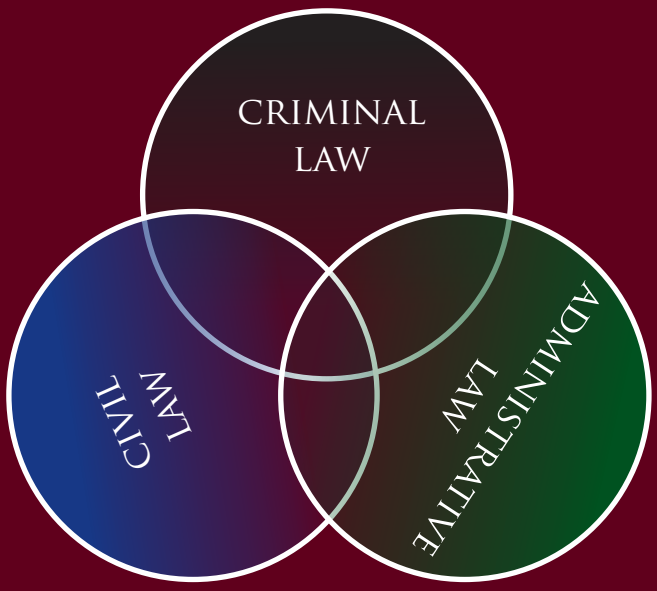
THE INTERSECTIONS OF CRIMINAL, ADMINISTRATIVE AND CIVIL LAW

INTERNATIONAL AND NATIONAL CONTEXTS



EDITED BY:
GABRIELĖ JUODKAITĖ-GRANSKIENĖ, ANDREJ GORBATKOV

The Intersections of Criminal, Administrative and Civil Law

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International and National Contexts

Editors
Gabrielė Juodkaitė-Granskienė
Andrej Gorbatkov

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Gabrielė Juodkaitė-Granskienė
Law Faculty of Vilnius University
https://orcid.org/0000-0002-5335-1811
gabriele.juodkaite-granskiene@tf.vu.lt

Andrej Gorbatkov
Law Faculty of Vilnius University
https://orcid.org/0000-0003-1804-7272
andrejus.gorbatkovas@tf.vu.lt

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Review
Jonas Prapiestis
Mykhaylo Shepitko

Language editor
Lily Buchanan

Cover
Paweł Sepielak

Layout
Piotr Poniedziałek

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Welcome Words

It is my pleasure to present this collective monograph, funded by the Faculty of Law at Vilnius University. The volume highlights the growing importance of examining legal issues that arise at the intersection of different branches of law and across national jurisdictions.

The contributions in this collection address a range of contemporary legal challenges shaped by technological, social, and geopolitical developments. The authors explore questions relating to legal liability, artificial intelligence, neuroscience, ethics, and the role of national and international jurisprudence in the development of legal standards.

This publication brings together the expertise of distinguished scholars, judges, legal practitioners, and other experts from Lithuania and abroad. Their analyses offer valuable insights into issues of both theoretical and practical significance and contribute to ongoing academic and professional discussions.

I am confident that this volume will be of interest to researchers, students, legal professionals, and all readers interested in contemporary legal developments from comparative and interdisciplinary perspectives.

I sincerely thank all authors, reviewers, and editors for their contribution to this publication and hope that it will inspire further research and meaningful dialogue on the challenges facing modern legal systems.

Prof. dr. Vigita Vėbraitė
Dean of the Faculty of Law
Vilnius University

Introduction

Dear Readers,

Herewith, we would like to present a collective monograph prepared at the initiative of the Faculty of Law at Vilnius University.

The idea for the book originated during the scientific-practical conference "Intersections of Criminal, Administrative, and Civil Law," held on March 28, 2025, at Vilnius University's Faculty of Law. The conference results revealed numerous pressing issues related to the regulation of similar legal relationships by different branches of law or different regulation of the same legal institute among European countries. The nature, character, purpose, and application of liability for violations of these norms in criminal, administrative, or civil law inspire scientific discussions not only at the national level, but also at the European and global levels. Therefore, based on the papers presented at the conference, it was decided to compile a collective monograph that would present the expert opinions of scholars and practicing professionals from various fields of law on specific issues of concern not only to Lithuania but also to other countries.

It is essential to note that everyday economic, social, and legal relations evolve and change in response to ongoing geopolitical, environmental, technological, cultural and other developments, which raise questions such as: What impact do these changes have on the legal system and its structure? Is a changing environment in need of detailed legal regulation, or is the existing regulation sufficient? etc. Therefore, the authors of this book attempt to analyse not only specific issues at the intersection of criminal, administrative, and civil law, but also to reveal legal problems in the sphere of insurance or ethics relevant to Lithuania and some other countries and to propose promising solutions to them.

The publication is intended for everyone interested in the comparative analysis of different countries' practices, as well as EU law, addressing different

aspects of international law, national law (criminal, administrative, disciplinary and private), international relations, and more.

A collection consisting of 12 articles written by 20 (twenty) authors. They are recognised professors and other scholars of the universities of Lithuania (Vilnius University), USA (the University of North Carolina at Chapel Hill, School of Government), judges of national courts (Constitutional Court, Supreme Court of Lithuania and Lithuanian Court of Appeal), attorneys, practicing lawyers and other experts.

The articles in the book are grouped into three chapters.

The first part of the book titled "The distinction between legal responsibilities" is devoted to examining the issue of distinguishing between types of liability, including the comparative analysis of criminal and administrative liability in EU and USA, the problems of distinguishing between criminal offences and civil law violations in the case law of the Supreme Court of Lithuania and the experience of some other countries in this area; the problems of distinguishing between different types of legal liability for copyright infringement; the problem of distinguishing between property crimes and administrative offenses and civil torts in the practice of Lithuanian courts and other Baltic countries; the relationship between the criminal and civil liability of doctors in Lithuania and other European countries and the question of the violation of judges' ethics principles based on the practices of three countries: Lithuania, Latvia and Moldova.

In the second part of the book named "Some legal aspects of AI and neuroscience applications", the authors examine the EU Artificial Intelligence (AI) Act, the risks associated with the use of AI, AI literacy requirements, digital attacks under International Humanitarian and Criminal Law, and the intersection of neuroscience and criminal law.

The third part of the book titled "National and international court jurisprudence as source of applicable standards" is dedicated to constitutional, European court jurisprudence on different legal issues, including European standards applicable in criminal procedure for the defence, insurance of forensic experts and other.

We believe that this publication will not only contribute to the advancement of science and the development of professional practice, but will also be a pleasure to read.

Sincerely,
Editors of the collection
Prof. dr. Gabriele Juodkaite-Granskiene
Assoc. prof. dr. Andrej Gorbatkov

Part I



The Intersection of Different Legal Responsibilities

The Intersections of Criminal, Administrative and Civil Law:
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Donatas Murauskas
Vilnius University, Faculty of Law
donatas.murauskas@tf.vu.lt

Charles Szypszak
University of North Carolina at Chapel Hill
szypszak@sog.unc.edu

Criminal and Administrative Liability Confounded: Regulatory Offences Under the European Convention on Human Rights and the U.S. Constitution

1. Introduction

The discretion of regulatory agencies has been the subject of ongoing debate for decades. This issue is closely linked to the broader question of the extent to which regulatory agencies should be permitted to intervene in the activities of individuals and market participants. The need to act in a timely manner, unforeseen business models, and the digitalisation of social activities and markets have created a need for regulatory agencies to seek solutions that are better suited to realities. The creative approaches adopted by state authorities do not always fit neatly within the traditional civil-criminal law divide,[1] which can point to the importance of creating sufficient safeguards from uncontrolled regulatory intervention on individuals.

It took years for the major courts in Europe and the United States to develop their frameworks currently employed to address the absence of safeguards in administrative law context. This was done in specifying the criteria that

1 Gail Heriot, "An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages," *Journal of Contemporary Legal Issues* 7, no. 1 (1996): 44.

trigger 'criminal' safeguards in the administrative law context. In the European context, the classification of an offence as 'criminal' implies significant changes in how the individual concerned is treated during both the investigation and the trial.[2] In the United States context, characterising a charge as criminal triggers fundamental protections guaranteed to defendants in the Bill of Rights. Perhaps most conspicuously, the U.S. Supreme Court (the Supreme Court) has long held that conviction for a crime requires proof 'beyond a reasonable doubt'.[3] Other constitutional rights are triggered as well, including the Seventh Amendment right to a trial by jury, and the Eighth Amendment protection against 'cruel and unusual punishments'. These protections are not afforded to someone when the courts characterise a punishment as civil rather than criminal, even when to the defendant the punishment is severe either way.

The imposition of administrative sanctions with a punitive character has led to the search for appropriate protection mechanisms. Determining the optimal threshold for triggering criminal procedural safeguards is inherently difficult. The threshold must strike a balance between, on the one hand, preserving the ability of state authorities to effectively perform functions pursued in the public interest and, on the other hand, preventing the erosion of fundamental criminal law protections where governmental measures are substantively punitive in nature. If the threshold is construed too narrowly, there is a risk that genuinely harsh state actions will evade the procedural guarantees traditionally associated with criminal proceedings.[4]

A pan-European approach to ensure certain threshold under which the criminal procedural safeguards are being invoked was established under Article 6 of the European Convention on Human Rights under the label of the *Engel* doctrine was developed in 1976.[5] The European Court of Human Rights (ECtHR

2 For example, Article 6 of the Convention on Protection of Fundamental Rights and Freedoms (the Convention) guarantees specific rights to persons charged with a criminal offence. Article 7 of the Convention applies only to such individuals. Moreover, Protocol No. 7 is also linked to the existence of criminal proceedings.

3 The U.S. Supreme Court said that this *standard provides concrete substance for the presumption of innocence-that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law <…>. The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction*. See Supreme Court of the United States, In re Winship, 397 U.S. 358, 363 (1970), no. 778, March 31, 1970.

4 Issachar Rosen-Zvi and Talia Fisher, "Overcoming Procedural Boundaries," *Virginia Law Review* 94, no. 1 (2008): 122.

5 European Court of Human Rights, case of Engel and Others v. the Netherlands, applications nos. 5100/71 5101/71; 5102/71; 5354/72; 5370/72, June 8, 1976.

or the European Court) made clear that the applicability of criminal procedural guarantees does not depend exclusively on the formal classification chosen by national legal systems. A comparable analytical framework had already emerged in the United States in *Kennedy v. Mendoza-Martinez* in 1963.[6] In that case, the Supreme Court identified a number of factors relevant to determining whether a formally civil sanction should nevertheless be regarded as punitive in character.

Although the traditional civil-criminal distinction did not initially pose significant difficulties, the emergence of the administrative state and subsequent innovations in regulatory practices have complicated the assessment of procedural safeguards afforded to market participants and other individuals. European and United States regulatory agencies have not merely applied statutes. They have repeatedly invented new ways of intervening in economic and everyday life.[7] The literature shows this 'creative discretion' operating through soft law, guidance, consent orders, temporary product bans, experimental pilots, systemic-risk duties, algorithmic scoring and data-driven monitoring.[8] The core scholarly conclusion is not that agencies are simply 'activist', but that modern regulation increasingly depends on institutions that learn, improvise and fill statutory gaps under conditions of uncertainty.[9]

The aim of this paper is to investigate how Supreme Court and ECtHR delineate between criminal and non-criminal regulatory offences in the context of evolving administrative law. The paper is observational, not aimed at comprehensive analysis. First, we briefly outline the debates on civil-criminal and creative discretion in the light of evolving administrative law. Second, we examine the main criteria in both jurisdictions that seek to identify the criminal element within regulatory sanctions. Third, we analyse whether these criteria are satisfactory considering the changed nature of administrative law today.

6 Supreme Court of the United States, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), no. 2, February 18, 1963.

7 This shift may also be understood within the broader context of the changing mediality of law – from the traditional belief that law consists exclusively of norms issued by a sovereign legislative authority to the understanding that the mediality of law is itself shaped by regimes of knowledge and structures of power and is therefore capable of transformation. See Philip Schimchen, "Beyond Sovereignty: Decentralized Knowledge Production and Legal Normativity in the (Post-)Modern Age," *Teisė* 134 (2025): 129, https://doi.org/10.15388/Teise.2025.134.9.

8 See, for example, David Zaring, "Best Practices," *New York University Law Review* 81, no. 1 (2006): 294–351; Christopher J. Walker, "Administrative Law without Courts," *UCLA Law Review* 65 (2018): 1620–1640; Charles F. Sabel and Jonathan Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the European Union," *European Law Journal* 14, no. 3 (2008): 271–327, https://doi.org/10.1111/j.1468-0386.2008.00415.x.

9 See Zaring, "Best Practices," 304–306.

The paper is primarily doctrinal. It examines the existing scholarship on two distinct, yet partially overlapping, debates: the distinction between civil and criminal liability and evolving nature of administrative law. In addition, the paper compares the approaches adopted by the Supreme Court and the European Court of Human Rights in delineating criminal offences from civil violations, identifying structural similarities in their reasoning. The comparative analysis enables us to highlight a potential conceptual impasse shared by both jurisdictions and to argue for the need to develop a distinct, administrative law-based framework for addressing regulatory offences.

2. The Debates on Civil-Criminal Division and Evolving Nature of Administrative Law

2.1. The Civil-Criminal Debate – Absence of Clarity in Established Delineation Criteria

The civil-criminal debates in both European and United States scholarship focus on the lack of rigidity in the application of established criteria used to distinguish criminal offences from other regulatory and civil breaches. This has prompted discussion as to whether these criteria are satisfactory, including questions about how their meaning has been refined in subsequent case law of leading courts.

The most acute recent critic of the threshold doctrine itself is Robert Goss, whose 2025 article is the clearest recent attack on the internal coherence of the *Engel* framework[10] and whose 2023 article on the 'disappearing' minimum rights of Article 6 of the Convention highlights a parallel concern: even where proceedings remain formally criminal, substantive defense guarantees may be thinning.[11] Robert Attard's 2026 paper *Escaping the Engel Criteria*,[12] studies the 'Engel judgements' as a body and argues that the ECtHR sometimes escapes

10 Ryan Goss, "The Engel Criteria in the 21st Century: Irrational Flexibility and Deference in Recent European Court of Human Rights Jurisprudence," *Human Rights Law Review* 25, no. 4 (2025): ngaf031, https://doi.org/10.1093/hrlr/ngaf031.

11 Ryan Goss, "The Disappearing 'Minimum Rights' of Article 6 ECHR: The Unfortunate Legacy of *Ibrahim* and *Beuze*," *Human Rights Law Review* 23, no. 4 (2023): ngad024, https://doi.org/10.1093/hrlr/ngad024.

12 Robert Attard, "Escaping the Engel Criteria," *Malta Journal of Legal Studies* 1, no. 1-2 (2026): 44–91, https://doi.org/10.1163/30508762-00000001.

the orthodox framework for reasons of expediency and efficiency, making the criteria more and more 'blurry'.

Javier Ignacio Escobar Veas addresses one of the fundamental issues of multiple sanctioning systems in Europe that is grounded on the interaction between European Union, Council of Europe and national legal systems.[13] He addresses this issues in the light of *Ne bis in idem* principle, but the discussion is nevertheless part of the broader debate of how to reconcile multiple sanctioning systems in Europe with the principles of fundamental rights, especially related to basic safeguards of criminal law.

Legal scholars in the United States largely have criticised the Supreme Court's analytical approach to the question of when an administrative penalty implicates the constitutional protections afforded criminal proceedings. As one commentator summarised, *scholars and jurists have criticised* Mendoza-Martinez *on a number of grounds*, including a framework that is too deferential to the legislature in ways that deprive citizens of advance notice of violations, with a framework that is *highly subjective and potentially leads to results that undermine public confidence in the rule of law*.[14] This commentary also noted, *Because of these problems, some critics have proposed jettisoning the* Mendoza-Martinez *framework altogether*.[15]

Some Supreme Court justices also have called into question the utility of the *Mendoza-Martinez* multi-factor framework. In the 2005 case of *Smith v. Doe*,[16] a majority of the justices applied the factors to a challenge brought by an individual who was convicted of sex offenses and required by state law to register with the state and local law enforcement. The majority held that these requirements were not punishments that triggered constitutional protection against retroactively applied criminal laws, using elements from *Mendoza-Martinez* but also noting that these factors are *neither exhaustive nor dispositive*.[17] Although seven of the nine justices agreed with the outcome, two of those seven filed concurring opinions with different analyses. Dissenting Justice John Paul

13 Veas Escobar and Javier Ignacio, *Ne bis in idem and Multiple Sanctioning Systems: A Case Law Study of the European Court of Human Rights and the Court of Justice of the EU*, Springer, 2023. See also other important contributions such as Xavier Groussot and Angelica Ericsson, "Ne Bis in Idem in the EU and ECHR Legal Orders: A Matter of Uniform Interpretation?" In *Ne Bis in Idem in EU Law*, ed. Bas van Bockel (Cambridge University Press, 2016), 53–102, https://doi.org/10.1017/9781316091845.003.

14 David A. Singleton, "What Is Punishment?: The Case for Considering Public Opinion Under Mendoza-Martinez," *Seton Hall Law Review* 45, no. 2 (2015): 435–474, https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1533&context=shlr.

15 Singleton, "What Is Punishment?" 443.

16 Supreme Court of the United States, Smith v. Doe, 538 U.S. 84 (2003), no. 01-729, March 5, 2003.

17 Smith v. Doe, para 97.

Stevens criticised what he saw as the Court's tendency to *manipulate multifactor tests*.[18] In a recent case challenging a victim restitution requirement Justice Clarence Thomas noted the problematic nature of deferring to the legislature's choice of language in a statute. He said, *The modern framework, because of how much it turns on legislative labelling and semantics, allows a legislature to manipulate when the protection will apply*.[19]

2.2. The Debates on the Nature of Administrative Law – Emerging Regulatory Creativity

The changing nature of administrative law is reflected in scholarship debates on the role of regulatory agencies in shaping legal frameworks of regulated subjects. *Long gone are the day when one might comfortably profess to be an advocate of either 'compliance' or 'deterrence' approaches*, R. Baldwin and others note.[20] The regulatory creativity occurs when agencies develop intervention tools that are not exhaustively specified by legislation but are assembled from broad purposes, technical mandates, procedural flexibility, and institutional learning. David Zaring's account of agencies regulating by 'best practices',[21] C.J. Walker's view on modern administrative law operating without courts,[22] and Nicholas Parrillo's work on guidance[23] all show how agencies can govern behaviour outside classic rulemaking and adjudication.

European scholarship describes a parallel but institutionally distinct phenomenon. Sabel and Zeitlin's work on experimentalist governance frames regulation as recursive goal-setting, monitoring, reporting, and revision under uncertainty.[24] More recent work on European Union agencies shows how discretion has expanded through delegation doctrines, soft law and networked administration. Simoncini argues that the post-crisis case law on the European Securities and Markets Authority (ESMA) altered the law governing delegation of

18 Smith v. Doe, para 110, 113 (Stevens, J., dissenting).

19 Supreme Court of the United States, Ellingburg v. United States, 607 U.S. 163, 169, 177–178 (2026), no. 24-482, January 20, 2026 (Thomas, J., concurring).

20 Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice*, 2nd ed. (Oxford University Press, 2012), 9.

21 Zaring, "Best Practices."

22 Walker, "Administrative Law without Courts."

23 Nicholas R. Parrillo, "Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study," *Administrative Law Review* 71, no. 1 (2019): 57–125.

24 Sabel and Zeitlin, "Learning from Difference."

powers to European Union agencies.[25] Iglesias-Rodríguez characterises ESMA product intervention as a form of *residual lawmaking*, shifting European Union financial regulation from warnings and convergence toward direct prohibition and restriction.[26] Foster and Ringe, in turn, building on the Supreme Court Justice Louis Brandeis' ideal of *regulated competition* argue that the European Union administrative system's significant bureaucratic discretion has enabled social learning and *regulated competition* in ways the United States has not matched institutionally.[27]

3. The Delineation Criteria

3.1. The European Standard – *Engel* Criteria and Later Developments

The drafting of the European Convention did not anticipate the importance and scope of regulatory sanctions in the second half of the twentieth century.[28] Andrijauskaitė notes: *the percolation of administrative sanctions into the case law of the ECtHR happened against the backdrop of the growth of the 'administrative state', which took on more and more novel functions and the increasing use of administrative sanctions as a handy tool to achieve the goals of public administration in post-war Europe*.[29] The Committee of Ministers' reaction to growing discretionary powers of regulatory agencies is clear from Resolution (77) 31 on

25 Marta Simoncini. "The Delegation of Powers to EU Agencies after the Financial Crisis," *European Papers* 6, no. 3 (2021): 1485–1503.

26 Pablo Iglesias-Rodríguez, "ESMA as a Residual Lawmaker: The Political Economy and Constitutionality of ESMA's Product Intervention Measures on Complex Financial Products," *European Business Organization Law Review* 22 (2021): 627–671, https://doi.org/10.1007/s40804-021-00218-y.

27 Chase Foster and Kathleen Thelen, "Brandeis in Brussels? Bureaucratic Discretion, Social Learning, and the Development of Regulated Competition in the European Union," *Regulation & Governance* 18, no. 4 (2024): 1083–1103, https://doi.org/10.1111/rego.12570.

28 This paper does not address the standards developed by the EU courts, nor does it examine the significance of EU law for the development of national regulatory frameworks in Council of Europe member states that are also members of the European Union. The interaction between EU law and the Convention system is both complex and continuously evolving (see, for example, Egidijus Kūris, "Brussels in Strasbourg: Theoretical Reflections on the Impact of European Union Law on the Case-Law of the European Court of Human Rights." *Teisė* 131 (2024): 8–22, https://doi.org/10.15388/Teise.2024.131.1. The authors acknowledge that incorporating the EU dimension could strengthen the argument advanced in this paper. However, they consider that doing so would substantially broaden and complicate the scope of the analysis.

29 Agne Andrijauskaitė, "The Principles of Administrative Punishment under the ECHR" (PhD diss., Vilnius University, 2022), 139.

This collective monograph explores contemporary legal challenges at the intersection of criminal, administrative, and civil law in Lithuania, Europe, and beyond. Bringing together the perspectives of scholars, judges, practicing lawyers, and other legal experts, it examines the boundaries between different forms of legal liability, the legal implications of artificial intelligence and neuroscience, and the role of national and international court jurisprudence in shaping applicable legal standards. Through comparative analysis of legal systems and practices, the book addresses pressing questions arising from social, technological, and other changes, identifying existing legal problems and proposing potential solutions. It offers valuable insights for legal scholars, practitioners, and anyone interested in the development of law in a changing world.

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