings criminal and civil actions relating to the same transaction. Federal securities laws and the False Claims Act are areas in which such parallel proceedings often arise. At other times, the government brings criminal charges and a private party brings a civil action relating to the same transaction. Sometimes the civil action follows the criminal one and sometimes it precedes or instigates the criminal action.

A. Actions under the Securities Laws

SEC v. FTC Capital Markets, 2010 WL 2652405 (S.D.N.Y. June 30, 2010)

B. The False Claims Act

United States v. Gieger Transfer Service, Inc., 174 F.R.D 382 (S.D.Miss. 1997)

C. Forfeiture

Kaley v. United States, ___ U.S. ___ (Feb. 25, 2014)

CFTC v. Walsh, 09 CV 1749 (GBD), 210 WL 882875 (S.D.N.Y. Mar. 9, 2010)

D. *United States Attorneys' Manual*, Section 932

Week 7: Constitutional Issues

Does a party faced with what can be an overwhelming onslaught of litigation have any constitutional protection?

A. *United States v. Scrushy*, 366 F.Supp. 2d 1134 (N.D.Ala. 2005)

B. *United States v. Stringer*, 408 F.Supp. 2d 1083 (D. Or. 2006)

C. *United States v. Stringer*, 521 F.3d 1189 (9th Cir. 2008)

D. SEC Form 1662

Week 8: The Fifth Amendment Privilege Against Self-Incrimination

One of the most difficult tactical problems parallel proceedings raise is whether or not to invoke the privilege against self-incrimination. Can a witness simultaneously invoke the privilege and claim innocence? What are the consequences of invoking the privilege?

A. *Ohio v. Reiner*, 532 U.S. 17 (2001)

B. *Baxter v. Palmigiano*, 425 U.S. 308 (1976)

C. *Steiner v. Minnesota Life Ins. Co.*, 85 P.3d 135 (Colo. 2004) (*en banc*)

Week 9: More Readings On The Fifth Amendment Privilege

What happens when an employer coerces cooperation?

- A. *Garrity v. New Jersey*, 385 U.S. 493 (1967)
- B. *Spevack v. Klein*, 385 U.S. 411 (1967)
- C. *D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc.*,
279 F.3d 155 (2d Cir. 2002)

Week 10: Practical Considerations In Connection with Invoking The Fifth Amendment

How does one invoke the privilege? What showing does one have to make to claim protection?

- A. *United States v. Morganroth*, 718 F.2d 161 (6th Cir. 1983)
- B. *Rad Services, Inc. v. Aetna Casualty*, 808 F.2d 271 (3rd Cir. 1986)
- C. *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983)

Week 11: Discovery Issues Other Than Fifth Amendment Questions

Parallel proceedings raise a host of other discovery issues as well. What are the consequences of a private party's sharing documents with the government? Conversely, what are the consequences of a prosecutor disclosing material to a criminal defendant?

- A. Document production and the selective waiver doctrine
In re Pacific Pictures Corp., 679 F.3d 1121 (9th Cir. 2012)
- B. Wiretaps
SEC v. Rajaratnam, 622 F.3d 159 (2d Cir. 2010)
- C. Grand Jury Materials
In re Air Cargo Shipping Services Antitrust Litigation, 06-MD-01775 (JG)
(VVP) United States District Court, Eastern District of New York
- D. Brady Issues
United States v. Martoma, 12 Cr. 973 (PGG), 2014 U.S. Dist. LEXIS 566
(S.D.N.Y. Jan. 5, 2014)

Week 12: Stay of Civil Proceedings

Parties seek to avoid the privilege and discovery issues we have been discussing by seeking a stay of the parallel civil proceeding. Sometimes the government seeks a stay. In other cases, private litigants seek to stay civil discovery.

What circumstances might cause a private litigant to seek a stay? When might the government want to stay a parallel civil action? Some courts have questioned the fairness of the government's commencing simultaneous parallel actions and moving to stay civil discovery. Is there a rule that courts should follow in deciding these issues, or should such motions to stay be decided on a case-by-case basis because they are too fact-specific?

- A. *SEC v. Nicholas*, Case No. SACV 08-539-CJC (RNB)
United States District Court, Central District of California,
William J. Ruehle's Opposition to The Government's
Motion to Stay Discovery
- B. *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*,
62 F.3d 1222 (9th Cir. 1995)

Week 13: Ethical Issues At the Intersection of Civil and Criminal Law

To what extent may an attorney threaten criminal sanctions in connection with a civil dispute? Do the ethical considerations change if the government is involved in that conversation? To what extent should government prosecutors participate in discussions concerning possible global settlements that encompass parallel civil proceedings? The first reading addresses some of these issues in the context of intellectual property cases, another field in which parallel civil and criminal proceedings frequently arise.

- A. Prosecuting Intellectual Property Crimes, Computer Crime and
Intellectual Property Section, United States Department of Justice,
Third Edition, September 2006,
Chapter X.B., The Victim's Role in the Criminal Prosecution
- B. New York State Bar Assoc. Opinion 772, Nov. 14, 2003