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Criminal versus Civil Remedies for Intentional Wrongs

by Wendy McElroy

On October 3, 1995, O.J. Simpson was found not guilty of murder by a jury in criminal court. On February 4, 1997, a civil jury found him liable for the death of Ronald Goldman and awarded \$8.5 million in compensatory damages to Goldman's family.

For many people, the Simpson saga was their first exposure to the fact that both criminal and civil courts can be used to address the same offense and that the two proceedings can reach dramatically different conclusions. Because criminal and civil courts express distinct paradigms of law, the two trials are not deemed to constitute double jeopardy.

Criminal law is intended to prohibit specific acts, such as murder or rape, and to punish the committing of those acts. Because crimes are viewed as acts against society — that is, against the state — the government is always the party bringing charges against a defendant.

Various sanctions are possible in criminal cases — from fines to capital punishment — but the most common sanction is incarceration. Controversy exists as to the proper role of criminal law but its purposes are generally stated as punishment, deterrence, and/or rehabilitation.

Civil law, as encountered by the average person, is broken into two general subdivisions: contracts and torts. Contract law addresses written or oral agreements that are in dispute or have been breached in some manner. Torts are wrongs or harms that have been inflicted by one person upon another, either intentionally or through negligence.

Rather than prohibit specific acts, civil law deals with interpretation of agreements and events in order to discern what the reasonable conduct of the parties in a given situation should have been. The lawsuit is brought in the name of the plaintiff. If a defendant is deemed to have acted unreasonably, e.g., broken a contract or caused intentional damage to property, then he may be subject to various remedies to restore the victim to a "whole" position, including the specific performance of a contract or monetary damages for breach of contract. Incarceration cannot be ordered by a civil court. The proper purposes of civil law are generally stated as compensation for actual damages suffered by the victim and, in cases of intentional wrongs, where both compensatory and punitive damages are recoverable, compensation and deterrence.

It has always been possible to try many criminal offenses in both criminal and civil court at different times or at the same time. This allows the victim to access both types of remedies against a guilty defendant, that is, both imprisonment and compensation for damages. It should also be noted that the criminal law does provide for an order of restitution, whereby the court orders the defendant to reimburse losses suffered by the victim.

In the last decade, however, the practice of using both criminal and civil courts to address the same offense has increased substantially, largely because of advocacy by feminist groups who advise victims to use both courts to address offenses such as [domestic violence](#) and sexual abuse. A high-profile example is the civil suit that was just filed against Kobe Bryant by the alleged victim of the rape for which he is currently undergoing a criminal trial.

Some people have expressed concern over the growing tendency to sue in civil court for intentional torts. The nexus of concern is often the fact that it is far easier for a victim to prevail in civil court than it is for the state to prevail in criminal court. The standards of evidence and other legal protections enjoyed by the defendant are lowered in civil court because he is not at risk of losing liberty (or life), only of losing money, which is seen to be a far lesser penalty.

With civil awards ranging up to \$8.5 million, however, some defendants might find it as painful to lose their financial fortune in civil court as their liberty in criminal court. Moreover, as has been hinted at in the Bryant case, there is a danger that civil procedures may start to substitute for criminal ones. If a defendant were found guilty that is, liable in a civil court, then his wealth, reputation, and career might be ruined by the verdict without his ever having the chance to vindicate himself in a more stringent proceeding.

In short, the public perception that a verdict of civil liability is equivalent to criminal guilt could ruin a person's life. This danger is heightened by an [increasingly voiced suggestion](#) by feminist advocates that civil procedures should sometimes substitute for criminal ones because they are easier to win.

Civil procedures allow victims to prevail more often than do criminal ones for several reasons. There is no presumption of innocence. In criminal court, guilt must be established "beyond a reasonable doubt"; that is, it must be a virtual certainty that the defendant is guilty. In civil court, liability is established by "a preponderance of the evidence"; that is, it is more likely than not that the plaintiff's account is accurate.

In criminal court, a unanimous jury verdict is required to convict. In civil court, juries are allowed for "actions at law," which include property and contract disputes, and personal injury. In many jurisdictions in such cases, a unanimous jury verdict is not required; only 9 out of 12 jurors need agree for a verdict to hold.

The standards of evidence in civil court are lowered; for example, certain types of hearsay evidence are admissible and more weight is placed on syndromes such as posttraumatic stress syndrome. Arguably, this difference cuts against both accuser and accused. In the Bryant case, for

instance, the accuser no longer has the benefit of rape-shield laws that prohibit the introduction of sexual history.

The increased use of civil courts to address what have been traditionally considered criminal matters may well lead to a reevaluation of civil procedures. Until then, whatever flaws exist in the two competing systems of justice along which American society has been organized are likely to be highlighted by a harsh spotlight. Perhaps this is a good thing.

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