**Pricing v. Sanctions**

* Pricing
  + Strict Liability
  + Smooth transition (risk of behavior is proportional to internalized cost)
    - Only meant to offset the harm cost/discourage inefficiency
    - Some productive level (think toxic chemicals or breaches)
  + Contracts (pay for breach, not judgement)
  + Sometimes instituting pricing sanctions may legitimize the behavior
    - Israeli daycare (people feel no moral shame)
  + Two types of lawyers: 1) the economist
  + Behavior is tolerable at appropriate level or with appropriate precaution (illegal parking)
* Sanction
  + Negligence
  + Abrupt issuance of penalty (may have increased for intentional or repeated)
    - No concern for zero activity level
  + Moral element; remedy is a form of punishment
  + Two types of lawyer: 2) moral and intrinsic desire to comply with the law
  + None of the activity should exist (drunk driving)

**Why Make Defendants pay? (**Compensatory/corrective justice v. instrumentalism/deterrence

* Compensatory/Corrective Justice (backwards looking)
  + Right the wrong and make amends (level the scale)
    - Can’t just be about returning the plaintiff to his position (must be defendant as well)
  + Compensatory ≠ Corrective justice
    - Compensatory
      * Restore P – Sometimes D is worse off (ie gain might not have been good)
      * Does it matter who pays? 9/11
    - Corrective Justice (Aristotelian)
      * Restore both D&P (Balance the scales)
      * Something pleasing about balancing scales
  + Relies on a legal trigger of requiring compensation (a wrong)
  + How do we determine baseline position?
    - Remember that some bad things snowball or may lead to good things
      * When can we stretch frame?
        + Court look at specific incident/transfer (immediate results of the breach or tort) (compare Cuban Revolutionary Court)
    - Act v. Omission (baseline is important)
      * What about all the harms that are put unto people, but not compensated
      * Think OWS...
    - Cuban Revolutionary Court
      * Peasant steals banana
      * Court hears evidence of oppression and determines shopkeeper is predatory and must expropriate wealth
      * US court’s see this as up to the legislature (political question)
    - What about if poor people pay less (ie what they can afford) and rich people pay more
      * Poor people will be under-deterred
  + Distributive Concerns: Is D ever justified? Are there exceptions?
    - Poorer people will be under-deterred ∴ more accidents
    - Richer people will be over-deterred ∴ reduced incentives to be rich & discouraging of potentially productive behavior
    - Without distributive justice (Cuban revolutionary court) only the distortion between the rich and the poor.
* Economic or Instrumental Justice (deterrence) (forward looking)
  + Fixing the past wrong is besides the point (sunk cost)

**Specific v. Substitutionary Remedies**

* Specific Remedy/performance – exact restoration
  + Ex. Hammurabi 235 (boat builder who must fix crummy boat)
* Substitution – something else (damage/cash)
  + Court’s value is substituted, not value to the owner

**Compensatory v. Super Compensatory**

* Compensatory
  + Standard measure in American system (aversion to windfalls)
  + Restore parties to pre-wrong position
  + Why 1 to 1 ratio
    - Instrumentally
      * Exact internalization of costs (optimal deterrence)
      * Perfect with SL or negligence
    - Morally
      * Plaintiff is paying for the harm caused
      * The system is not harming the defendant
* Super Compensatory
  + Problems
    - Moral hazard problem: want someone to steal your sheep
  + Benefits
    - Instrumentality: don’t catch everyone
    - Moral principle of punishment
    - Want to discourage beyond just internalization (no efficient theft)
* Why give to plaintiff?
  + Don’t want to discourage plaintiff from taking certain actions (loaning oxen in the Hammurabi example) for fear of not being compensated
  + Incentive to bring claims
    - But couldn’t government bring claims
  + However, plaintiff may take no precautions because of recovery

**Public v. Private (Criminal Sanctions)**

* Why have public sanctions?
  + Vivid punishment
  + Goal of complete deterrence
  + Qualitatively different
  + Stigma
  + Deters people who may not be deterred by money
  + Allows for more preventative sanctions
  + Punishment for harms that may not discretely affect one individual (could be accomplished by private, but much more difficult given standing etc.)

**Tort v. Regulation**

* Dyke penalty example (why penalize ex post and not inspect ex ante)
* Why Regulation?
  + Defendant may be unable to compensate ex post
  + Small loses shared by lots of people
  + Agency can develop specific care standard (expertise)
  + Can take into account third party arms
* Why tort?
  + Cost of inspection (have to check all dykes), and administrative costs
* Why both?
  + Speeding tickets and crash liability
  + Capture some of both

**Eye for an Eye – Sometimes a specific remedy can lead to an efficient result by allowing the parties to bargain for the appropriate compromise as opposed to having the court establish a baseline.**

**Penalty v. Reward**

* Depends on baseline situation (worse=penalty, better=reward)
* Legal regimes tend to rely on penalties more than rewards
  + Why not?
    - Israeli daycare problem: implicitly approving bad activity if willing to pay
    - Loss aversion (people are more afraid of punishment), (thayler reading)
    - Conserve enforcement resource (more legal behvaiors)
      * Couldn’t you just up the reward and give it to less people
    - Secondary issues
      * Seat belt
        + Incentive to drive much more
        + This issue is context specific
    - Infringement on liberty (don’t want to be pulled over)
    - However, no problem of people paying

**Amount of Compensatory Damages**

* Theoretically, the amount that would make the plaintiff indifferent to the loss
* *Market Value* (default and effective in most cases)
  + What about subjective additional value? (only the marginal buyer is purely compensated)
    - Valuation tends to increase after purchase
      * Endowment effect (more value for something once it’s yours)
        + Why endowment effect?

Sour grapes (our shit’s the bomb)

Difference in value when we are selling and when we are not

Risk of trade falling through (1 in hand better than 2 in bush)

* + - Prospect theory (value assessed as change not absolute)
      * Care much more about loses than gains (endowment, status quo bias)
    - Maybe subjective value isn’t important because the thing can be replaces however...
      * It could be a hassle (incidentals, attorney’s fees)
      * Some psychological value may be relevant
        + Sentimental value
      * What about Used goods (can’t replace my used car with as good of one for its value)
        + Over/ask differential
        + Lemon effect: Seller knows lots about the good, buyer has little and ast to make a judgement. Sellers with lemons will flood the market
      * Opportunity costs
  + Becomes problematic when there is no available replacement. (Trinity Church, natural resources)
    - Natural resources (potential ways to get market value)
      * Use value (commercial and recreational)
      * Existence value (value of having it there)
      * Cost of clean up
        + May be unfeasible (financial or physically, may take years)
      * Contingent valuation
* ***50 Acres v. United States***
  + U.S. takes crummy landfill. City replaces it with fancy one. Court holds that there is a market in landfills and that market value is appropriate.
  + Market value v. replacement cost
    - Replacement cost in case appears to be fancy landfill (couldn’t get another junk one)
    - City lost opportunity cost of waiting a decade for a new site
    - City would get huge windfall if compensated for fancy site
    - Risk added from buying the large landfill (what if city expands differently)
      * Functioning market would allow resale of used landfill (so could be irrelevant)
    - *Substitute Facilities Doctrine*
      * Have to replace it; only possible to spend more than paid; no actual benefit
    - *Larry Silverstein (lesser of two rule*) – Doesn’t work for substitute facilities doctrine
    - *Alternative rule* – replacement costs should be awarded for integral parts of a whole
    - Alternative hypo (ie **when to award replacement**) ***U.S. v. Ebinger***
      * Building cooling tower is destroyed
      * Building is worthless without cooling tower (tower must be replaced)
      * Building’s old tower lifespan exceeded building lifespan (no windfall)
* ***King Fisher Marine – Exception***
  + Plaintiff buys a barge for $30,000 and gets sunk 3 days later
  + Plaintiff claims $200,000 dry dock (boats function)
  + Court awards $200,000 and guy did buy dry dock after
* ***Texaco v. Pennzoil***
  + Pennzoil claims that Texaco broke up $3 billion deal worth 10.9 billion
  + Sketchy that there was such a discrepancy, but seemed legit, judge holds for Pennzoil
* ***Bottom line – Look at how much plaintiff needs to be paid to be brought up to baseline without windfall (doctrine is fine, evidence is important***
* ***Trinity Church v. Hancock***
  + During construction of John Hancock building, damages is done to Trinity Church that will reduce the Church’s lifespan however the church is still functional (25% of lifespan lost)
  + Can church be awarded damages for a fraction of its lifespan?
  + Replacement costs – impossible given historic value (not a church in the suburbs)
  + Reconstruction Costs – How could you actually reconstruct it the same?
  + Market value is basically nil (what about subjective value)
    - Value doesn’t have to be objective, just has to be believable subjective (special use)
    - How can Trinity true subjective value show value?
      * Insurance
      * Coasian assessment
        + IE pick a middle figure and hope for the best (obvious error one way or the other, why not compromise)
        + Not a thing court’s like to do (blue bus problem)
  + Creative solution–Force Trinity to rebuild, have Hancock repay Trinity. This would encourage bargaining (neither party wants to rebuild)
  + Time value
    - When should the church receive damages?
    - Majority views harm as already having occurred (structural damage): broken now recover now
    - Dissent: harm is collapse (harm has not yet materialized)
  + ***Peavy House***
    - Farmer leases farmland to mining company with covenant to restore land, cost of restoration is much greater than the difference in market value, company breaches, market value awarded. Why not issue specific performance and let them figure it out?
* ***Property Tax Assessment – Looking for subjective value***
  + Self assess system (Australia and Wisconsin)
    - Ask people to give subjective value, anyone can buy at that price
    - Compare to claiming races for horses ($20,000 means any horse can be bought for that)
    - Golf handicap
    - Admiralty–general average contribution (owners self assess value of cargo and compensate pro rata for any cargo that must be portaged)
* ***Probabilistic Harms***
  + Why only pay when harm is done, not every time you act negligent?
    - Compensation? (people who get hurt only get a small fraction) – insurance could handle
    - Huge administrative problem despite no good philosophical justification
  + ***Children dying on boats hypo*** (causation problem) (normally just a recurring miss)
    - Every year 10 children die from falling off of the ferry–life preservers, if added, would save 40% of the time.
    - Why not compensate each plaintiff 40%? Wouldn’t this avoid the compensation problem
      * Overcompensates the one’s who wouldn’t be saved, undercompensates the saved (maybe we don’t like being certain that we are wrong)
      * Litigation costs (10 trials instead of 3)
        + This wouldn’t be a problem if the boat got some danged life preservers
  + ***Lost-Chance Cases/recurring miss***
    - Ex. medical malpractice decrease chance of death from 60%-75%
      * Court hold recovery for lost chance (40-25)
      * Must show >50% chance that D cause loss in chance
  + ***Market-Share Liability***
    - Can show injury from drug, but cannot show which D made it
    - D should not escape liability merely because P cannot show which D injured which P
  + ***Alternative Liability (Summers v. Tice)***
    - What if there were more hunters?
  + ***Should Tort world move to probabilistic remedies?***
    - Perfect deterrence, matching is off (over/under compensated), administrative costs
  + **Probabilistic Testimony**
    - All testimony is probabilistic to some extent
    - Why not allow probabilistic evidence (I.e., 80% of buses are blue, you were hit by bus)
      * Incentive to get the best possible evidence
      * Juries won’t understand statistics
      * Allows us to pretend were 100% certain
    - Each element is a preponderance (can be less overall)
      * Congresse Juror Theorem (bays theorem)
        + If people are >50%, the group is very likely to be right as a whole (better than a single expert)
    - Conjunctive Fallacy
      * Linda (bank teller in feminist movement chosen over bank teller despite odds against this choice)
      * Base rate neglect (Mammogram example)

**Boring Review**

* ***Contract***
  + Measures of damages
    - Expectation–Position P would have been in if contract was performed
      * Very good at encouraging efficient breaches
      * Can encourage overreliance (overinvestment)
        + Better software v. worse software
        + Changes when the seller can efficiently breach

Option of investing additional 25 to increase total value from 200 to 230 (from buyers perspective, make the deal)

When the seller breaches this investment is lost

Always efficient for the buyer, but not for the system as a whole

(1/3\*-25 + 2/3\*5)

* + - * **Overall**, does not create perfect incentives, but better than reliance and restitution b/c it creates incentives for efficient breach and is no worse at efficient reliance
    - Reliance–Position P would have occupied if the contract had never been made
      * Will encourage inefficient breaches and overreliance
      * Could be equal to expectation if opportunity costs are included
    - Restitution–Unjust enrichment (disgorgement of profits)
      * Defendant to his rightful position does not include gains from breach
      * Deters overreliance
      * Encourages inefficient breachs
  + Why no negligence in Contract?
    - No moral culpability
    - Contractors don’t want it
    - More expensive to enforce breached contracts
    - However, Levinson is not convinced that the reason is obvious
  + Liquidated Damages–Courts don’t like these
    - Will enforce only when damages are meant to be an approximation of expected compensator damages and actual compensatory damages are tough to measure
    - Why would parties want supercompensatory? (who knows)
      * Parties could just gamble
      * May have idiosyncratically high value on performance (tour bus to NYU reunion)
        + However, you are allowed to add bonuses
  + Lost volume sales (*Neri* *marine* – when sale is repeatable award difference and profit)
  + Mitigation
    - *Groves v, Warner*
      * Contractor sued concrete supplier, claimed that contractor could have mitigated by hiring a new supplier
      * **Rule:** Must take reasonable steps to mitigate (***Applies to Tort and Contract)***
        + Analogous to negligence or cost/benefit
        + Eliminates overreliance problems from boring review
        + Foreseeability can counter – warn etc.
      * **Equal Opportunity Rule:** Same mitigation steps were available to both parties
        + Rule can’t be right?

What about employment (equal mitigation of hiring the employee back, however mitigation is required for plaintiff)

* + - *Evra v. Swiss Bank*
      * Evra pays for wire transfer, loses big deal when transfer is botched
      * *Hadley v. Baxendale* is applied (pre-breach behavior, not post breach of avoidable consequences)
        + But this isn’t a contract case (the bank hired the swiss), it’s torts
      * Does it make sense to apply *Hadley*?
        + Negligence in tort suggest the rule is unnecessary in Tort
        + What about avoidable consequences? (want the plaintiff to act reasonable even if they know that the defendant is negligent)
      * Is posner wrong?
        + Compare Groves idea of cheapest cost avoider (mitigator)

Cheaper for Evra to send the money earlier

* + - * + Could have used Tort law supplements (contributory negligence, foreseeability and proximae causation, assumption of risk, seatbelt rule but cf. eggshell skull)
      * Evra may make sense because incentives are closer to strict liability in most negligence cases (ie who assumes the other person is non-negligent) therefore plaintiffs should take optimal precautions
* ***Tort***
  + Unilateral Tort (only tortfeasor’s behavior matters)
    - SL – Leads to efficient behavior if damages are right (depends of level of compensatory)
      * Tortfeasor will internalize both benefits and costs
    - Negligence – Efficient as long as standard of care is right
  + Bilateral Tort (tortfeasors and victims behavior affects the risks and the severity of accident)
    - SL – Will not lead to efficient victim behavior, remedy = contributory negligence
      * Activity level–efficient for tortfeasors, no incentive for victim even under CN
    - Negligence–victim will be incentivized assuming tortfeasors is efficient
      * No efficient activity level
  + Special Rules
    - *Eggshell-skull* – Take the Plaintiff as they are.
      * Tends to depend on court’s intuition with regards to D’s liability (compare if Putney was playing kickball)
    - *Seatbelt rule* – reduce the amount of damages plaintiffs can recover for failing to wear their seat belts in car accidents. (Pre-tort\*amount of damage)
    - *Contributory negligence* – negligence of plaintiff counters negligence of defendant
    - *Avoidable Consequence*–P has a duty to mitigate (cf. equal opportunity)
    - *Forseeability/Proximate Causation*– Compare Hadley, can rule as matter of law, (some harm may be and some may not (unfair to have d pay all)).
    - *Assumption of the risk*–P cannot recover for conscious taking of unreasonable risk
    - *Economic Loss Rule*– no recovery for purely economic harms
* ***Dilemma of Compensation ­– Easy to get perfect incentives for one side, difficult for both* (see issues with activity level in negligence)**
  + Possible solutions: public law (workers comp); decoupling (amount paid by P is not amount D receives); allow leeway for liquidated damages.

**Economic Loss Rule (Pure Pecuniary Loss)**

* General Rule – You can always recover for injury to person or property, but not pure pecuniary
  + Ex. You hit Arod, he can recover medical and lost wages, but Yankees can’t recover ticket sales
  + Used selectively
  + Concern for insolvency – may be impossible to compensate all of those
  + Eliminates potential to falsify info/effect
  + Fear of unlimited liability
    - Must draw arbitrary circle (Compare *Pruitt* w/ *palsgraf*)
* ***Pruitt v. Allied Chemicals –* Water is polluted and fish are screwed up**
  + Three plaintiffs – *Commercial fisherman*; distributors, retailers, restaurants; *Surrogates (bait shops, boat owners)*(surrogates are allowed as stand-ins for sports and rec fisherman)
  + Full application of PPL would mean no recovery for anyone (no one owns the fish)
    - Why?
      * Trade off between under-compensation and under-deterrence, and defendant side corrective justice
      * What about offsetting economic benefits
        + *Rickers v. Sun Oil –* oil taker destroys bridge to island

Mainland businesses profit more as island business lose

However people chose island, so loss of surplus

* + - * + Securities fraud – some lose, some gain
  + *Third parties could contract with those who are directly harmed, this would create a relationship*
  + Regulation might be better in cases like this
    - No need for false substitutes/stand-ins
    - Single plaintiff (government)
    - Funds can be used for compensation and clean up, etc (a large range of things)
    - Government may be in a better position to figure out who has been harmed than courts
* ***Feinburg’s approach to economic lass in BP***
  + Geographic limitation initially (water’s edge), but expanded to more nebulous proximate cause

**Pain and Suffering**

* General Idea/Nuts and bolts
  + Normal tort recovery–Medical expenses, lost income, pain and suffering
  + More than 50% of personal injury damages are P&S
  + Includes a wide range of things–physical pain; emotional anguish; disfigurement; loss of function; regret; fear of future harms.
    - Westbrook case–no longer follow coon dogs, loss of waterskiing and sex, irratible
  + Always lump sum and not discounted
    - Periodic would be more accurate (as harm is ongoing), but creates moral hazard and administrative costs
* Incommensurability
  + No relation between pain and money, and no market
  + Makes compensatory justice irrelevant
  + Redress v. Rectification
    - What is the goal in giving damages? (compensation, corrective justice, etc)
    - Radin’s view that goal is redress
      * Symbolic ritual (although we know the things are the same, giving something valuable (money) as compensation shows that we appreciate the right and disapprove of the act); money looks suspiciously like an attempt to compensate
      * Aren’t there a lot of other ways we could symbolize (public shaming, parade, etc)
  + Irrelevant from deterrence perspective
* How to Value?
  + Contingent Valuation
  + Implicit prices (Insurance Theory) (risk based calculations–how much to reduce a certain risk)
    - Leaves out deterrence
    - Weaknesses
      * Not clear that people want to transfer pre-lost dollars to post-loss dollars when pain and suffering are involved (a dollar is worth less if you’re in a wheel chair).
      * people aren’t well informed about risks or potential harms
      * May not be a nexus (ie you couldn’t insure)
    - May be some value in having a level life as opposed to the highest utility value
    - Psychological studies show that happiness is very stable over time despite serious good and bad things
  + Role of Juries – Instructed generally reasonable, fair compensation? (what’s this)
    - Per Diem Arguments (not always allowed) – very effective at helping juries do math
    - No Golden rule arguments (how much would you want if you lost your leg?)
      * Why is this not allowed?
      * Sunstein–Loss aversion, people don’t want to look like they’d put a price on it so prices go up
    - Juries discriminate based on attractiveness of plaintiff and unattractiveness of defendant
* Statutory rules
  + 17 states have caps (ratio or absolute)
    - tends to only affect serious injuries (are the low levels the least likely to need them?)
  + What about scheduling?
* ***Sunstein Illusory Loss***
  + Self reported happiness is not much effected by injuries and disease compared to what it imagined by the uninjured person
    - However the harm from some injuries is underestimated (tinnitus, chronic pain, etc)
  + Broader ramification?
    - Maybe eliminate P&S
    - Maybe eliminate monetary damages (why does it even matter)
      * Or keep it, money paid doesn’t matter either
    - What about our political system? (wasteful spending, should focus on noise)
  + Most important thing is baseline/expectations (bronze medalist happier than silver)
  + Values instead of hedonic loses
    - Capability (ability to do things, education, wealth, health)
    - Understanding/consciousness (miserable Socrates over happy fool)
    - Compare people with disabilities would pay large amounts or give up remaining life to have their disabilities cured
    - Maybe we just stink at forecasting (people say kids=best decision, but they are less happy)
* ***Death – At common law claim dies with individual (compensation makes sense, but no deterrence)***
  + **Tort Recovery**
    - Survivors can recover: P&S; medical; funeral; and compensation for financial support
    - Some jurisdictions: Lost services (value of the services the deceased would have provided)
    - Loss of consortium allowed in slim majority (arose in part because children are worthless)
    - Still require dependents for recovery
  + Jury verdicts – Widely variable (very small number of very large verdicts: high income, sympathetic, iconically children)
  + Implicit value of life is around 4-10million (ie based on self valuation based on risky wages)
    - Obvious problems with valuation (infinite value to death, rich value higher)
    - Problem of reconciliation (teens are most risky, won’t change batteries in smoke detector, but it would take a lot to get burned)
  + Value of Life (VSL)
    - Ex ante v. ex post – Small amounts for small risk yet infinite for certain death
    - Individual lives v. Statistical lives – More value for identifiable individuals
    - Equality of life (is everyone’s life equally valuable?)
      * Tort system values lifes very different (wage value) ∴ rich people should value lives more
      * Should regulatory agencies assign different value?
        + Bus passengers are poorer than airline passengers (spend less on busses)

What about second class airlines (less safety, less price)

* + - * + What if different value is difference between having a car and not (titanic example: no life rafts for poor, but they got to go)
      * Countries get a competitive advantage b/c of lower value of life
      * We have voluntary military (rich people value their lives too much so don’t join)
    - Does market analysis of value of life work?
      * Everyone chooses for themselves (through insurance/purchase/safety)
      * Sometimes invisible hand decides (tort law or regulation)
      * Problems
        + Sometimes explicit value distinctions make us uncomfortable Ex. Draft lottery instead of drafting lowest value; organ market; adpotion.

Tends to be imperfect (explicit buyout in Civil war, deferment in Vietnam)

Tendency for “gray markets”

Like to have the appearance of equal value

* + - *Criminal life boats (what if 5 in boat, and only 4 can survive, is it homicide)*
      * Rule: must be random lot, cannot conspire or choose the weakest
      * *Seattle God Committee (chose those to get kidney transplants)*
        + Brings out the faults in a choice situation – people loathe to state their open secrets and treasured hypocrisies (key is to be secret)
      * Don’t we make decisions about who lives and who dies all the time (regulation, etc.)
        + This is statistical lives rather than individuals: easier
      * Cardozo: appalled at any killing, people should choose themselves or sort it
      * Ways to avoid making choice: market, lottery, gray market, psychology (statistical lives and act v. omission)
    - Maybe tort focuses on economic compensation while Regulation focuses on VSL
    - What about the value of life for older people v. younger people
      * Young people put a lower value on life despite higher value
      * EPA did have a senior death discount (didn’t work, very controversial)
* 9/11 Victim Compensation – Splitting the difference between tort and regulation
  + Individuation – matching tort value and preventing tort action
    - NPV of ((Age and income – taxes) \* work life – risk of unemployment – consumption)
    - Services compromise – part time workers could get, full time could not
    - Cap at 7 mil
    - Non economic
      * $250,000 for individual and $100,000 for each spouse and dependant
  + Compare Israel fund for any terrorism
    - Why only compensate for 9/11? What about other terrorist attacks (okc?)
  + Some precedent
    - Floods, fires, whiskey rebellion, but always case specific
    - Federal disaster relief fund (can authorize modest relief)
  + How can we rationalize
    - Compare with Katrina, job losses from trade policy, crime victims, takings, poverty generally
      * Distinquish based on when government is at fault?
      * Victim incentives?
  + Reduction for collateral source (**collateral source rule** generally)
    - Rule in general
      * Collateral sources are not offset
      * Tort reform attempts to change or eliminate CSR
      * Why does it accomplish eliminating the CSR?
        + Eliminates double recovery...?

But people paid for their benefit, so not a true windfall

Subrogation (insurance gets the claim)

No offset with subrogation should be perfect

If offset is added, tough for plaintiff

Attorney’s fees

* + - * + No deterrence
    - Rule in 9/11 – Collateral offset for insurance, not for charity
      * Why not offset charity?
        + Deterrence perspective?
        + Compensatory because charity may have gone anyway (synagogue)

**Takings**

* General theory (strict liability for any taking)
  + Difficult to determine (regulation v. Taking)
  + Should encourage government to take property only where benefits are greater than costs (analogize to efficient breach in contract)
* Dilemma of compensation (Heller and Krier article)
  + Sometimes government should pay, sometimes should receive without payment
* ***Levinson’s position***
  + ***Traditional view*** assumes that government properly internalizes/rationalizes costs like a business
  + Why is government different?
    - Government isn’t paying its own money
    - Incentives are based on politics (money v. votes)
      * What is the relationship between money and votes?
  + What if we switch the loser (if there is no compensation)
    - Victim of taking will try and punish the government (won’t with compensation)
    - Political consequences of no taking compensation
      * Politically powerful will change things, if initial loser is weak, stays loser.
    - Lucas v. SC – Rich beachfront property owners with fancy houses
      * State government wants to impose environmental restrictions
      * Rich win taking, cost is now dispersed to tax payers (no more political opposition to environmental regulation)
  + Political incentives are more complicated than the boring review
    - Maybe we don’t need just compensation after all (political system will end unfair things)
* What about incentives to person who loses property
  + Demoralization costs
    - Less likely to act in reliance (trump investment (50% chance of highway reroute example), if no compensation
      * May act more overrely with compensation
    - Can be analyzed under boring review
* Constitutional Rule about just compensation (not about incentives, about fairness and justice)
  + However takings in underinclusive from this perspective (they take in taxes)
  + Government already sets entitlements (taxation/regulation),
* What if government compensated in kind
  + Compensation offset (railroad example)
  + Penn Station example (can’t build skyscraper here)
    - Argued cost was offset by comparable regulations for the rest of the city (ie no one else could build on historic whatever)
      * Couldn’t this be extended to all takings cases?

**Dignitary Harms and Constitutional Torts**

* Dignitary Torts
* Assault, minor battery, malicious prosecution, iied, invasion of privacy
* How to deal with damages when there isn’t really damages?
  + Presume damages (liable at common law)
    - Damages are hard to prove, but we know they are there
    - Ex. loathsome disease; statement’s about a woman’s chastity; imputing serious crime to P; affecting P’s business or trade
  + Look to emotional distress
    - Almost impossible to get without damage to personal property
    - Iied (still hard to prove successfully)
      * Snyder v. Phelps (funeral protests by westboro Baptist)
    - Negligent emotional distress (almost never a claim (cf. stuck in an elevator with clear evidence)
  + Basically providing harms damages for emotional harms is not a common principle of tort
* Constitutional Torts
* General concept
  + All constitutional rights should be protected regardless of efficienty
* Possible Remedy
  + Parallel tort remedy
  + Presume damages
    - Court’s don’t like putting a value on constitutional rights
      * What is the value? (don’t want to have rights pecking order)
* *Carey v. Piphius*
  + Student suspended for majiuana without a hearing
  + Measure of damage: must show actual injury, nothing abstract like solely lack of process
    - Why not? (could just be arbitrary)
      * No market value
        + Not strictly true, plea bargaining
        + Unconstitutional conditions taking (surrender of easement
      * Windfall to plaintiff
        + Happens in exclusionary rule and porn peddler
      * Incommensurability (doesn’t *feel* right)
* *Munroe v. Pate –KKK Case allowed damages not just injunction (****why have damages at all?)***
  + Compensatory justice
    - Money comes from tax payers, not violators
    - No clear victims (not necessarily the injured)
  + Deterrence
    - Might not actually work (see takings)
    - Politics might still encourage unconstitutional behavior (random searching, etc.)
    - This is the main justification applied
  + Damages like exclusionary rule may be most effective (makes cop look bad and angers public)
  + Incentive to bring cases
* 42 U.S.C. §1983
  + Independent claim against state government or official (extended to federal in *Bivens*)
* Violations of Free Speech, procedural violations, voting rights, or religious favoritism
  + Diffuse societal harms (harming an individual in these ways harms society)
  + *Carey* rule of damages
  + Relation between severity to society to individual is arbitrary
    - Case 1 (make a ton with porn site, government wants to shut down)
      * You win, and could win lost business
      * Not a great societal get
    - Case 2 (political demonstration shut down)
      * Damages are negligible so no recovery

**Enforcement**

**Multiplier Principle: Probability and Magnitude of Penalty**

* *If the goal is to set the expected penalty at least equal to social harms and enforcement is not perfect, then optimal penalty equals the harm caused by the violation multiplied by 1/probability of getting caught*
* ***Bentham theory of Optimal enforcement***
  + *If law enforcement is costly, the system that makes sense is to catch as few as possible and penalize with a large amount.*
  + Why does this not make sense/why don’t we do this?
    - Wealth of defendants (not scared if can’t pay anyway)
      * Could use jail instead (still maximum)
      * Could force insurance (but don’t want insurance for intentional wrongs)
    - Defendants may be risk averse
      * Prefer high probability of low penalties (more efficient)
      * Polinsky argues this is why a moderate approach is best
      * However, risk preference is tricky
        + Not all defendants are risk averse

Corporations are neutral

Individuals are complicated

Vegas, prospect theory, endowment effect, status quo bias

Risk preferring for losses but not for gains (certain gain of 800 over 85% chance of 1000, but opposite for loss)

This compliments Bentham

* + - Social aversion (see Kahan)
    - Present Bias (higher value in present than future)
      * People discount future very steeply at first, but less so as time goes by (hyperbolic)
        + Smaller reward sooner and larger in future, demand much larger in future

Tend to discount future gains more than future losses (won’t pay much to delay loss)

* + - *Fairness – most powerful argument against Benthamite argument*
      * Even U of C law students won’t enforce Benthamite notions (sunstein)
      * Why are we morally against bentham’s view?
        + Proportionality (shouldn’t pay more than harm done)

Unfair to one time offenders (tollbooth that charges once a month example)

Insurance could solve the proportionality problem

* + - * + Equality

Some people will get away with it (good argument for parking, bad for murder)

Double parker who is caught subsidizes the rest

* + - * + Corrective justice (scales misbalanced)
  + Regulation as the opposite (high enforcement cost and everyone gets penalized)
* ***Kahan: Theory of Sociological reasoning***
  + *Social Influence* 
    - Perceptions of others committing crimes changes view of cost/risk of harm
      * Cuts against Bentham
    - Broken window theory
  + *Reciprocity*
    - Feel like a sucker when everyone else is parking illegally and you don’t
    - Intense desire to punish those who don’t conform
    - How cheating may be contagious
      * If lots: suggests people won’t get caught; no one will judge; don’t want to be a sucker; conformism
  + *Announcing a stricter enforcement may make people less likely to comply because they assume the enforcement is being increased because people are doing it (conformity)*
    - Numbers affect (college evils, numbers are lower than thought, so they decrease)
    - What if we faked numbers (made lower to get lower)
  + *How Kahan theory supports emphasizing certainty*
    - People will be risk preferring (misperceive risk to be lower than is)
    - (aside) may value getting arrested over sentencing

**Vicarious Liability & Group Sanctions (Who should be penalized?)**

* Presumption of punish the committer of the wrong v. the one who is best situated to prevent the wrong
* ***Vicarious Liability – Employers are liable for the torts of their employees when in scope of employment***
  + Why? (Monitoring; information (easier to identify business than individual); compensation)
  + Scope of employment
    - Why so limited?
      * No benefit for employer beyond scope
      * Employer cannot exercise control or training
      * We don’t want employers monitoring the employee all the time (costly & privacy)
  + Independent contractor v. Employee (examine level of control)
* Other types of third party liability (Gatekeeper liability)
  + Where 3rd parties can prevent the harm and may be inefficient to go after individual
  + Securities fraud
  + Bartender and social hosts for damages of party guests
  + Therapists may be liable for failing to warn against potential harm done by client
  + ***Cybercrime and Copyright*** 
    - *Aimster:*
      * Service provider was liable for facilitating illegal transfer of music
        + Why?

Individuals are likely judgement proof

Dispersed and difficult to sue individually

* + - * + What about level of aimsters control?

Will force control to exist by judgement

* + - * + What about suppression of legal activities (outweighed by illegal)
        + Contributory or vicarious?

Contribution because of aiding and abetting

Vicarious by contractual control

* + - *MGM v. Grocster*
      * Same model as Aimster
      * Ends in same place as Aimster but different route
        + Can’t be liable just for creating a tool that creates major infringement

Instead assisting in crime (a step beyond omission)

* ***Group Sanctions – (ex. Res ipsa, International sanctions, elections, criminal conspiracy)***
  + Overarching Logic – Group will either take punishment or solve issue/hand over offender
    - Information forcing
    - Control internal behavior
      * Ex. Peer pressure, hitting another batter (not pitcher), individual heat v. relay, rope fulling (2-93%, 3-85%, 4-49%, yet over 100% if told people will know)
      * People don’t want to be the one to screw up
    - Must be high levels of solidarity to be effective
      * Not good in international sanctions (tends to hurt those who can’t change things)
      * Could try and build solidarity (tip pooling)
        + Eliminates competition and should make waiter/esses more responsive to all, but solidarity may result it too great a level of camaraderie (bar raiding)
  + Costs and Failures
    - Free-riding (if people don’t have control, sanctions don’t work)
    - Excessive control – Group solidarity may be too strong (group may over react)
    - Deviant goals (group might work to fight back if too much solidarity)
  + ***Ybarra v. Spangard*** 
    - Res ipsa medical procedure (everyone in operating room held presumptively negligent
    - Theory of inducing the parties who would no to turn over the guilty party (how would the victim know?)
  + ***Ajuri (deporting families of bombers in Israel)***
    - Logic behind rule
      * Suicide bombers are hard to deter (but might care about family even if not own life)
      * Family members might rat
    - More extreme proposals – Destroy entire village, kill family
    - Court rejects basic principle of group liability, looks for some assistance (compare Grocster)
      * Based on moral code of Jewish law (this is ambiguous, consider original sin)
  + ***HUD v. Rucker – Housing policy evict families when one member is convicted of drug crime***
    - Supreme Court upholds eviction of elderly blind woman
  + ***Fletcher Reading – Group punishment is inevitably barbaric***
    - However, functional representation is not about holding the group responsible, instead compare to res ipsa and vicarious liability (really about motivating the one who can help)
      * Frank Pledge (mid-evil England)
        + Adult men are organized in groups of 10, all are liable
      * Riot act of 1714 – Collective punishment on subunit of county if riot occurred
      * Nazi collective reprisal
        + Warsaw uprising citizens refused to shelter insurgents (backfired because they knew they would be punished no matter what
    - Problem is that group punishment punishes innocent individuals for acts of guilty ones
      * Don’t like this idea (what about strict liability)
      * Group members who can stop crime may not actually be “innocent”
    - Sometimes groups are good at hiding from the outside: corporate criminality

**Injunctions**

**Preventative and Reparative Injunctions**

* **Why comply with injunctions?**
  + To be a good citizen
  + Contempt (not direct contempt like in my cousin vinny)
    - Criminal Contempt
      * Injunction is a new crime (bill of attainder if broken (ie no new trial)
      * Judicial power in crime creation
    - Compensatory Civil Contempt
      * Has to pay what ever is inflicted by breaking injunction
      * Can be used in conjunction with criminal sanctions
      * Why have this (can just sue for damages)
        + Contempt goes to top of docket
        + Attorney’s fees are compensated
        + Disadvantages is that sometimes “clear and convincing” is required
    - Coercive Civil Contempt
      * Increasing fine, or lock-up until compliance
      * Defendant has the keys to the jailhouse door in his own pocket
      * Creates games of chicken (D wants judge to think he’ll never comply)
* Ripeness; Substantial likelihood/imminence – How certain is the court that the harm will occur
  + Probability issue not temporal (99% in next 10 year – enjoin it)
  + ***Humble Oil –*** *Injunction sought to prevent destruction of documents*
    - Only evidence is affidavits from Humble’s attorneys
    - Humbler argues no harm because already illegal, however
      * Double deterrence
      * More punishment than legislature contemplated
* Why not enjoin everything?
  + Separation of powers (judiciary would be intruding on legislature)
    - Issue with “obey the law” injunctions
      * Legislature should decide penalties for crimes/wrongs
  + Against due process (haven’t done anything wrong)
  + Additional administrative costs
  + So why do it when we do?
    - Irreparable harms
    - Legislature stinks at individualization
    - Particularity (can eliminate vagueness in law)
      * But isn’t this why we hire lawyers?
    - May increase penalties for people who refuse to follow law
  + Allows to use administrative costs where most helpful
* Declaratory Judgement (ex. quiet title, facial challenges to statutes)
  + Originally not sure if constitutionally because advisory ≠ constitutional
  + Courts still require ripeness
* ***US v. WT Grant*** 
  + Ripeness is some cognizable reason
  + *Unnecessarily complicating a simple question:* ***how likely is this to happen in the future?***
    - Just because a bad act happened in the past doesn’t mean the court will enjoin it from happening in the future (can be evidence, but not definitive)
* **What the Law is** 
  + ***Marshall v. Goodyear***
    - Violation of age discrimination by one employee at one location (D court enjoins nationally)
    - Overturned
      * No evidence at any other offices (must show more likely than other companies)
      * Plaintiff can get injunction limited to single store
    - Argument in favor of broad injunctions
      * No harm cause already illegal
        + However, changes statutory scheme, creates inequality and personification in the law, litigation costs of enforcing
      * Factual argument: Storewide policy or systematic policy is needed
  + ***City of LA v. Lions*** 
    - Asking to enjoin use of chokeholds
    - Citing WT Grant–just because you were choke doesn’t mean you’ll be choked again
    - Most talk is about standing (*standing and ripeness are redundant (and mootness)*)
      * Insufficient likelihood
        + Unripe or
        + Lacks standing because there is no redressability
        + Moot – not sufficiently likely it will even happen again
  + How serious is the standing/ripeness/mootness rule
    - ***Roe v. Wade*** 
      * By the time of the case child has been born
      * Why standing?
        + Pregnancy comes more than once (what about chokeholds coming more than once)
    - ***Bowers v. Hardwick***
      * Prosecution withdrawn before trial (mootness argued
      * Propensity to engage in future sodomy is enough (appellate court)
      * SC ignores issue
    - ***US parole commission v. Garity*** 
      * Federal prisoner is allowed to pursue an injunction about guidelines for prisoners on parole (no reason to think he’ll be back on parole)
    - ***Clemons v. Bashing*** 
      * Ballot access problems
      * Candidates challenge elections, election is done by end of case
        + Not moot because of repetition (probability is sufficiently high)
    - What’s up with ***Lions***?
      * Seems like no one can get anti-chokehold injunctions
      * Court seems to have just started restricting injunctions against PD
        + Already restricted for 6 month
* **Timing**
  + ***Nicholson v. Halfway house***
    - Court denies injunction
    - Compare ***Toren*** ­– Court enjoins funeral home because its nuisance per se
    - *Balance of error’s* 
      * Intervening too soon would disallow legal halfway house
        + Could wait and get more information
        + Can determine if there are and what the scope is of negative effects
      * Intervening too late costs may be done that could have been prevented
        + Lost value of construction, sunk cost
    - Alternative solutions
      * Could bribe the people not to open halfway house
      * Could limit injunction to certain things (no child rapists)
        + More than just what’s illegal (see scope infra)
  + Preemptive war on Iraq (instead of waiting)
  + Guantanamo lock ups
  + Dissolving companies in bankruptcy (how long to run up debt)
  + Ex ante regulation v. ex post tort (
  + ***Calculation/value judgement***
    - Cost of detaining innocents v. costs of waiting
    - Criminal law (better 10 guilty free than 1 innocent convicted)
      * Balance of increased crime v. imprisonment of innocents
    - Precautionary principle
      * Apply cost/benefit and put thumb on scale against harm that would result if regulation was not done
* ***Systematic bias against prevention*** (security guard paradox)
  + Also reverse paradox (we think our precautions would have worked
* Applied to remedies
  + ***Permanent v. mai***
  + ***Permanent*** can last indefinitely – issued after full trial on the merits
  + ***Preliminary*** injunction issued in advance of full trial (after hearing)
    - Less extensive procedure
    - Can be immediately appealed
    - Denial does not mean plaintiff cannot prevail
    - Can have ***Temporary restraining order*** (can be issued without a hearing)
    - Factors:
      * Likelihood of success on the merits
      * Irreparable injury to the plaintiff if injunction is not issued
      * Balance of hardships (irreparable injury to defendant)
      * P\*(expected irreparable harm to plaintiff) must be > (1-p)\*(expected irreparable harm to defendant)
    - ***Lakeshore Hills v. Adcocks ­– 600 pound bear named yogi***
      * What’s the harm of removing the bear v. harm of potential damage
      * Fourth factor: status quo
    - ***Winter v. NRDC ­– NRDC wants to enjoin use of sonar testing***
      * Injunction issued by COA because cost to navy is very small
      * Supreme Court reverse
        + Must demonstrate likelihood of harm (presumably >50%)
        + Preliminary injunction must be in public interest

Why isn’t this already in the balancing?

* + - Erroneous preliminary injunction
      * Defendant gets compensated for harm during injunction
      * ***Rule 65C***
        + Preliminary or TRO must be guaranteed by bond (without this all harm to the defendant is irreparable)

Therefore plaintiffs may welcome (also then don’t have to pay damages ex post)

* + - * + Vague amount (“in the amount proper) – may be waived

***City of Atlanta – City in=pay bond, city out=probably no payment***

* + - * Something weird about making plaintiff pay
        + Merely lucked into injunction
        + Erroneously litigating plaintiffs don’t have to pay defendants

Some jurisdictions require bonds on appeal to cover delay of payment.

* + - * + May represent ambivalence against preliminary injunctions
  + ***Temporary Restraining Orders***
    - Same factors as preliminary, but more ad hoc
      * Notice and chance to oppose where notice is possible
    - Duration
      * w/o notice – 10 days
        + ***Sampson*** and ***Granny Goose*** suggest 10 days as well for notice
      * What happens if the injunction isn’t extended?
        + ***Sampson – Converts to preliminary injunction***
        + ***Granny Goose ­– Expires; no longer binding***
    - Appealability
      * No appeals (can piggy back on other appeals)
      * Limited exceptions for when TRO decides entire case (ex. election
* **Scope of Injunctions**
  + ***Nicholson*** – injunction against building halfway house v. nuisance
  + ***Aimster –*** against illegal activity v. foreclosing some legal activity
  + ***Pepsi Co. v. Redmond*** – Injunction to not work for a competitor
    - Prophylactic because it goes beyond illegal activity
    - Compare ripeness to humble oil
  + Reparative Injunction – Stop ongoing harm that already happened
    - Raises causation issues (to what extent was harmed cause); compare ***Brown v. Board***
    - Same compensatory effect as damages (substitute)
      * In most cases, damages will work best
      * ***Bell*** – Justice of the peace election (voter intimidation)
        + Remedy by having new election (same result)
    - ***Foster v. Boss* –** dock owner not allowed dock permit and damages (no double recover)
  + Reparative and preventative distinction
    - Scope
      * Preventative: How much further can courts go to obey the law?
      * Reparative: How much further than precisely repairing the harm can courts go? To what extent can the court make the defendants make the world a better place?
* ***Winston v. Bailey*** 
  + ***Winston –*** D took some of P’s employees and made the machine
    - D wants no injunction, P wants permanent
    - District Court grants 2 year, COA affirms
      * Goal is to perfectly compensate (2 years is this attempt)
        + If there had been no infringement, P’s machine would have been released to the public and could have been developed
    - Preventative v. Reparative
      * Reparative if the violation was stealing secrets
        + Assume tis is the right way to view it
      * Preventative by preventing illegal act of selling
    - **Rule: *Scope of injunction is supposed to be narrowly tailored to rights violation***
      * This is the rule courts would state if pressed
      * Equivalent to compensatory justice
      * Why maybe go above compensatory (if compensatory is the worst outcome, defendants might have no reason no to steal)
      * Small right 🡪 small remedy or large right🡪 large remedy
  + ***Bailey v. Proctor*** – Trust is overleveraged, court requires dissolving of the trust
    - Preventative v. reparative
      * What’s the illegality?
        + Preventative: Fraud and self dealing (of which high d/e makes vulnerable)?

If so preventative, yet ripeness problem (are the new people going to do this?)

Best ripeness argument is that the structure may push into fraud/self-dealing

Stretch from ripeness to scope

Overinclusive because forecloses legal use

* + - * + Reparative: Lack of balance of fund

If this is what is illegal, it should be relevant that congress said this type of structure is legal

* + - **Rule: *The court is trying to make the world better than it was before the harmful act***
      * Court is redistributing
      * Same problem as separation of powers (it is congress job to determine right/obs)
    - Small right ->large remedy
  + Rights v. Remedies
    - As long as the court is restoring norms 🡪 remedies. If trying to make the world a better place🡪rights
    - How does the court get away with creating rights?
      * There is some latitude (Levinson’s view)
        + No legitimate position of bailey small🡪large, but some pepsi co type balancing
    - ***Three possibilities***
      * Winston – strictly remedial
      * Bailey – right expanding
      * Intermediate – Some prophylactic as long as the goal is to prevent illegal conduct
        + Compare to timing/ripeness and the tradeoff in aimster
        + Look to potential ex post solutions

In ***bailey***, potential for bankruptcy

In ***pepsi co***, trade secret violations may go unnotices

In ***amister*** damages won’t work

* + - Practice
      * ***Bundy v. Jackson*** – Supervisors are sexually harassing female employees
        + Court orders training and monitoring not required by law
      * ***EEOC v. Wilson medal casket***
        + Owner must be accompanied by chaperone when with female employee
      * ***Microsoft*** – Broke up operating system and web browser
        + Nothing illegal about being the most popular as long as because of networking and not illegal activities
        + Dramatically over inclusive, but court sees sneaky ways to be illegal without getting caught
      * ***Anti-Gang injunctions***
        + Regulate a number of gang type behaviors (curfew, public appearances)
        + How can this be justified (bailey problems and separation of powers)

Allows laws against groups (get around equal protection)

Ex. Chicago gain ordinance struck down (vagueness)

* + - * ***Maritrans v. Pepper***
        + Firm must stop representing a client because of inside information
        + Enforcement of conflict of interest norm (Winston enforcement of a prophylactic law)
        + Was the right not to have a lawyer with conflicting interest?

We can reinterpret this as the right to not have law firm use confidences against you

Which is right? How do we decide?

Compare criminal: hanging out by ATM, but may be prophylactic to prevent thefts

* + - For Constitutional Law everything is reversed (court makes rights, congress does remedies)
      * ***City of Boerne*** 
        + Court decided meaning of free exercise right

***Smith (Peyote case)***

Congress overrules

Says even neutral law can’t have detrimental effect

Discriminatory intent is to hard to detect

* + - * + Is congress just changing the remedy, or are they changing right?

***Proportionality***

Must be congruence and proportionality between the injury to be prevented and the means adopted to that end

Compare to balancing of error costs

* + - * ***United States v. Morrison (violence against women act)***
      * ***Dickerson v. United States* –** Miranda rights
        + ***Miranda*** – held specific statement required

Before just no coerced confessions

Understood to be imposing prophylactic measure

Balance difficulties of full understanding and lack of information

* + - * + Can Congress change or get rid of Miranda under §5?

If Miranda warning is not dictated by Constitution, there is some leeway (this is the view in Miranda)

* + - * + ***Question presented (framed by Court): is Miranda prophylactic? Or a component of the right (5th amendment)?***

This is a real loser right? (Miranda said it was prophylactic)

Even allowed some evidence where no Miranda

Court thinks that if Miranda is not part of the right it was never legitimate in the first place (can’t impose nonconsitutionally required right)

Most of the time the court doesn’t admit to prophylactic measures and just says “this is what the constitution requires”

***Scalia’s view of color blindness***

Still prophylactic by preventing subtle and sneaky discrimination

If it is prophylactic (ie remedy), Congress and states could change

* + - * + What about the alternative category 2 view (balance of error costs)

Problems with Miranda

Costs to states of not being able to do what may be constitutional some times

Contrast to banning all confessions (eliminates coerced, but also stinks for states)

Question becomes: Can Congress revisit Miranda balancing?

Congress controls the remedy

Congruence and proportionality (from ***Boerne***)

* ***Structural Injunctions***
  + Different because of regulatory approach (eh this is unconvincing, structural injunctions can be analyzed in the same way as others)
  + ***Swann v. Charlotte-Mecklenburg***
    - What method to use
      * Eliminate de jure and just have neighborhood schools (problem of neighborhood segregation)
        + Can’t be enough because Brown wants integration
      * Busing instead
    - Winston or Bailey?
      * What is the right? (from Brown)
        + Either no de facto or no de jure (no de jure is prevalent)
      * If no de jure, where does Court get power to remedy de facto? (possibilities)
        + Interpret brown right to include de facto big right🡪big remedy
        + Court’s justification

Expand causation and make injunction reparative

Avoids bailey, but no one thinks this is true causation

* + - * + Category 2

Some neighborhood is result of school

Better to be over-inclusive (busing) than under-inclusive by doing nothing

* + - * + Could expand right against de jure (other forms of intentional discrimination)

Satisfies Winstonian proportionality

However, too much to undo all racial inequality

* + - * Even if court is intruding on right, court can just diffuse this by expanding de jure
  + ***Missouri v. Jenkins***
    - Past de jure, present de facto, getting worse by white flight
    - Judge orders drastic increased funding to create magnet schools
      * Includes raising taxes
    - Justifications
      * Make schools more attractive to get white people back
      * De jure cause of lower test scores
    - Supreme Court rejects
      * Different kids different time (no longer result of de jure)
      * Insists on Winston (tailor to small de jure rights with close empirically accurate causal connection)
      * End of school desegregation
        + After ***Seattle schools*** can even do voluntarily
  + Three dimensions on which the court can move
    - Size/Scope of the right
    - Relationship of right to remedy (Winston, Bailey, Cat 2)
    - Empirical Causation (Swann)
  + ***Prison Reform structural injunctions*** 
    - ***Hutto v. Arkansas***
      * Prisons in south were dark and evil worlds based on prison labor (replacement for plantation system)
        + 1 in 4 people died each year
      * In 1933 model was switched to penal plantation model (no more outsourcing, instead worked on state-controlled prison farms)
        + Conscripted inmates as monitors/guard
      * Some cases sought discrete injunctions against specific conduct
        + Lashes – cruel and unusual ham
        + Did little to change overall nightmarish condition of prisons
      * Case sought to reform prison system (demanded structural remedy)
        + Strategy of one giant 8th amendment violation
        + District Court granted injunction against whole structure

No clear definition of constitutional right

No need because it’s real bad

No clear remedy guidance (how should the prison look?)

Court takes a series of steps without regard for baseline

Same characteristics as Bailey (make bad good)

Identify areas that need most changes (housing, medical care, etc)

Lots of state discretion

Progressively more specific as discretion is not used

Bunk per man, new diet, ***30 day max iso***.

* + - * Arkansas appeals restriction of 30 day isolation (isolation chamber was actually crowded)
        + Constitution says nothing about this (what does the 8th amendment precisely forbid, and what can state do) (ie prophylactic)

Rehnquist dissent (Winstonian view)

District view may force more than 8th amendment standard

This is true (if the prison did everything great, it would be better than minimal standard)

* + - * Justifications for doing more
        + Stevens–Taking the long and unhappy history a comprehensive response is justified (tried to do it, but they sucked)

Category 2 argument (even though some freedom is lost, they had their chance and we still need to remedy the violations)

Rehnquist just balances different

* + - * + Second Stevens–Injunction is justified by the interrelatedness of the violations (solve one thing, might solve them all)

Overcrowded cells aren’t alone 8th amendment violation, but may lead to violence, bad health care, etc. (by the time the violence gets bad, its too late)

This is another category 2 argument

Conditions contribute to creating other constitutional violation

Creates causal debate (compare ***Swann***)

* + - * Risk that District courts will read that 30 day isolations are inherently unconstitutional (***Sometimes remedies drift into rights)***
        + Trying to bound the 8th amendment (ignores cat 2 justification)
        + What about a decent prison with only overcrowding and citing early decision

Many judges buy it

* + - * + Compare to de facto spread to the north (ignores initial justification for de facto in the south)
        + Compare Dickerson in which the court expands the remedy of Miranda into part of the right
        + Compare ***Rhodes v. Chapman***

Overrules district court order of one prisoner per cell

Could not be further from ***Hutto***

What ***hutto*** meant was looking at the totality

Even after this case D ct’s still found violations in overcrowding cases

* + - * + ***Wilson v. Cider (1991)***

Court puts an end to totality of circumstance prison injunctions

Every violation has to be clearly defined and articulate (evaluate each condition on its own merits and in isolation)

Compare desegregation frame of reference to de jure

* + - * + ***Lewis v. Casey***

Right to representation turns into right of free-standing prison library (exapand too far)

Inmates are in decent prison, but argue insufficient staff in library and failure to update, lack of adequate photocopying, too noisy.

Library aren’t ends in themselves, right is adequate access to the court system.

Scalia says you can’t go beyond category 1

Role of legislature to deal with constitutional behavior that’s still bad

Does recognize that the two roles coincide when a court grants relief by ordering alteration of organization or procedure (must have imminent or actual harm, not just crummy organization)

Prison equivalent of Missouri v. Jenkins (Winstonian view)

Require narrowly tailored

Extend no further than necessary

Least intrusive necessary

Most of the way to ending prison litigation

* + ***Brown v. Plata*** 
    - Court upholds ordered release of prisoners
    - Against congressional act (act give procedure for release)
    - Compare release justification to feedback loop of Hutto crowdedness leads to unconstitutional healthcare
    - Scalia emphasizes issues of courts in making this types of decision
      * ***Lyons*** argument
        + must show that they individual are likely to be treated unconstitutionally
        + some are in danger, but can’t identify the ones who will be
    - Deeper difference in values between preventing crime v. health care for prisoners
* ***What we need*** 
  + Insist on clearly defined rights (measure of remedies)
  + If not Winstonian, constrained category 2
* ***Other flexibility***
  + Causation
  + How to balance the error costs in Cat. 2
* Court resists changing remedies into rights/but contrast ***dickerson***

**Choice between Damages and Injunctions**

* Irreprarble injury law – no relief in equity if there is an adequate remedy at law or equity will only act to prevent injury that is irreparable at law
  + Hierarchy of remedies – Preference for damages
  + Standard is generally easily met and has little traction about when to prefer one or the other
* ***Pardee***
  + Plaintiff is threatening to cut down a tree–please enjoin
  + Still have the ripeness requirement
  + How to view cutting down a tree
    - Tree=money (plaintiff won’t care either way)
    - Tree=property = irreparable
  + The court will find a problem with damages anywhere the plaintiff finds problem with damages
    - Incommensurability; idiosyncratic value; difficulty measuring damages
* Death of the irreparable injury rule
  + Laycock found that courts take the view of plaintiffs (if there is any reason to care, injunctions are cool)
* Relationship between irreparable injury rule and compensatory
  + What’s the compensatory damages going be
    - Market damages
  + Same argument is made for injunction as for higher than market damages
  + If courts were willing to give higher than market value damages in cases like this more commonly, plaintiffs would be even less likely to prefer injunctions (still some would, incommensurability)
  + Basically make damages adequate (then they never are inadequate ∴ no need for injunction
    - But courts are much more likely to give injunction than depart from market value
      * Why?
        + ***Pardee –*** either injunction or more damages until adequate
        + Less likely to have error in injunction

May over or under compensate victim

* + - * + Still have to litigate damages

Injunction is easy, not extra litigation

* + - * + More expensive to monitor injunction in some cases
        + May enjoin parties that weren’t going to do it anyway (waste of litigation)

Mitigated by ripeness

* ***Continental Airlines***
  + Damages are going to be hard to measure
    - Math his hard
    - Facts are complicated
  + Injunction is cheap and easy solution
* Why might a plaintiff choose damages or injunction?
  + ***Pardee*** – hypo: defendant just really wants to cut down the trees and P is timber company
    - What if defendant values trees more than plaintiff? Wouldn’t it be good to allow D to take trees and pay market value?
    - Why don’t we always like the idea of efficient theft (back to Hammurabi)
      * Benthamite law enforcement (not every thief is caught, so penalty must be multiplied)
      * Never no for sure the true value of entitlements (just because the defendant values property at more than market, doesn’t mean that plaintiff values it less)
        + Problem with thief offering $2000 for levinson’s care

Lemon problem

* + - * + Easier for government to prevent theft than personal prevention
      * Moral reasons (autonomy of property owners over thieves, social stability)
  + Create remedy for theft that it will not be in anyone’s interest to steal (property right, not liability)
    - Exchange only in the situation where bargaining reveals that buyer values more
    - Enforced through criminal law, super compensatory, and injunctions backed by contempt
  + Why do we treat the person who crashes into my car as only having to compensate (can non-consensual take car and pay only compensation.) what is the difference?
    - No chance for consensual transaction (thief could have bought instead of stole)
  + ***Vincent v. Lake erie***
    - Finished unloading cargo when storm comes in, storm makes ship damage dock, but ship is saved (efficient trespass), necessity defense
    - Defendant has to pay $500 damage to the dock (no super compensatory damages or criminal punishment)
    - No opportunity to bargain (or perverse bargaining)
      * Variation: owner of dock is there at the time
        + Is this the car theft case?
        + Is it more complicated than theft?

Opportunity for bargaining is contextual

Other transaction costs

Monopolistic (only 1 dock)

Parties will bluff true value (exchange won’t happen)

Or resources are consumed in bargaining

* + - Closer to traffic accident than standing in the drive way when car gets stolen
  + Other circumstances where courts will allow liability rules to override property
    - Imminent domain
      * A lot of people to deal with and bi-lateral monopoly (hold out problems)
    - Products liability
      * Does this make sense? We are in contractual relationship
        + Consumers don’t have enough information
  + Cathedral Framework
    - Property rules (sanction)
      * Much higher price than anyone is likely to pay
      * Can be enforced criminally, injunctions, or super-compensatory
        + Must be more than pure compensatory
    - Liability rules (price)
      * Amount that has to be paid is set at something like compensation (or market value)
      * Determined by some third party, not the parties

|  |  |  |
| --- | --- | --- |
|  | **Tree** | **Factory** |
| **Property/injunction** | **1** | **3** |
| **Liability/damages** | **2** | **4** |

* Factory example
  + Nuisance (court must decide right and remedy)
  + Assume goal is to minimize cost of harm (reach result if factory owner also owned the trees)
  + Costs of shutting down pollution v. costs to tree owner
  + Rule 1: if the factory wants to pollute it has to buy its way out of injunction
  + Rule 2: factory can pollute, but must pay court determined level of damages
  + Differences
    - From Coasian perspective only difference is who sets price
      * If court picks the same level as the tree owner, there is no difference
  + Rule 3: deny any remedy, tree owner must buy the right to not be polluted
  + Rule 4: (great innovation of article), court determines the price (compensatory damages for factory to stop polluting): ***Spur industries***
    - Developer sues feed lot that has been there a long time
    - Why doesn’t the court do this more
      * Weird to say that plaintiffs have to pay
      * Multiple plaintiffs (transaction costs)
  + Choosing rules?
    - If the court has perfect information about cost of harm and cost of prevention, the court will always reach the right decision, and the remedy won’t matter (both will work)
      * Same situation if the parties can bargain costlessly (parties will come up with efficient result)
    - Difference
      * Distributive consequences of entitlement
        + Whoever gets the entitlement will be wealthier (Cuban revolutionary court)
        + Should be relevant
        + Giving injunction to factories is subsidy to factories and tax to trees
        + Coase theorem holds only in short run (effects health and investment in long term economy)

Everyone who experiences effects has to be involved

Judges might not be good at setting broad policy

* + Two rules of thumb (between 1 & 2)
    - Where transaction costs are low, then we should prefer property rules to liability
      * Efficient theft intuition
      * As long as entitlement is right, value estimation problems by court are irrelevant
      * But why can’t tree owner bargain after issuance of incorrect liability rule
        + Pay for the difference
        + Factories can’t locate to take advantage of tree paying
        + Would prefer where there are multiple bribe takers
    - If transaction costs are high, then we should switch to preferring a liability rule
      * Vincent v. Lake Erie
      * Boomer v. Cement
        + Lots of people being injured
        + Not feasible for factory to install mechanisms

Factory relocation – 10,000 somethings

Trees – 5,000 somethings

* + - * + Beneficial bargaining range, but lots of people factory needs to talk to

So seems like factory would not beable to make bargain and would shut down

* + - * + Calabresi says use liability rules to allow entitlement to be transferred without high transaction costs (rule 2)
      * Assuming high transaction costs, Only use property rule when were certain who the efficient user is, if not liability
      * Caveat: think about efficient theft problems
        + Suppose in boomer the neighbors value the trees higher than factory, but court assess damages wrong and undervalues trees.

Like stealing car and having to pay less than its worth

Moral is no perfect solution (because court stinks at getting damages right)

* + - * + So trade off between error of giving the property entitlement to the inefficient party (because no transfer is practical because of high transaction costs) and getting the damages wrong under liability
    - Suppose you have tree example, (high transaction costs), court knows value of trees, but not value to fix factory (improve factory)
      * Rule 2 (perfect case)
  + Compare Trinity Church
  + Things that make us want property: risk of recurring thiefs (where transaction costs are low)
  + Things that make us want liability: allows movement of entitlement without transaction costs
    - Creates risk that damages will be miscalculates
* **Specific performance (property) v. Damages in Contract (liability)**
  + Specific performance rule: same as irreparable injury rule (granted where a damages remedy would be inadequate, or uniqueness (no good market substitute))
  + ***Campbell Soup***
    - If carrots that Campbell wants are readily available it should be indifferent to contract carrots or other carrots (should be damages)
    - In the actual case: Campbell wants the specific carrots are not replaceable on the market with identical substitutes
      * Could get other similar carrots (not precisely identical, different color)
      * Court decides this is enough to make damages inadequate
  + Point Laycock makes is that this works the same as irreparable injury rule. IF the plaintiff cannot buy a perfect substitute, then damages will be deemed inadequate and specific performance will be granted
    - Consistent with Uniqueness and UCC standard “unique or other circumstances”
  + How perfect do substitutes have to be?
    - Laycock wants you to see that courts insist on close to perfect
      * Is this right? He didn’t look at every single case like injunctions
      * Tend to trust him
        + But see Law and Economics tend to assume specific performance is the exception

Only no conceivable substitute

* + - * + Farnsworth (authority on contract law)

Took the view that although there used to be an advantage to damages, now SP is much more routine. (Close to Laycock)

* + - More you can show imperfection, the more likely client will succeed in SP over damages
  + What about intellectual perspective (pros v. cons) look to cathedral
    - Benefits of consensual exchange
      * Parties can get the costs right
    - Costs of CE
      * Transaction costs
    - Concerned with moment of breach, not moment of contract
      * Party looking to breach could buy their way out (both parties share benefit of breach)
        + Make SP default to encourage this
      * If transaction costs will be too high (no deal can be struck voluntarily)
        + Would make sense to have liability, but with same risk of inaccurate damages (will encourage inefficient breach)
    - Endless debate
      * Argument for general rule for SP: expectation damages tend to be under-compensatory, and will encourage inefficient breaches
      * Argument for ED: based on transaction costs, typically to expensive to bargain around specific performance (cite Vincent v. Lake Erie)
      * Computer sale hypothetical
        + B2 offers more (3000) for computer and CS breaches with B1 (2000)
      * Levinsons example with Colleen O’brien and George the Greek (desperately wanted to take her to the prom)
        + Colleen was dating his nemesis (a bad guy)
        + Nemesis did a bad things to George the Greek

Prehistoric fish stolen by nemesis and embedded fish in cheeseburger and fed to George the Greek

* + - * + George’s strategy involved buying a Saab (used)

Finds perfect Saab at neighbors

Owner sold car day before (2000) but offers (3000)

* + - * + How to we get product to highest value user (George the Greek) assuming low transaction costs

Damages: Saab seller breaches, pays 2000 and sells for 3000

Specific Performance way 1: S could sell for 2000 and then B1 could sell to George the Greek (windfall goes to B1)

Specific Performance way 2: S could approach B1 and bargain a deal to middle ground (buys back for 2500)

B1 likes specific performance in both cases because of George the Greek windfall

But do we care who benefits? Forget about Cuban court in contract because the contract price always depends on the remedy

* + - * + Transaction costs?

Specific performance standards have transaction costs that are prohibitively high

Scenario 1: George the Greek has a harder time finding B1 than S (S has no reason to tell him)

Scenario 2: bargain between S and B1 is bilateral monopoly (both parties need information and will bluff)

Administrative costs of damages

* + - * + Problem with damages: what if B1 actually values it higher than George the Greek (they could still bargain)

Need to weigh risk that damages will be too low v. risk that transaction costs will prevent efficient transactions happening

Bargaining in damages (renegotiation)

No thieving or multiple takings

Proponents of specific performance will say that this scenario requires a bilateral monopoly scenario that is the same as in specific performance (won’t often work, and there still is a residual risk)

* + - * + Boils down to cost of losing some efficient breaches because of transaction costs outweighs under compensation

Too little breaching under specific performance v. too much under damages

Might suggest that American rule makes some sense because we are only worried about undercompensation when there aren’t good substitute and these are the uniqueness cases where we give specific performance

* **Attempt to extend cathedral to Constitutional Violation (kontorovich)**
  + Injunctions are the normal expected and preferred remedy for constitutional violations
    - Often preventative injunction is not possible
  + Real contrast with regular cathedral still creates tiebreaking rule
  + Reversal of presumption from damages in private law to injunctions in public law
    - Not perfectly consistent in constitutional law
      * Just compensation
      * Rule against prior restraints on speech
  + Two puzzles
    - Why is constitutional law different in general?
    - Why does it depart in small pockets?
    - Kontorovich says no answers in text of constitution or court
    - Easy to see as a theoretical reasoning why
      * Don’t think of constitutional law as pricing, sanction instead (no efficient breaches)
      * Might think that the role of damages in forcing governments to internalize costs is less effective in constitutional law than private law (see levinson article)
      * Easy to see constitutional harm as always irreparable
        + What about takings

We do have a liability view (people think its ok)

* + Kontorovich suggests use of cathedral to determine when liability rules might work where they aren’t currently applied: in any setting where government has a compelling need to take entitlements, but cant do so legitimately through transactions because of high costs
    - What transaction costs?
      * Bribing/dealing doesn’t work in constitutional law: unconstitutional conditions
      * Where are they ok
        + Plea bargaining (bargaining not for money, but lower sentence)

Don’t we see this as a necessary evil

* + - * + Takings

Overcomes high transaction costs

Why do we think about takings different? These are property rights after all?

One possibility is that individuals don’t fully internalize benefits of free speech etc, but do for property

Damages are uncertain in rights not takings

* + - How might we use liability in other cases
      * Mass detention (allows government to get around trying to pay people to get locked up)
      * Advantage is that if court has to choose between rule 1 and 3 in security crisis, they will choose 3. (ex Korematsu)
        + Rule 2 becomes intermediate option
        + Has nothing to do with cathedral
* Undue hardship
  + Refuse injunction when cost to defendant far exceeds benefit plainitiff
  + Van Wagner advertising v. S&M Enterprises
    - VW has contract for 10 year lease for billboard facing midtown
    - Defendant buys building and breaches contract
    - VW wants specific performance, but court refuses
    - VW argues that billboard space is unique ∴ injunction is necessary
      * Courts traditionally say that every piece of property is unique
    - Court says a distinction must be drawn between distinctness and economic equivalence
      * Only reason we care about specific performance is that market value may be undercompensatory as long as plaintiff can’t buy equivalent
      * How big is uncompensatory risk here? Basically zero, it has no idiosyncratic value on this specific location (formula for billboard pricing (eyeball and duration for which eyeballs will be fixated)
      * VW has also already sublet the space to other billboard companies
    - So why does VW care to get specific performance?
      * What’s gonna happen if VW gets specific performance (bilateral monopoly)
      * Court doesn’t want to give windfall when no risk of undercompensation
    - What would be wrong with a world where VW got to share in the proceeds of development?
      * Risk would be priced into contract
      * May get no deal between parties because VW holds out
      * Do people want lottery tickets bundled with their contract?
        + Don’t see parties contracting around specific perfomance
      * Stakes are low, parties could contract around it
      * Problems with bargaining
        + Trump comes to S&M looking for a deal, and they have to deal with VW (adds transaction costs)
        + Makes joint value lower because of transaction costs (increases contractual surplus)
  + Whitlock v. Hillander foods
    - Building an addition to grocery store, underground footings intrude onto plaintiffs property
    - Plaintiff notifies defendant
      * No deal can be made
    - Trial court grants no injunction because the shopping store would have to be torn down
      * Appellate court remands implying that injunction is correct in this case
        + Damages would be value of land taken (basically nothings)
        + Cost to defendant of injunction is huge (project cost 1.5 million originally)
        + Why not clear undue hardship?

Last thing we want to happen is the shopping center to be torn down

May be more uniqueness in this case

Windfall:

Plaintiff will get overcompensated

Why bad in whitlock

Force purchase of lottery in VW (not the same)

Don’t want lottery because we want people to pursue efficient breaches

Contingency here is bad (having to rebuild instead of Trump calling)

Is there a corresponding problem? If defendants will have to pay through the nose, defendants might overinvest on property determination (wouldn’t want this to be more than the price of land)

Recall Jacobs and Young v. Kent – Reading pipe case (enjoined to tear down the house and put in the right brand of pipe), Cardozo says diminution in market value. (what if there was some reason to prefer reading pipe, may be undercompensation)

The only unique thing relates to distribution of wealth (in contracts we can make point that buyers don’t want windfall because they have to pay for it ex ante)

Parties aren’t in contractual relationship

* + - * However seems to be intentional by defendant
        + This become the efficient theft case (problem?)
        + No holdout problem so injunction makes sense to protect property rights
        + Injunction makes sense in intentional takings
      * Should courts care if P and D are friends
        + People almost never bargain in nuisance cases

But the cases looked at were personal and only ones that got to appellate stage

Court may have got it right, so no bargaining

* + - * + May be extra aspect of costs from acrimony
        + Endowment effect my mean that injunction itself increases subjective value (is this transaction cost or is it part of subjective valuation?)

Answer would depend on definition of well functioning market

Many values may be tied to emotion and irrationality

* + - * Plaintiff may have been in the best position to prevent the intrusion, but may have instead decided not to because they wanted to exploit
  + Comes up where injunction costs much more than compensation to plaintiff and there is no reason
  + Harder cases arise where there are big concerns about undercompensating plaintiffs
    - Peavyhouse (sample exam)
      * Compensation points to SP
      * Undue hardship points to damages
      * What about inalienable specific performance or damages at $301
        + Why ingenious

Means compensation will have to be true (no windfall)

If LO doesn’t, he’ll take $301

* + - * + Not perfect

What if farmer values between 300 and Specific performance

He will still choose specific performance even though its inefficient

* + - Specific performance is far from a perfect solution
      * Even if parties bargain, neither party will reach the right level
* Laches
  + NAACP v. NAACP legal defense fund
    - Parties used to be the same, but split
    - NAACP files suit in 1982, but in the 25 year interim, the legal defense fund has earned significant recognition
    - Court says laches (could say undue hardship, but that would still require damages)
    - Estoppel generally, laches specifically
* Estoppel is preferred defense for cutting of damages whereas laches cuts off injunctions
* Statutes of limitation
  + Initially applied only to legal claims and not equity (laches and estoppel apply here)
  + Some statutes of limitations only apply to damages and not equity
    - For the most part alternative basis for cutting of claims due to time
  + Once statute has run, time is done
  + Why have
    - Prevents evidence from getting stale
    - Repose after a certain time (doesn’t make much sense)
    - People may wait because recovery will be higher (see NAACP)
    - Or plaintiff could potentially benefit from wrong, but will sue if it goes bad
      * Election/ballot access cases
* Ebay
  + Supreme court does its best to screw up remedies doctrine
    - Compare navy case and Sampson v. granny goose
  + Four part test for granting an injunction (this test came out of nowhere)
    - Irreparable injury rule stated two ways
      * Affirmative: suffered an irreparable injury
      * Negative: damages are inadequate to compensate
    - Balance of hardships must favor plaintiff (taken from preliminary injunctions)
    - Public interest not be disserved (also taken from preliminary injunctions, Winter v. NRDC (navy case))
  + Some combination of viewing public interest as tautology and restricting to patent cases
  + Substantive contribution to undue hardship
    - Changes remedial course in patent cases
      * Until Ebay there had been a strong presumption of injunctive remedies
      * Court appears to push courts away from presumption and have them treat IP cases
      * Hugely sucks to determine damages in patent cases
        + Problem was that not valuable patents could tie up entire buildings
    - Patent holdup problem
      * When just a small component is patented and threat of injunction is used as extortion (does not serve public interest)
  + Risk of getting damages wrong v. risk of undue hardship/extortion/not serving the public interest
* **Punitive Damage**
  + Big question: why have them
    - Deterring
    - Punishing
    - Why can’t this be accomplished by standard legal regimes
      * Compensatory
        + Generally encourage optimal deterrence without risk of overdeterrence (no benefit of super)
      * Criminal punishment
    - When would we maybe want supercompensatory
      * Channel people into market transactions
      * Want a sanction instead of a price
        + Criminal violations
        + Not worried about overdeterrence (no efficient level)
      * Bentham
        + Want to create level where people escape liability or compensatory damages isn’t enough or enforcement isn’t profit
        + 1/probability of paying
        + not about creating a sanction, just about creating right price
        + economists see this as the only justification
        + Exxon Valdez v. case with cruise ship just slowly leaking oil (overtime = ame amount as exxon)
        + Exxon is more clearly a case for punitive damages, but bentham would justify in cruise ship case
        + Surprising that jurors would take this into account as it suggests that jurors would think unjust

Hastie article shows that jurors couldn’t figure out multiplier principle

* + - Punitive damages are an aberration because they don’t restore anyone to their rightful position (not keyed to gain or loss)
      * Not what punitives are designed for
  + What if we think of punitives as criminal type thing
    - Why would we need an additional level
    - Why in this case is it ok to have juries make up crimes and convict without criminal procedure
    - Why would it be addressed primarily at corporations (not people)
      * Retributive doesn’t seem to filter as shareholders are harmed, but have little control
        + Can be effective as in group liability (but still no benefit to punis over criminal)
      * Regarded as crazy compare common law (diadand)
        + Non human object that caused harm and would be tried and convicted and destroyed.
      * Criminal law seems better at stigmatizing (maybe the only effective thing about criminal sanctions against corporations)
  + How do punitive damages work in practice
    - Standard for punitive damage case
      * Outrageous
      * Reprehensible
      * Malicious
      * Jurors understand them to mean something distinctive and specific
        + Intentional conduct is especially bad (mens rea style ordering)
      * How do jurors view intentionality
        + Grimshaw v. Ford motor (pinto) and similar cases

Outrageous that manufacturers intentionally brought to market products that would cause injury and death

* + - * + Jury is influenced by cost/benefit calculations

Seems like in torts case this isn’t even negligent

Jurors find reprehensible (don’t want to just number)

* + - * + Enormous hindsight bias

Once confronted with concrete death or injury, no amount of money seems sufficient

Compare to Chilean miners (identifiable lives v. statistical lifes)

* + - * + Why do jurors think this way

60% endorse view that if everyone tries as hard as they can the risk of environmental harms is zero

* + - * What are jurors objecting to
        + Wrong cost/benefit (liability and not loss of actual life)

What is the gap here (not every person who dies recovers, some people lose)

* + - * + Regulation
    - How much in punitive damages
      * Doctrine doesn’t provide much guidance
      * “an amount sufficient to punish and deter”
        + Reprehensibility

Juries look to intentionality

Judgements become inconsistent when blameworthiness is translated to dollar amounts despite being very consistent at level of reprehensibility

Often numbers are based on arbitrary numbers

Defendants that use higher VSL numbers get more punitive damages

* + - * + Defendant’s wealth/income/profit/market capitalization

For deterrence this makes some sense

Must tailor

But in this case only the benefit should matter

$25 million in grimshaw is amount saved by not moving the gas tank

Punishment

Overall wealth makes sense because of diminishing marginal utility (rich defendants must pay the more)

Criminal law doesn’t do this

Also odd because of corporations because they should only consider npv, no marginal utility

* + - * + Punitive damages must be in reasonable ratio to compensatory damages

Approach of SC in limiting damages

What is the relevance?

Punishment

No necessary correlation between bad behavior and compensatory harm

Punitive damages originated in dignitary torts

Deterrence

Benthamite

But he wants way more because you want to reduce administrative costs

Advantage is that it is easy to administer in a consistent way

Getting rid of them would also be easy and consistent

* + What to worry about
    - May be too big
    - May be too inconsistent
    - Even if they are predictable, they are not based on any clear or legitmate purpose
      * Example high damages for doing cost/benefit
  + Exxon case
    - Surveys punitive damages cases
      * Largest concern with unpredictability
      * Small number of very high outlier verdicts
        + Don’t seem to track any good reasons (3rd concern) according to Souter without looking at the cases
      * Not convinced of first problem
      * Tie to criminal offenses
        + Could satisfy 2 and 3
    - States
      * Some have limited
        + Placed caps or maximum ratio (1:1 – 5:1)
      * Part of damages are paid to state (8 states)
        + Ohio supreme court did this on its own
        + This makes the parties always settle
  + BMW v. Gore
    - Stuck down under due process
    - Alabama was very discriminatory against out of state defendants
      * DCC was an initial way of arguing, but due process is used
  + State farm v. Campbell
    - Three factors
      * Reprehensibility
      * Ratio
      * Other fines and penalties (evidence of notice)
        + But if defendant is not otherwise deterred, this might be exactly where we want punitive damages
        + low fines justify low punitives

Grimshaw says opposite (this is the point of punitive damages)

* + Is bounding really gonna do anything
    - Multi part test is like a raised eyebrow test
      * Without bright line then all its going to be able to do is to say it thinks punitive damages are out of control
    - Court could just get rid of punitives
      * Some rationality and predictability
      * No other legal system thinks they are good or sane idea
* **Unjust enrichment/restitution**
  + Was once a free standing subject
  + Difficult subject to cover because there isn’t any clear there there
    - Like remedies got divided up into many discrete discussions
    - Near complete absence of any doctrinal rules or overriding principles
  + Both remedy and subject (fit into legalistic mindset one way benefit (un-bargained for))
* Blue cross v. Sauer
  + Facts
    - Blue cross mistakenly pays money to Sauer\
  + Restitution recovery and compensatory are the same
    - But no COA besides unjustly receiving the money
  + Equitable or legal?
    - Historically most unjust enrichment claims were legal
      * But there are some types that would have been equitable
* Biggest category of cases – quasi contract
  + Plaintiff confers an unbargained for benefit, so court makes up a contract
    - Ex. if you have a heart attack and doctor saves your life
      * Compare to car crash where idea is to duplicate contract that parties had no opportunity to create
      * Large part of what goes on in restitution claims are places there are high transaction costs and its difficult to have consensual agreements
  + Important how much we blame the plaintiff for not making a contract (more agreement was possible the less likely damages will be)
    - Where we want people to make contracts (benefits generally) we want people to make contracts, so court doesn’t deal with it (no legal claim)
    - In harm cases make them pay (legal claim is obvious solution)
  + What if we focused on gains as default damages as opposed to harms
  + Borderline cases
    - Blue cross is example
      * Not a case where transaction would have been easy, or impossible (middle case)
      * Defendant has been negligent
        + Most courts will allow, but could argue either way
    - Summerville v. Jacobs
      * $20,000 spent on lot they don’t own
      * court holds that Jacobs must either pay increase in value because of building or sell the land for value minus value of building
      * if the somervilles knew that they were building on someone else property, they could never recover (no forced exchange)
      * If the Jacobs see that the summervilles have made a mistake and do not notify and stand by, then they can clearly recover for unjust enrichment
        + Compare laches in whitlock
      * Defendant didn’t do anything wrong in this case and the plaintiff was merely negligent
        + Here there is some disagreement

(Summerville says yes)

don’t want to overdeter by making people over check line

Jacobs and young

Disproportionately unfair punishment and windfall

Other courts say plaintiff loses

Want to encourage summervilles not to make mistake

* + - * This case is harder than Sauer because the only option in sale of property (not just a cash exchange)
        + This accounts for some difference (why blue cross is easy)
* Other category (taking away from a plaintiff)
  + Leave your house in the care of your brother who will live in until you get back (transfer title for tax reasons), brother sells
  + Taking, but not in common law or tort cases
    - Often breach of trust or misrepresentation (family)
  + Many courts impose restitution here (quasi-trust or constructive trust)
    - Pretend that brother breach fiduciary duties with regards to fictional trust
    - Tracing rules allow you to recover the thing you lost even when the thing has change formed or value
      * Brother sells house and buys new house that appreciates in value
        + Many courts will allow you to trace your proceeds to the higher value house (getting back the very thing you lost)
        + Based on distinction of whether the thing has kept its formed and can be traced (did it become money that was comingled)
      * What happens if the defendant is insolvent?
        + Do you have to line up with all creditors

So long as you can clearly show that the money from sale went into some segmented account, then often you are allowed to trace even into bankruptcy

* Restitution as a remedial tool
  + Tort of conversion, you can still have restitution as a remedy
    - Brings along idea of tracing
      * Suppose that stock broker takes your 100 dollars and breaches duty and invests in brother’s oil well, your 100 becomes $100,000 and you sue in tort
        + If you sue compensatory, stuck at 100
        + If you restitution, you can trace the 100 into 100,000
  + Ruffin v. Ruffin
    - Husband wins lottery
    - Wife argues that 2 dollars used to buy the ticket was her money as it was owed in child support and alimony (that was rightfully her $2)
    - Principle
      * Tracing may be limited where the proceeds would be very disproportionate to plaintiffs loss
    - Would it have made a difference if the $2 was stolen from the house
      * Many courts would allow in this case
  + Restitution is a possible remedy for a lot of substantive liability (tort, contract, IP, etc.)
    - Can be very attractive when tracing makes sense
  + Olwell (eggwashing case)
    - Defendant uses machine once a week for three years without getting permission
      * Plaintiff attempted to sell machine to defendant
      * Olwell sues for restitution and gets money gotten by defendant
    - Why restitution
      * Olwell has no damages (didn’t even know)
      * Damages could be market rental value (what defendant would have had to pay to rent)
      * What is the justification for allowing restitution (more than the rental)
        + Efficient theft case (defendant could have bargained about using the egg washer)
  + Compare Edwards v. leeds admisntrator
    - Edwards discovers cave on property and turns into tourist attraction
      * 1/3 of cave is under lees land
    - Court allows recovery of 1/3 of profits
      * We would want Edwards to bargain with lee (but laycock doesn’t like)
      * Bilateral monopoly problem
      * Majority of court gives property rule (reflecting bargaining justification)
        + Dissent expresses high transaction cost concern
  + Beck v. natural gas company
    - A gas company is leasing storage in underground caves from plaintiff
    - Some gas accidentally escapes into lease not part of lease
    - Court does the same thing as lees
      * Restitution, but really just damages in amount of market compensatory
        + Not super compensatory in anyway
        + Vincent against lake erie (high cost of not knowing the gas was leaking)
* Two advantages of restitution
  + Restitution can easily be super compensatory
    - If there is some reason to want super compensatory damages, then we can use restitution interchangeably with punitive damages and criminal liability
    - This doesn’t have to be the case (see cases like beck and dissent in lee v. Edwards)
  + Ease of valuation
    - Where compensatory damages are hard to measure and defendants gains are easier to measure, restitution makes sense (see olwell and Edwards)
      * What has been lost is intangible rights to exclusive use of property
  + Myer brewing company
    - Plaintiff makes fancy black and white label scotch (has trademark)
    - Defendants make cheap beer with same name
    - Remedy for trademark violation is restitution is all of profits from selling black and white beer
    - Super compensatory makes sense
      * Deliberate trademark violation
    - What would compensatory damages be
      * Lost sales of scotch due to customer disappointment with beer or general cheapening of the label that makes customers switch
      * Causation becomes a real problem
      * Statutes have created a range of figures to allow courts to address this problem
      * What about damages as price for license of trademark
        + Same problems are raised
        + How much is exclusive use of the trademark worth

Not sure without figuring out how much profits are lost

* + - * + Would work if there was a market price for licensing
    - To say that profits are easy to measure is simplifying it
      * Plaintiff is recovering all profits, and not just profits that are unjust
      * Most profits are probably attributable to the beer itself
        + Maybe we want this because without, there would be no reason not to just take the trademark
    - Notice court in olwell does something different
      * Doesn’t award all profits of egg packing business, but instead only the portion of profits attributable to egg washing
      * Why a different approach in this case
        + Court wanted to go above fair market value, but why stop at $1600
        + No good answer for why

Proportionality

Minimizing windfall

* + Restitution cases often raise the issue of how much restitution to pay
    - If the were really about restitution of only wrongful gains, then the cases would get tricky because defendants use what they got from plaintiff as some part of a productive enterprise and apportionment is difficult
    - One gets the sense than when courts are making causation and influence
      * They are really influenced by deterrence and the correct amount of super compensatory damages
    - Nice thing about restitution is that it gives the court a wide range of options
      * Close to compensatory (beck) or punishment (myers)
* Snepp v. US
  + Condition of CIA employment is not being able to publish anything before prior approval
  + Snepp publishes a book about CIA activity in Vietnam without approval
  + Court says Snepp must pay restitution for all of the profits despite the fact that none of the information was classified, and the book would have been equally profitable with approval
  + CIA hasn’t suffered any harm from book
    - But if people are able to bypass CIA approval harm will be done
      * Harm will be irreparable and potentially very large
  + Court doesn’t see itself limited by apportionment
* Shelden v. MGM
  + MGM makes profitable film based on real life story
    - MGM plagerizes plaintiffs play
  + District judge awards the entire profits of the film despite lots of testimony that the revenues were mainly from the story of the public domain and joan Crawford and Robert Montgomery
  + SC applies restitution (20% awarded to play right)
    - Where does 20% come from (4 times compensatory)
* Michael Bolton copyright case
  + Infringing elements of one of Bolton’s song account for 66% of song and profits from song are 28% profits from album
* Why does it happen in certain cases
  + MGM
    - Plagerism might be not getting caught every time
    - But don’t want writers being to careful
    - Moral hazard problem of incentives for writers to not negotiate a license and hope that their text gets incorporated into a movie
    - These may be reasons for not giving 20 times compensatory
* Davinci theft example
  + Want to keep intact causation (99.9% genius, .1% stolen materials)
  + Proportionality
  + But still looks not so different from oil well tracing case
* Detemrinations of apportionment of unjust enrichment are about more than empiracle causation, they are partially about that and broadly constrained by that, but within that constraint there is a large latitude (all the way up to myer or snepp)
* Example of 4th and 5th amendment exclusionary rule
  + This is a kind of restitutionary remedy
  + Shares with other forms of restitution a lack of proportionality
  + Criminal defendants get a huge windfall
  + Ease of valuation
  + Good at deterrence
* **Reparations**
* Posner and vermule
  + Hybrid between legal remedies and large scale government redistribution
    - Generally adminsterd by legisatures and not courts
      * Lots of technical barriers to recovery
        + Statutes of limitations
        + Soverign immunity
        + No violation of positive law when action occurred
      * General sense that this is beyond judicial role
    - More like remedies
      * Based on compensatory/corrective justice framework
        + Entirely backward looking (not about deterrence or forward looking distribution)
  + Schemes
    - Paid by west Germany to survivors of holocaust
    - Reparations to return property taken by communists
    - Some reparations to native americans for lands taken
    - Japanese internment
    - Reparations for slavery (ogletree)
      * Federal and state legislatures and courts
      * Some discrete (Tulsa race riots)
      * Some broad (slavery in general)
      * Ogletree says broad/discrete isn’t much different
        + However more likely to have success in discrete claim
* How do reparations make the boundaries of remedies visible
  + Important stretches
    - Relaxes requirements of matching wrongdoers with those who pay
    - Relaxes matching those compensated with those victimized
    - Threatening to compensatory/corrective justice
      * Makes courts and legislatures nervous
    - Relaxed in other areas
      * Corporate punishment
      * Governmental liability
      * Vicarious liability
      * Disconnecting benefit from victim to get them to avoid injury (decoupling)
      * Compare also probabilistic recovery
        + Worry because of mismatch between recipients and compensation
        + Same anxiety in market share liability and summers v. tice
        + Fluid class actions

Administrative cost of compensation is too high for all small classes

Either distribute benefits to another class

Reduction of levi’s jeans price

* + - * Ordinary class actions
        + Different legal claims get identical recoveries
      * School desegregation
        + Even if we believe in intergenerational transfer, still have a problem because of difficulty tracking (to what extent are the disadvantaged because of this transmission)
        + Court insists on close matching of victims and compensation

Specific proof of causal effect

* + - * Affirmative action
        + Remedy under title VII

People helped were not the one’s harmed and the marginal harmed employee was not a wrongdoer

* + - * + Court insists on close matching of victims and compensation
    - Conceptual move to rectify matching
      * Move from individuals to groups
        + Racial groups still exist
        + Compare Lyons (not likely to be choked, but his group is)
        + Toxic exposure in probabilistic recoveries

Probabilistic harm = large group certainty

* + - * + Standard in reparations discourse

Ogletree talks about African-American community

Consider Brown university president announcing conducting investigation whether Brown should pay reparations for slavery

One suggestions was scholarships for black students

Brown must be personified as a university and at the same time personify African Americans as a group

* + - Alternative from shifting from individuals to group
      * Recreate matching by expanding scope of relevant wrongdoing
        + All black people are being hurt by slavery even today

Compare Swann all housing segregation is caused by school desegregation: slavery caused racial inequality

* + - * + Wrongdoing side

All non Black Americans are wrongdoer because unjust enrichment

Compare justifying desegregation by de facto lines

* + - * + Not perfect solution because of problems of degree and valuation

How do we measure the extent to which individual black persons are harmed or white persons have benefitted

Would still violate the demands of matching by glossing over the differences

* + - Responsibility of nations
      * Are the German people responsible for Nazi atrocities/and who should get compensation
      * At the center of the idea of the US constitution
        + We didn’t actually enter into it
        + In order for this diea to make sense we have to personify the American people
  + Reparations raise special concern about personification
    - Problems with personifying on racial lines (racial essentialism)
      * Jewish reparations are in a way honoring Nazi views that Jews and Aryans are separate and unequal
        + Same view as Thomas and Scalia in affirmative action
        + Brownsville punishment of black squadron group instead of individuals (easier to treat racial minority group individuals as fungible)
    - Not as worried about shareholders
    - Economic loss
      * Balance out is not a problem (all business are the same)
  + Further problems with sorting out harms from big problems like slavery
    - Offsetting benefits
      * Arguments that whites have conferred benefits upon blacks
        + Redistributive programs, civil war, but for slavery African Americans would be Africans in sub-Saharan Africa.

Might point to Colonialism in Africa

* + - * Compare takings
        + Took your house, but compare your life with government to living in the woods
      * Sometimes we take offsets into account
        + Doctor who causes pain and suffering is allowed to offset pain and suffering prevented

But doctor finds someone on highway in pain dying cannot just kill him later.

Doctor botches sterilization and someone gives birth when they didn’t want to

Some recovery, so limit or disallow recovery by offset benefit of having a child

Wrongful death cases where spouse remarries

Offset loss with gain of new spouse

* + - We can imagine the world if a car wasn’t crashed into (world is the same in all respect except dent in car (even this is delusion, see back to the future))
      * But for large harms the ramifications are huge
        + Requires creating a world baseline

What would the world have looked like without slavery?

Pure imagination (everything would be different)

Can point to infinite benefits and harm counterfactually

* + - * Having a child is in between
      * Special problem when government gets involved
        + When citizens deal with government, there are infinite interactions between them

Two strangers, clear that denting car made relationship imbalanced

When government dents your car, they’ve done things for you

* + - * The bigger the wrong and the more distant in time, the harder it is to imagine what the world would look like if the wrong had never occurred
        + Part of the problem is incommensurability

Money doesn’t undo slavery or holocaust

* + - * + Further problem that once we lose grip on the but for, we have no way of getting our minds around how we would start remediating

Opportunity for alternative history has passed.

* + - * At what point should we throw up our hands and give up?
        + For economist, that point is immediately

No concern with past harms (sunk costs), only deterrence for the future

May mean compensation, but only because of desirable incentives

* + - * + Judges and regular people balance is more tricky

at some point everyone will say that counterfactuals are too difficult that we cannot do meaningful remediation

even if we could somehow figure out the counterfactual, we are not willing to expend the resources to recreate that world

rather try and make this world better than recreate other world

Brown could either try and reparate slavery or could build cancer research center

Could spend money on busing or could invest in better schools

Jenkins tried to do both

* + - * + Distributive justice (present and forward looking)

Bill gates Torted by a custodian

How much do we care about remediation of having janitor starve just for gates to get a drop in bucket

How much do we care about distribution, should be go all the way to Cuban

* + - * + How to make goals point in the same direction

Some times can rectify and remediate and create a better world

Good incentive effects and more social wealth that can be distributed effectively though taxes

Doesn’t always turn out this neatly

Compare just compensation for takings paid to wealth beach land owners in lucas

No good reason to tax median house owner

No deterrence because encourages investment

Need some trade off between remediation and deterrence/making the future better

Not willing to give absolute priority to backwards looking

Example giving native Americans all the wealth of the US.

There is no shared set of beliefs or theory about how to balance or tradeoff these competing goals

In reparations consider the choice between targeted benefits to African Americans and targeted benefits to the poor.

Tensions in eastern European

Families that were wronged were wealthy aristocrats asking for castles back and most people in the country are desperately poor

Not a baseline problem, we know the rightful position

9/11 victim compensation fund

gives money to bond traders instead of investing in preventing terrorist attacks