Differences between Civil and Criminal Law in the USA

Otmane El Rhazi

Table of Contents

Introduction

Criminal law is much better known to laymen than civil law, as a result of journalists' reports of famous criminal trials. In talking with people about law, I find that they often misapply principles from criminal law to situations in civil (e.g., tort) law, which results in their misunderstanding. They are surprised when they learn the actual legal principles that apply to a problem. The purpose of this essay is to compare and contrast criminal and civil law.

In civil law, a private party (e.g., a corporation or individual person) files the lawsuit and becomes the plaintiff. In criminal law, the litigation is always filed by the government, who is called the prosecution.

---

punishment

One of the most fundamental distinctions between civil and criminal law is in the notion of punishment.

criminal law

In criminal law, a guilty defendant is punished by either (1) incarceration in a jail or prison, (2) fine paid to the government, or, in exceptional cases, (3) execution of the defendant: the death penalty. Crimes are divided into two broad classes: *felonies* have a maximum possible sentence of more than one year incarceration, *misdemeanors* have a maximum possible sentence of less than one year incarceration.

civil law

In contrast, a defendant in civil litigation is *never* incarcerated and never executed. In general, a losing defendant in civil litigation only reimburses the plaintiff for losses caused by the defendant's behavior.

So-called punitive damages are never awarded in a civil case under contract law. In a civil case under tort law, there is a possibility of punitive damages, *if* the defendant's conduct is egregious and had *either* (1) a malicious intent (i.e., desire to cause harm), (2) gross negligence (i.e., conscious indifference), *or* (3) a willful disregard for the rights of others. The use of punitive damages makes a public example of the defendant and supposedly deters future wrongful conduct by others. Punitive damages are particularly important in torts involving dignitary harms (e.g., invasion of privacy) and civil rights, where the actual monetary injury to plaintiff(s) may be small.

One can purchase insurance that will pay damages and attorney's fees for tort claims. Such insurance coverage is a standard part of homeowner's insurance policies, automobile insurance, and insurance for businesses. In contrast, it is *not* possible for a defendant to purchase insurance to pay for his/her criminal acts.

While a court can order a defendant to pay damages, the plaintiff may receive nothing if the defendant has no assets and no insurance, or if the defendant is skillful in concealing assets. In this way, large awards for plaintiffs in tort cases are often an illusion.

effect of punishment

The notion that the threat of punishment will deter criminal conduct is based on the principle that human beings are rational. In practice, criminals are either impulsive (i.e., *not* rational) or believe that they will not be caught by the police. Therefore, the threat of punishment does *not* deter criminal conduct, as one is reminded every day by reading reports of journalists.

Legal theory considers the possibility of loss of freedom (i.e., incarceration) as much more serious than merely paying damages to an injured plaintiff. As a result of this high value placed on personal freedom, legal dogma is that criminal litigation is more serious than civil litigation, therefore criminal defendants have more rights and protections than civil defendants, as explained later in this essay. The economic reality is that most people would prefer to spend, for example, one year in prison, than pay a million dollars from their personal assets.

---

burden of proof

criminal law

In criminal litigation, the burden of proof is *always* on the state. The state must prove that the defendant is guilty. The defendant is *assumed* to be innocent; the defendant needs to prove nothing. (There are exceptions. If the defendant wishes to claim that he/she is insane, and therefore not guilty, the defendant bears the burden of proving his/her insanity. Other exceptions include defendants who claim self-defense or duress.)

In criminal litigation, the state must prove that the defendant satisfied each element of the statutory definition of the crime, and the defendant's participation, "beyond a reasonable doubt." It is difficult to put a valid numerical value on the probability that a guilty person

really committed the crime, but legal authorities who do assign a numerical value generally say "at least 98% or 99%" certainty of guilt.

civil law

In civil litigation, the burden of proof is initially on the plaintiff. However, there are a number of technical situations in which the burden shifts to the defendant. For example, when the plaintiff has made a prima facie case, the burden shifts to the defendant to refute or rebut the plaintiff's evidence.

In civil litigation, the plaintiff wins if the preponderance of the evidence favors the plaintiff. For example, if the jury believes that there is *more than a 50%* probability that the defendant was negligent in causing the plaintiff's injury, the plaintiff wins. This is a very low standard, compared to criminal law. In my personal view, it is too low a standard, especially considering that the defendant could be ordered to pay millions of dollars to the plaintiff(s).

A few tort claims (e.g., fraud) require that plaintiff prove his/her case at a level of "clear and convincing evidence", which is a standard higher than preponderance, but less than "beyond a reasonable doubt."

---

protections for criminal defendants

Anyone who has studied civics in the USA knows of a number of protections specified in the U.S. Constitution:

- No ex post facto law. Art. I, §9 and 10
  If an act was lawful when it was performed, the performer can *not* be convicted of a crime as a result of a law enacted after the performance.

- prohibition against "unreasonable searches and seizures". Amendment IV.

- prohibition of double jeopardy. Amendment V.
  This protection takes two forms:
  1. A defendant who is found "not guilty" of a more serious charge can *not* have a second trial on a lesser included offense. For example, if D is found "not guilty" on a charge of felony murder (e.g., incidental killing of someone during the commission of a felony, such as robbery), then D can *not* be tried for the underlying felony (e.g., robbery).

  2. The prosecution can *not* appeal a "not guilty" verdict. Of course, the criminal defendant can appeal a "guilty" verdict and an incarcerated criminal can file a "habeas corpus" writ.

  However, it is possible to try a defendant in criminal court and then try the same defendant again in civil court, for the same event. The most common example of such two trials is a criminal prosecution for homicide and then have a second trial for the same defendant for the tort of wrongful death: the most famous example of this

situation is the cases of O.J. Simpson. While legal scholars carefully explain the distinction between criminal and civil law, the plain fact is that one *can* be tried twice for the same event. Another situation in which one can have two trials for the same event is a prosecution under state law (e.g., for assault and battery) in a state court, then a second prosecution in a federal court under federal statute (e.g., civil rights violation).

- prohibition against compelled self-incrimination. Amendment V
- the right to a speedy trial. Amendment VI
- the right to the assistance of counsel. Amendment VI, as interpreted in, among other cases, *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).
  Indigent defendants have the right to an attorney who is paid by the state, even during custodial questioning by police. *Miranda v. Arizona*, 384 U.S. 436 (1966).

It may come as a surprise to know that these protections are *not* available in civil law.

The standard in tort cases is what a reasonable and prudent man would have done, the details of applying this standard to the facts of the case is decided by the jury, and *un*known to the defendant until the end of the trial.

In criminal law, police generally must first obtain a search warrant in a proceeding showing a "neutral and detached" magistrate that there is "probable cause", before searching or seizing items from a person's house. *Spinelli v. U.S.*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Johnson v. U.S.*, 333 U.S. 10 (1946).
In civil law, an attorney may request documents or a visit inside a building. (Federal Rule of Civil Procedure 34). In civil law, an attorney may demand information from the opposing party about any matter that is relevant to the case, provided that information is not privileged. In civil law, an attorney may properly demand information that would be *in*admissible at trial, if such demand "appears reasonably calculated to lead to the discovery of admissible evidence". Federal Rule of Civil Procedure 26(b)(1). An attorney may even take the deposition of nonparties in a civil case, and require them to bring documents with them. Federal Rule of Civil Procedure 30, 34(c).

The prohibition against double jeopardy applies *only* to criminal trials. The corresponding concept in civil litigation is *res judicata*: one can have only one trial for claims arising from one transaction or occurrence.

In a criminal case, the suspect or defendant has the right to remain silent during questioning by police and prosecuting attorneys. In a criminal case, the defendant may choose to refuse to be a witness, and the jury may infer *nothing* from the defendant's choice not to testify. However, in a civil case, the defendant must be available and cooperative for depositions and testimony as a witness in the trial. In fact, the defendant in a civil case in Federal court must

voluntarily provide his/her opponent with a copy of documents "in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings." [Federal Rule of Civil Procedure 26(a)(1)(B)] Further, the defendant in a civil case must voluntarily provide names of people who are "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings." [FRCP 26(a)(1)(A)] In other words, the defendant in a civil case must help his/her opponent collect evidence that will defeat the defendant. And, at trial, if a party invokes their fifth amendment privilege against self-incrimination, then the judge will instruct the jury that they may make an adverse inference against the party who refused to testify.

There are often several years between the filing of a complaint in a civil case and the trial. So much for "speedy trial"!

People who can not pay for an attorney (legal fees for trial preparation often run to more than US$ 100,000) are practically *un*able to obtain access to the courts in civil cases. The one notable exception is in tort law, where attorneys for plaintiffs often take cases with the possibility of large awards (e.g., more than US$ 500,000) on a contingency fee: the attorney is paid, for example, 1/3 of any award, but the attorney is paid nothing for his/her time if plaintiff loses. However, the plaintiff usually pays for expert witnesses, deposition transcripts, and other expenses. These expenses can be tens of thousands of dollars.

---

ignorance of the law is no excuse

The statement "ignorance of the law is no excuse" is an ancient legal doctrine:

> Ignorance of the law excuses no man; not that all men know the law; but because 'tis an excuse every man will plead, and no man can tell how to confute him.

John Selden (1584-1654), posthumously published in *Table Talk,* 1689.
If a defendant were allowed to escape legal responsibility for his acts, merely by saying "I didn't know it was wrong/illegal", the system of using law to regulate human conduct would collapse. So the doctrine is a practical necessity.

This doctrine still has vitality and validity today. See, for example, *Ratzlaf v. U.S.*, 510 U.S. 135, 149 (1994); *U.S. v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring); *Minnesota v. King*, 257 N.W.2d 693, 697 (1977).

However, the law in the USA has swelled to a size that is *un*knowable even by experts.
In Oct 1998, the annotated edition of the U.S. Code (i.e., federal statutes) occupied 990 cm of library shelf space. In Oct 1998, the annotated edition of the New York state statutes occupied 675 cm of library shelf space. Who can know *all* that is within these pages? A criminal law class in law school contains only about 40 hours of lectures, mostly about homicides, with a little about larceny and rape. The only solution seems to be a detailed search of statutes and cases in a database on a computer (e.g., WESTLAW), plus the avoidance of any behavior that harms people, either through physical, financial, or emotional injury, or by deceit.

A related concept in law is "wilful blindness": the criminal defendant who should have known, and could have asked, but deliberately chose *not* to ask. The law regards "wilful

blindness" as equivalent to knowledge. *U.S. v. Jewell*, 532 F.2d 697, 700-701 (9th Cir. 1976), *cert. denied*, 426 U.S. 951 (1976). Cited with approval in *U.S. v. Lara-Velasquez*, 919 F.2d. 946, 950-951 (5th Cir. 1990).