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: US Attorneys’ Manual Chapter 1-12.000
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. November 18, 2009)

B. Press Release, USAO, District of Massachusetts, June 18, 2009

C. Bextra and Celebrex Settlement, Settlement Information Website, http://www.bextracelebexsettlement.com

D. Griffin and A. Segal, *Feds found Pfizer too big to nail*, CNN.com

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


*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.


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


**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. Criminal penalties that appear to be civil fines

   Restitution and victims’ rights

   The New York State Crime Victims Board: [http://www.cvb.state.ny.us/home.aspx](http://www.cvb.state.ny.us/home.aspx)

B. Civil “fines” as criminal punishment


C. Civil consequences that may outweigh criminal penalties

1. Deportation


2. Loss of license

   *Matter of Stewart*, 74 A.D.3d 51 (1st Dep’t 2010)
3. Paying tuition, but not getting the license


4. Loss of business – the entire business


**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


*In re WorldCom Inc. Sec. Litig.*, 234 F. Supp. 2d 301 (S.D.N.Y. 2002)

B. The False Claims Act


C. Forfeiture

*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. The constitutionality of parallel proceedings

B. Recent limitations


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

C. 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)


C. *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387 (7th Cir. 1995)


**Week 9: More Readings On The Fifth Amendment Privilege**

What happens when an employer coerces cooperation?


D. *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?
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.*, No. 11-71844 (9th Cir. April 17, 2012)

B. Wiretaps
   
   *SEC v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010)

C. Grand Jury Materials
   
   *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979)

D. Brady Issues
   

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. Chestman*, 861 F.2d 49 (2d Cir. 1988)

C. Heightened scrutiny of government requests for stays


D. Government attempts to stay civil cases to which it is not a party


E. Private litigants’ attempts to stay civil discovery


2. *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995)

**Week 13: The Privatization of the Prosecutorial Function**

The government has increasingly relied on private parties to police conduct. Almost every company has a compliance program. Internal investigations keep armies of attorneys employed. And the government compels companies to hire monitors to act as the government’s eyes and ears.

A. Corporate Compliance Programs and Internal Investigations


B. When is a private lawyer a government agent?

Information, *United States v. Zar*, Cr. No. 4-331, (ILG), United States District Court, Eastern District of New York, Count Three, Conspiracy to Obstruct Justice

C. Monitorships

Week 14: 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.


200685175.1