Remedies Outline

1. Design Choices in Law:
   1. **THEMES**
      1. Paternalism vs. externalities
      2. Rules vs. standards
      3. Bifurcating rights and remedies
      4. Law vs. equity
      5. Pricing vs. sanctions (economists vs. moral philosophers)
      6. Compensatory justice (backward looking) vs. bilateral corrective justice (forward looking)
         1. Where compensatory just benefits victim, bilateral takes away from harmer as well
      7. Distributive Justice vs. Compensatory Justice
2. Compensatory Damages
   1. Compensation & Probability
      1. **Market value** is the predominant approach to determining compensatory damages
         1. E.g. “Lesser of two” rule between replacement cost and market value - *In re 9/11*
         2. Two qualifications:
            1. “Incidental expenses” (covering costs) generally not compensable 🡪 problems of proof
            2. Attorney’s fees

American system (on your own side) encourage settlement by reducing variance in expected outcomes (e.g. by adding in recovery for fees)

* + 1. But market value is often *undercompensatory*
       1. Ignores consumer surplus & idiosyncratic value
          1. Does court actually believe there is idiosyncratic value? Compare *Trinity Church* and *Peevyhouse*
       2. Ignores the endowment effect (Thaler)
       3. Ignores lemon problems in markets
    2. Special purpose doctrine - Can get replacement cost if: - *Trinity Church*
       1. Improvement was unique and built for specific purpose
       2. No market value for specific use
       3. Economically feasible and reasonably expected to be replaced
    3. Probabilistic harms - *Trinity Church*
       1. Should parties be able to recover for a level of structural harm that has yet to cause any real damage? 🡪 only increases *probability* of future disutility
       2. **Intermediate probabilistic harm damages – expected damages**
          1. Overcompensatory in case of no damage and undercompensatory in case of damage 🡪 but insurance markets should take care of this
          2. Benefits of suing *now* while defendant is still solvent and evidence is still fresh
          3. But Courts don’t like probabilistic damages, particularly for torts 🡪 hence no attempt liability in tort

Problems of fraud

Imperfect insurance markets

Administration costs

Judicial integrity theory – better for courts to be confident

* + - * 1. Stronger case for **recurring miss scenarios**?

E.g. lifesaver w/ 40% success rate will never be considered negligent, even though you could save four lives out of ten

Used in cases where we don’t know who caused the harm w/ significant probability (market share cases)

* + - 1. Difficult in restoration cases, e.g. *Peevyhouse*
         1. Should use Coasean solutions 🡪 specific performance and let parties bargain to true value
  1. Contract, Tort, and the Dilemma of Compensation
     1. Contract Rules and Types of Damages
        1. **Default rule**: expectation damages
        2. Lost volume sellers - *Neri*
           1. UCC 2-708 gives volume sellers lost profits as an expectation damage, even though they have “mitigated” by reselling the item

UCC Removes **common law** mitigation as a defense to breach of contract in lost volume

* + - * 1. Justification:

Makes no sense in perfect competition 🡪 never “lost” volume

Makes no sense in monopoly 🡪 change price to attract new buyer

Justified as producing fixed volume based on volume estimates, e.g. auto dealers

* + - 1. Reliance/Incidental Expenses
         1. If expenses incurred w/r/t breach are wasted expenses, then recoverable as incidental

If not wasted, not recoverable

* + - * 1. Can’t use reliance to get *more* money than expectation damages
      1. Liquidated damages clauses - *In re TWA*
         1. Generally unenforceable if the damage doesn’t relate to the plaintiff’s actual loss 🡪 unconscionable “penalty”

To uphold must show:

Compensatory damages are difficult to measure at time of trial

Liquidated damages designed to approximate expectation damages

Courts are willing to enforce *under*-compensatory liquidated damages clauses

Why one-sided bias? Ignores parties contracting to idiosyncratic value

Unconscionability problems, e.g. *Walker-Thomas*? 🡪 but why one-sided?

* + - * 1. Easy ways around: work penalty into price of contract, or give a “performance bonus” for completing on time

Blockbuster late fees upheld as “alternate performance”

Though cell phone cancellation fees are penalties – Sprint

* + 1. Contract & Tort
       1. Expectation damages in contract are equivalent to strict liability damages in tort
       2. S/L remedies create **moral hazard** in potential plaintiffs:
          1. Tort solution: contributory negligence
          2. Contract solution: *Hadley v. Baxendale* rule 🡪 damages must be foreseeable to the defendant
       3. Why did tort switch to negligence regime?
          1. LEVINSON thinks historical accident 🡪 incentives balance out no matter what baseline you start at
    2. The **Dilemma of Compensation**
       1. To create efficient incentives, defendants must pay full costs to fully internalize, but plaintiffs must receive less than full costs to avoid moral hazard an fully internalize
          1. Contract and tort attempt to address w/ supplemental rules to match behavior w/ incentives

Tort uses negligence to shift the primary liability standard to an efficient level

Contract uses *Hadley* rule to impose efficient incentives on plaintiffs

BUT can’t effect both costs *and* activity levels

Negligence regime avoids activity levels issue

* + - 1. Two general solutions to the Dilemma:
         1. Contract solution: cut of super-compensatory damages through *Hadley*
         2. Government regulatory solutions: decoupling defendant’s liability from plaintiff’s recovery

E.g. criminal law or civil fines

* 1. Limiting Damages – when do we undercompensate?
     1. **Contract** - Mitigating Damages
        1. Equal Opportunity/Avoidable Consequences Rule - *S.J. Groves*
           1. In contract, plaintiff is relieved of obligation to mitigate when defendant has the exact same mitigation opportunity available 🡪 take reasonable steps to avoid the loss
           2. Two interpretations of *Groves*:

Two step approach

Plaintiff breached duty to mitigate

But lower cost mitigator, so we relieve plaintiff of prima facie duty

**Bilateral mitigation rule**

No duty to mitigate in first instance if the defendant is lower-cost mitigator

* + - 1. Employment
         1. Finding a new job:

You don’t have to take any job to mitigate, can be “substantially equivalent” - *Ford Motor*

* + - * 1. Sexual harassment:

Did plaintiff unreasonably fail to take advantage of corrective opportunities provided by employer? - *Faragher*

* + - 1. Landlords
         1. Common law rule is landlords have no duty to mitigate from breaching tenant - *U.S. Nat’l Bank v. Homeland*
         2. Modern changes in residential leases:

Landlord can’t unreasonably reject subtenant 🡪 shifts duty to mitigate to defendants; OR

Shift towards making landlords mitigate

Note *Groves* doctrinal logic would REJECT this shift (equal opportunity available)

Who is the cheapest cost avoider?

* + - * 1. Commercial lease: burden remains on tenant
    1. **Tort** - Pure Pecuniary Loss Rule - *Pruitt v. Allied Chemical*
       1. Doctrinal Rule: **Plaintiffs cannot recover for “indirect” harm**
          1. Very conclusory test
          2. Creates a proximate cause rule for mass torts in order for society to *function*
          3. Damages way out of proportion to scope of conduct
       2. Possible Justifications:
          1. **Offsetting wealth transfers** balance out the harm of indirect economic loss, e.g. bridge being shut down - *Lady Luck*

Pecuniary loss rule as rough estimate of line of where wealth transfers begin

But this proves too much 🡪 happens in most cases, e.g. shareholder suits, why just radical torts?

* + - * 1. Encourage parties to **contract** around assumption of risk? - *Robbins Dry Dock*

Cut off tort damages between **distant parties** to encourage contracting around risk between parties closer in privity

E.g. owner of boat suing dry dock on behalf of renter

Or printer contracting w/ electric company for power rather than suing contractor who damaged the power line - *Byrd v. English*

Sometimes recast as extending *Hadley* outside of privity of contract – *Evra*

Easier to see in **bilateral** cases

Can sue in tort for design defect but economic loss is limited to a contract suit - *Seely Truck*

Can’t end-run *Hadley* with a tort claim

But this doesn’t work in all cases, e.g. Lady Luck (can’t have gov’t indemnify you if their bridge goes down)

* + - * 1. Courts not equipped to make what are inherently **legislative** judgments

Tort limited to compensated the most severely damaged

Regulation (ex ante) and legislation (ex post) can do deterrence and broad wealth transfers

* + - 1. Seatbelt Rule - **assumption of risk** doctrine
         1. If you don’t take minimal steps to avoid major loss, we cut off or somehow limit damages (depending on jdx)
         2. Seatbelt rule operates *pre*-tort, whereas avoidable consequences operates *post*-tort at avoiding major damage

Focus on limiting *damage*, as opposed to contributory negligence which focuses on limiting *accidents*

* 1. Valuation Problems
     1. Pain, Suffering, Happiness, etc.
        1. Personal injuries recoverable:
           1. Lost earnings
           2. Medical expenses
           3. **Pain & Suffering**

*Actual* pain and suffering

Can be anything you can tie to an injury, even seemingly “minor” pains - *Westbrook*

**Hedonic** losses, i.e. loss of enjoyment/capability (Sunstein)

* + - 1. Problems with measuring hedonic loss:
         1. Adaptation neglect – you get used to it

LEVINSON thinks proves too much:

Doesn’t this apply to defendants too?

Why compensate at all?

* + - * 1. Attention affect – seems worse when you’re thinking about
      1. Three approaches to valuing welfare:
         1. Hedonic well-being

Moment to moment well-being

But should we value total utility or less variance in utility?

* + - * 1. Desire well-being

Maximize people’s preferences, even if not hedonic well-being

* + - * 1. Capabilities approach

Some “objective” list of “good” things

* + - 1. Incommensurability – (Radin)
         1. Difficult to value pain and suffering due to incommensurability (e.g. costs of commodification)

E.g. difference between WTP and WTA

* + - * 1. Pain and suffering is “dubiously compensatory” and should be thought of as “symbolic recognition”

But why is money used to recognize a wrong?

* + - 1. Anchoring the jury
         1. Some cases hold you can suggest a damage calculation to the jury - *Debus v. Grand Union*
         2. Others worry it is too prejudicial – *Westbrook*

Also, e.g. can’t ask jury to “put in shoes” of victim

* + - * 1. Danger of “too high,” but how do we know it’s too high?

Judges can use **remitteter** to force parties to accept lower amount

* + - 1. Statutory solutions:
         1. Damage caps

Hurts the most injured though

* + - * 1. Schedules of injury

Still somewhat arbitrary

* + 1. Death and Value of Life
       1. Background
          1. Common Law: No tort if victim died

No compensatory goal, but bad from deterrence perspective

* + - * 1. Wrongful Death statute:

Allows survivors to recover

Still no value of the life itself

* + - 1. Elements of recovery:
         1. Funeral expenses
         2. Financial support to dependents
         3. Most allow monetary value of services provided:

Two valuation methods:

Replacement cost 🡪 closest market equivalent (maid, nanny, cook, etc.)

Opportunity cost 🡪 highest income decedent could have earned in market

* + - * 1. Loss of society

Loss of capabilities that don’t have market equivalents, e.g. companionship

Not the same as “grief”

Perhaps depends on the actual relationship

No loss of society if you don’t care about the child - *Woodbury*

BUT perhaps prodigal son? – *Gamble*

No damages for death of wife when problems w/ marriage - *Pena*

* + - 1. Value of life itself?
         1. Movement towards allowing recovery for intrinsic value
         2. Value of Statistical Life (Viscusi)

Makes sense from regulatory, ex ante perspective of managing risk 🡪 deterrence

But doesn’t make sense from an ex post valuation perspective 🡪 compensatory

* + - * 1. Actual valuation of life is difficult:

Lottery, but many have exceptions (draft)

Market system

We allow for healthcare

But not for other things like airplanes

Individualized basis (Seattle god committee)

* + - 1. **Collateral Source Rule**
         1. Common law says no offsets for insurance, etc. – *Oden*

Statutory reforms counting collateral offsets are therefore strictly construed

E.g. must prove offset is linked to specific category of recovery (disability ins. as lost pension offset)

* + - * 1. Statutory reform 🡪 movement from deterrence (no double recovery problem) to compensation

Coase theorem says no double recovery problem at all! You paid for insurance w/ premiums, etc.

**Subrogation** explains why plaintiffs buy insurance 🡪 insurance company takes the risk and keeps recovery, plaintiffs pay lower premiums and reduce risk

Offsetting collateral deterrence is through *preemption* doctrine (regulation preempting tort)

* + - * 1. Charitable contributions

Really a timing issue (people will donate eventually, just wait for judgment to be paid) – 9/11, synagogue, etc.

No ex ante contracting

* + - 1. Mass Tort Settlements
         1. What is the “fault” of the gov’t that leads to a coherent theory of when to compensate and when not to?
  1. Constitutional Cost Remedies
     1. Gov’t Action
        1. Deterrence is often argued as a justification – (Heller & Krier)
           1. Argues dilemma of compensation reappears and we should decouple gov’ts payment (deterrence) from plaintiff’s recovery (avoid moral hazard)
           2. So gov’t pays...itself? weird
        2. But LEVINSON thinks deterrence makes no sense
           1. Gov’t paying other people has no effect on gov’t

Need a robust model of political incentives:

Objective social cost-benefit regulation

Majority rule model

Public choice theory (interest groups)

Bureaucrat-agency model

* + - * 1. Constitutional rights are counter-majoritarian, but awarding damages allows gov’t to perversely *buy off* political opposition - *Lucas v. South Carolina*

Hurts median taxpayer 🡪 wealth transfer

* + - * 1. “Demoralization” costs are really properly internalizing externalities of property investments

Gov’t uncertainty may be a problem, but doesn’t justify Takings Clause as proper solution

* + - * 1. Compensatory justice is weird as a rationale because gov’t is then in charge of both distributive and compensatory justice
    1. Dignitary Torts
       1. Types of damages:
          1. No intrinsic value to the loss of constitutional right – *Carey*

Applies to both procedural and substantive DPC rights – *Stachura* (free speech)

Why?

Dilemma of compensation to give plaintiff windfall gain for a social right violation – Heller & Krier

Can’t commodify “invaluable” constitutional rights – Radin

Constitutional rights as “trumping” social cost-benefit analysis – Dworkin

Money damages makes even *less* sense here than in Takings – Levinson

Violation of right may outweigh the cost 🡪 no deterrence rationale (buying off)

At best as good as takings

Qualified immunity makes no sense because state will always step in and thus we *underdeter* cops through money damages

* + - * 1. Emotional damages are often entire ballgame for constitutional violation – *Levka*

Remittiter as tool to police

Often needs to be obscene for real damages – *Zarcone* (judge, sheriff, coffee)

* + - 1. **Two options** for valuing emotional damages:
         1. Presumed damages

Once liability is shown, presume damages 🡪 jury just decides a number disconnected from harm

E.g. in defamation 🡪 hard to prove damages

But must show “knowing and reckless” and of “no public concern” – *Gertz* and *D&B*

* + - * 1. Actual damages 🡪 prevalent approach

Proving is difficult:

Negligence doesn’t allow emotional damages unless expanded by statute (dead bodies and funerals)

“Zone of danger” test – *Conrail*

Fear of disease must be “genuine and serious” - *CSX Trans.*

Not allowed in contract

* + - * 1. When to apply?

Normal torts get actual damages

Other forms of recovery available and general distaste (easy to fake, compensating “weak” people, windfalls, etc.)xx

Easier when tied to physical injury

Constitutional torts get somewhere inbetween

Easier to “prove” actual damages when no other recovery available

1. Enforcement
   1. Probability and Magnitude
      1. **Bentham-ite** law enforcement: high penalty, low enforcement
         1. Pros:
            1. Same deterrence effect with less enforcement and high penalties 🡪 expected punishment
            2. Cheaper enforcement costs
         2. Cons:
            1. People are judgment proof 🡪 upper-bound

Criminal law as law of poor people

* + - * 1. Risk aversion (Polinsky)

Levinson skeptical of this argument:

Not everyone is risk-averse (e.g. corporations)

Judgment-proof prefer risk

Loss aversion cuts other way

* + - * 1. **Fairness** (Sunstein et al.)

LEVINSON thinks most persuasive argument against Bentham-ite law enforcement

Ex ante perspective of expected result versus ex post perspective of “unfairly” singling out one person

Only seems fair in a repeat players situation

**Subsidization** of free-riders

Bentham would argue unfair to increase social costs through enforcement

* + 1. Low penalty, high enforcement (Kahan)
       1. **Social influence** as reducing crime:
          1. Information 🡪 “broken windows” signaling disorder
          2. Social esteem and conformity

Widespread pressure to conform to law

But reciprocity cuts other way 🡪 no one wants to be the sucker

E.g. tax compliance

* + - * 1. These arguments don’t directly cut against Bentham’s argument unless high-penalty/low-enforcement reduce information
      1. Other justifications:
         1. Group disruption 🡪 e.g. the Wire
         2. Time discounting: very long prison sentences don’t mean anything because people discount

Hard to develop general theory of discounting

* 1. Vicarious and Group Sanctions
     1. Focus is on **deterrence**: who is in the best position to control conduct?
     2. Vicarious liability
        1. Employers in better position than employees to prevent accidents
           1. But we don’t extend to when employees are off the clock
        2. Balancing social cost with **paternalism/overinclusiveness**
           1. This is an empirical CBA according to LEVINSON - *In re Aimster*

Aimster is easily identifiable and has control over its users, including illegit uses (maybe)

Can’t cloak yourself in unknowingness when its your own encryption scheme

Are the costs of screening out illegitimate uses are too high 🡪 overinclusiveness of legitimate, 1st Amendment uses?

E.g. Videotapes – *Betamax*

Posners thinks NO for Internet downloading

* + - 1. BUT some cases still hew towards requiring some sort of direct affirmative action on the part of the defendant – *Grokster*
         1. Many SCOTUS opinions, but emphasizes affirmative actions taken by Grokster
         2. Blurs line between direct and indirect liability
    1. Group Liability
       1. LEVINSON thinks just look for the **cheapest cost avoider** regardless of group versus individual
       2. Modern examples:
          1. Joint & Several Liability - Superfund
          2. Product liability and market share liability
          3. Criminal conspiracy and accomplice liability – *Pinkerton*
          4. Corporate liability – holding SHs liable for mgmt actions
       3. Justifications:
          1. Information forcing

Res ipsa loquitur – *Ybarra*

Someone start talking or you’re all liable

* + - * 1. Ability to control conduct – *Ajuri*

Holding group responsible allows them to exude pressure on the individual

Positive example: microcredit

* + - * 1. Group liability creates higher-powered incentives

Peer pressure is good

Group solidarity (positive and negative)

Eliminates intra-group conflict, e.g. lockstep compensation

* + - 1. Problems
         1. Excessive control and micromanaging – *Aimster* costs?
         2. Group response differs from intent

Cover-ups in corporations, group mutiny, etc.

“Rally around the flag” against the sanctioner

* + - * 1. Immorality of group sanctions and Act/omission distinction – *Ajuri*

Can you hold the family of a terrorist responsible for the terrorist’s actions?

Strict liability for group actions

1. Preventative Injunctions
   1. Requirements
      1. **RIPENESS (equitable)**
         1. To get a preventative injunction, there must be a “substantial likelihood” of injury; merely remote and speculative injury is insufficient – *Almurbati*
            1. Need actual evidence to show **probability** of harm, assertions are insufficient - *Humble Oil*
            2. About probability, not timing - *Regional Rail Reorg Cases*
         2. Individuation
            1. Can’t get a group injunction to say obey the law 🡪 tied to showing ripeness according to LEVINSON
            2. Three costs of obey-the-law injunctions:

Litigation costs are resource intensive

Raising the penalty for one specific defendant

Judicial power grab 🡪 adding remedies to legislative judgment (separation of powers)

* + - 1. Scope of injunction and probability of harm
         1. Must limit injunction to those practices and parties where you have shown “substantial likelihood” of harm – *Marshall*

Nation-wide injunctions require showing company **policy or practice** leading to harm

LEVINSON think nationwide injunctions should be limited to class actions 🡪 limit the injunction to the probability of harm to the *plaintiff*

But problems w/ individual plaintiffs leaving/quitting

* + - 1. **Error cost** calculation: balancing the cost to Δ of enjoining too early with cost to ∏ of enjoining too late – *Nicholson*
         1. Don’t know that a halfway house will actually cause harm, mere fear of causing harm enough
         2. But per se nuisances *do* cause legal harm, so no error cost to enjoin immediately

*Brainard* – Town dump

*Torrant* – undertaking house

* + - * 1. **Dershowitz** argues we have a systematic bias against early intervention, but LEVINSON thinks we overcompensate when harm actually does happen
    1. Mootness - *WT Grant*
       1. Flip side of same coin as ripeness
       2. Courts sometimes decide as just “no probability of future harm” without saying mootness/ripeness - *WT Grant*
          1. Voluntary cessation may not be enough to moot, question of how likely to happen again? 🡪 same as ripeness
       3. May be different in focusing on the conduct of the **defendant** rather than the harm to the plaintiff (LEVINSON argues this is how *Lyons* should have been decided)
    2. Standing – *Lyons*
       1. Ripeness in the Article III constitutional sense 🡪 but means the same thing
          1. Court rejects Marshall’s dissent: standing about the cause of action; ripeness is about the remedy sought
          2. No likelihood of future harm to the plaintiff means no standing/ripeness – e.g. LAPD chokeholds
       2. Like all threshold issues, conclusory judgment that depends on whether court wants to take on, *compare* *Lyons* with *Bowers*
  1. Contempt power
     1. Criminal contempt
        1. Requries mens rea, notice, and opportunity to comply
        2. Gov’t prosecutes, Judge sets penalties 🡪 severe consequences
     2. Civil contempt
        1. Compensatory
           1. Contempt equivalent of tort

Get to the top of the docket, bench trial

* + - * 1. Requires clear and convincing evidence
      1. Coercive - *City of Yonkers*
         1. Creates a game of chicken to force parties into compliance with the injunction

Can sometimes appear “unseemly” to target individuals, according to SCOTUS

* + - * 1. Level between criminal contempt and federal recalcitrant witness statute (limited to 18 months)

1. Pre-Trial Injunctions
   1. Preliminary Injunction
      1. Doctrine/Error Cost:
         1. *Winter* four-part test
            1. Likelihood of success of the merits
            2. Likelihood of irreparable harm

Harms that can’t be fully compensated

Harms that are difficult to value/monetize

Idiosyncratic harms

* + - * 1. Balance of hardship

Asking the error cost to the *defendant* for wrongful injunction

* + - * 1. Public interest
      1. Leubsdorf-Posner Test - *Am. Hosp. Supply Corp.*
         1. Grant preliminary injunction if and only if: (P x H∏) > (1 – P)\*H∆
         2. Where P is probability of plaintiff’s success on the merits
         3. H is only expected *irreparable* harm 🡪 don’t count harm that can be compensated through an injunction bond - *Lakeshore Hills* (bear case)
      2. Space between *Winter* and Leubsdorf error cost test:
         1. One reading: *Winter* requires a threshold showing of >50% likelihood of P *and* justified under error cost test
         2. Other reading: lower court erred in calculating H∆ 🡪 harm to the Navy
         3. *Nken* immigration case recites language of *Winter* but still doesn’t solve this debate
    1. “Preserving the status quo”
       1. BS doctrine that doesn’t mean anything 🡪 conclusory test
       2. If the status quo is illegal, it shouldn’t be maintained
    2. Injunction Bonds – FRCP 65(c)
       1. Damages for erroneous injunctions are limited to the value of the bond - *Coyne-Delaney*
          1. But 65(c) creates a “principle of preference” for granting damages up to the value of the bond absent a “good reason”
       2. Courts treat imposing a bond as “discretionary” - *Atlanta v. MARTA*
          1. Would hurt particular plaintiff classes (e.g. civil rights litig)
          2. Though this appears to contradict LH and text of 65(c)
       3. Relationship to granting injunction:
          1. The higher the bond, the lower the irreparable injury 🡪 H∆
          2. Thus, for cases where it’s waived, *all* harm is irreperable
  1. TROs – FRCP 65(b)
     1. Appealability
        1. TROs are *not* appealable, preliminary injunctions are under 28 USC §1292(a)(1)
     2. Issuing without notice – (b)(1)
        1. Must attempt to give notice and opportunity to be heard – *Carroll* 🡪 constitutionalizes Rule 65 as a DPC issue (but you can’t appeal!)
        2. Must certify why irreparable injury before notice
     3. Duration – (b)(2)
        1. Cannot issue TRO w/out notice for longer than 10 days
        2. TROs w/ notice past 10 days 🡪 2 approaches:
           1. *Samson* – TRO becomes preliminary injunction and must survive a challenge on that standard

Prelim injunctions must have notice – 65(a)

* + - * 1. *Granny Goose* – TRO invalid after 10 days, period.

1. Scope of Injunctions
   1. Three types of injunctions:
      1. Category I – “rightful position” – *Winston*
         1. **Compensatory** idea of injunctions 🡪 excising illegality and bilateral corrective justice ideas
         2. Put plaintiff in same position as if illegal act had never occurred
            1. This can be either reparative or preventative
      2. Category II – Error cost approach - *EEOC v. Wilson Metal*
         1. **Prophylactic** in the sense that the risk of *irreparable* harm w/out prophylaxis outweighs the burden on the defendant of restraining otherwise **lawful** conduct 🡪 using Posner formula
         2. What risks?
            1. Undetected harm
            2. Unlitigated harm
            3. Unproveable harm
            4. Damages are undercompensatory
      3. Category III – “equitable discretion” – *Bailey*
         1. Equity as “roving commission to **do good**”
            1. Broad, sweeping injunction that does more than simply correct the harm or risk of future harm to the plaintiff
            2. “Public law” injunctions
         2. But going too far beyond the illegality - *Microsoft*
   2. Monitoring Programs - *Bundy*
      1. Pattern or practice cases often impose monitoring programs on companies to prevent future instances of harm 🡪 reaching beyond *Goodyear*, but pretty common remedy
   3. Source of Law:
      1. Trade secrets and inevitable disclosure – *PepsiCo*
         1. Restraining working for competitor to prevent disclosure
         2. But also rewrites the contract to include a non-compete
      2. Public Nuisance – *Gallo*
         1. Applying a broad, arguably vague statute against specific gangs and individuals
         2. Arguments against:
            1. Judicial crime creation
            2. Prophylactic criminalization of otherwise legal conduct

Separation of powers issue in setting the prophylactic line

* + - * 1. Bill of attainder problem of targeting individuals

But this cuts both ways 🡪 specificity from courts is good

* + 1. Conflict of Interest - *Maritrans GP*
       1. Conflict of interest law is *itself* prophylactic 🡪 prophylaxis upon prophylaxis
       2. Others: attempt, possession, statutory rape, gambling, etc.
  1. Reparative vs. Preventative – *Forster*
     1. Reparative injunctions seek to avert the bad harmful consequences from the illegal act
        1. Substitute for **compensatory** damages 🡪 can’t have both
        2. No ripeness issues (illegal act already happened), only about **causation 🡪** what harms caused by the illegal act can an injunction repair?
           1. Still a question of scope
        3. E.g. ordering new election for illegal acts - *Bell v. Southwell*
     2. Preventative injunctions seek to prevent the illegal act from happening in the first instance, e.g. *PepsiCo*, *Humble Oil*
  2. Constitutional injunctions: rights vs. remedies
     1. In constitutional law, role of Congress and Court flipped 🡪 Congress sets the remedy, Court sets the right
        1. But **scope** remains the issue 🡪 does the scope of the remedy *change* the substantive right?
           1. E.g. Court reads *Miranda* as part of the 5th right to hold that Congress can’t change the 5th *right* by overruling *Miranda*, as they can only affect the remedy - *Dickerson*
        2. Difficult to tell if it’s a rights or remedies decision if Court isn’t explicit - *Washington v. Davis*
           1. Remedy interpretation: we under-enforce the full right of the EPC because the error cost of full enforcement is too high 🡪 “Category .5” injunctions
           2. Rights interpretation: the full right of the EPC simply doesn’t include disparate impact
     2. Error Cost Calculation - *Boerne*
        1. RFRA argued as prophylactic to prevent actual 1st discrimination
        2. Court rejects: error cost of prohibiting legal conduct is too high
           1. Court as giving **weights** to legal versus illegal conduct
        3. Same error cost logic leads to striking down VAWA - *Morrison*
        4. But uses to uphold Voting Rights Act - *Katzenbach v. Morgan*
     3. How to reconcile?
        1. Different weights on illegal versus legal activity in different contexts
        2. Line between Category II and Category III
        3. Different empirical assessment of error costs

1. “Structural” Injunctions
   1. No such thing 🡪 still in constitutional sphere of rights/remedies & category II/III
   2. School Desegregation cases
      1. What is the *right*?
         1. Unclear whether *Brown* includes de facto or only extends to de jure segregation
         2. Unlike *Boerne*, Court has jdx over both right and remedy
      2. What is the appropriate remedy?
         1. School bussing to remedy de facto segregated school zones UPHELD - *Swann*
            1. Four conceptual paths:

Remedying de jure violation

**I – change scope of empirical violation**

Presumption that unbalanced schools are caused by de jure segregation

II - Error cost judgment says prophylactic remedy to remedy all effects of illegal de jure segregation

III – possibly illegit *Bailey* injunction

Remedying de facto violation 🡪 expand *Brown*

* + - 1. Suburban bussing REJECTED - *Milliken*
         1. *Winston* theory 🡪 rightful position limited to the inner-city segregation [cat I]
      2. Improving inner-city schools REJECTED - *Missouri v. Jenkins*
         1. Rejects *Swann*-style presumption of linking test scores to de jure segregation 🡪 must prove the empirical link to pre-1954 de jure segregation
         2. Shifts the burden to plaintiffs to prove the empirical connection

Court uses to end even voluntary desegregation efforts - *Parents Involved*

1. Irreparable Injury Rule
   1. Doctrine
      1. “Equity only lies if the injury is irreparable such that damages would not compensate the harm” - *Pardee*
         1. But only a **tiebreaker** rule 🡪 if plaintiff asks for injunction, they probably think damages are undercompensatory
      2. *eBay* Permanent Injunction 4-Part Test
         1. Plaintiff has suffered irreparable injury
         2. Damages are inadequate to compensate: same as irrep. injury
            1. Inability to pay counts as inadequacy – *contra* *Mazzocone*
         3. Balance of hardships b/ween plaintiff and defendant favors injunction: undue hardship rule
         4. Public interest: conclusory, like *Winter*
   2. One View of the Cathedral
      1. Framework:
         1. Rule 1: Property rule in favor of plaintiff 🡪 grant injunction
         2. Rule 2: Liability rule in favor of plaintiff 🡪 award damages
         3. Rule 3: Property rule in favor of defendant 🡪 deny injunction
         4. Rule 4: Liability rule in favor of defendant 🡪 grant injunction but award mandatory damages to the defendant - *Spur Industries*
      2. Transaction costs:
         1. Bilateral monopoly
         2. Holdouts - *Boomer*
         3. Information costs – product liability
         4. No opportunity to bargain – *Vincent, Ploof* (dock and storm)
      3. Presumptions:
         1. When transaction costs are low, prefer property rules to **channel parties into voluntary transactions**
            1. Avoid efficient theft problem

Multiple bribes

Reciprocal theft

* + - * 1. But this is really only a problem for things, not externalities (no bribery/theft problem)
      1. When transaction costs are high, prefer liability rules, e.g. *Boomer*
         1. Problems of bilateral monopoly and holdouts 🡪 no market mechanism to adequately allocate surplus
         2. But you have to balance against the error cost of incorrectly valuing the entitlement and *undercompensating*

Does the court have adequate information to value?

E.g. *Continental Airlines* 🡪 court didn’t know how to value

* + 1. Applications
       1. Specific Performance vs. Expectation Damages
          1. Doctrine

Specific performance where damages are “inadequate” or “irreplaceable” - *Campbell Soup*

UCC 2-716(1) – inability to cover on the market is “strong evidence” for specific performance

How perfect is the substitute?

* + - * 1. Cathedral application

General rule towards liability because of bilateral monopoly problem and information costs to negotiate release from contract 🡪 more efficient to let promisor shift to higher use

But error costs cut in both directions:

Does promisee value above market value or above the “efficient” breach?

Cost of litigating damages in speculative situations - *Walgreen v. Sara Creek*

Hence “irreplaceable” rule:

Higher risk of undercompensation where no market substitute

Damages otherwise avoids bilateral monopoly

* + - 1. Constitutional liability rules – **Kondorovich**
         1. Conlaw reverses presumption and assumes injunction – Rule 3

Sanctioning regime 🡪 criminal law for gov’t

OR damages don’t seem useful

Gov’t doesn’t internalize

Difficult to value and compensate

* + - * 1. Kondorovich says transaction costs are too high to bargain for releasein emergencies 🡪 shift to a Rule 2 liability rule and pay for violations of constitutional rights (e.g. Korematsu)
        2. But what transaction costs?

No market exchange

Uneasy with gov’t bribing for unconstitutionality 🡪 rule of law?

Takings it works because we already have a market

* + - * 1. Maybe makes sense in quarantine situation 🡪 holdout problem
  1. Undue Hardship Doctrine
     1. Deny injunction where the benefit to plaintiff is severely outweighed by cost to defendant - *Van Wagner*
        1. Efficient breach that would be held up by bilateral monopoly extortion given defendant’s costs
           1. Or holdout problems, e.g., patent trolls – *eBay*
           2. Shouldn’t make defendants risk catastrophic loss - *Argyll*
        2. Windfall problem:
           1. “Good windfall” - Promisees pay for risk of windfall in future contracts 🡪 individual windfall
           2. “Bad windfall” – promisors overinvest in preventing mild harms 🡪 negative social windfall - *Reading Pipe*
     2. But defendant cannot invoke if breach was “intentional” – *Whitlock*
        1. Really about **culpability** 🡪 should promisor have bargained for release ahead of time?
           1. E.g. pre-design discovery versus post-design discovery
        2. If *promisee* should have minimized harm, then court invokes undue hardship, **or** laches **or** equitable estoppel
     3. Laches and Equitable Estoppel
        1. **Strategic maneuvering by plaintiff** - Used to cut off remedies to plaintiffs who have misled the defendant into a position where they have made significant investments – *Pro Football*
           1. Laches as subset of estoppel 🡪 misleading by *delay*
           2. Continuing violations are subject to laches once you first learn about the violation – *NAACP*
        2. Application:
           1. If SoL has run, case finished
           2. If SoL has not run, argue laches (historically injunctions) or estoppel (historically damages)
        3. Examples:
           1. Gambling w/ waiting until right after election to sue
           2. Waiting for property to appreciate – *Wagner v. Estate of Fox*
  2. “Other Considerations” 🡪 Hodgepodge
     1. Burden on the Court – more Error Cost
        1. Against injunctions – *Argyll*
           1. Difficult to supervise and monitor – “carrying on”

Difficult to craft enforceable injunction

* + - * 1. Comparative adequacy of damages
        2. Policy/public interest (e.g. school desegregation)
      1. Against damages – *Continental*
         1. Specific performance in contract where damages are highly speculative
         2. Burden on enforcing injunction outweighed by burden of calculating damages accurately
    1. Prior Restraint – *Mazzacone*
       1. Strong factor that often tips *against* injunction, even if damages are inadequate
       2. No legal justification: only applies to ex-post *unprotected* speech
          1. Deprives parties opportunity of conforming to protected speech
       3. Empirical justification:
          1. Judges less willing to issue ex post sanctions
          2. Judges overemphasize future consequences - *Pentagon Papers*
          3. Corruption - *Walker*
    2. Collateral Bar Rule - *Walker v. Birmingham*
       1. Claiming an injunction is invalid or unconstitutional is not a defense to a prosecution for *criminal* contempt
       2. Even where time is of the essence
    3. Contracts for Personal Services - *ABC v. Wolf*
       1. Employment contracts are *never* specifically enforced against the *employee*
          1. May force you to pay damages – *Basinger*

Though for fungible employees = zero

* + - * 1. Or prevent you from working for competitor:

Trade secrets – *PepsiCo*

Narrow non-compete

* + - 1. Justification:
         1. Difficult to monitor – *Argyll*

Employer defendants now prefer reinstatement, ironically

* + - * 1. 13th Amendment slavery

1. Supercompensatory Remedies
   1. Punitive Damages
      1. Problem: Risk of overdeterrence compared to compensatory damages
      2. Justifications:
         1. Channeling to voluntary transactions
            1. Substitute for property rules when too late for injunction
         2. Sanctioning rather than pricing 🡪 no optimal level
            1. Like criminal law, expression of moral outrage
            2. But why isn’t criminal law sufficient?
         3. Compensating for compensatory shortfall (underdetection, underlitigation, etc.) – *Kemzey* (Posner)
            1. Approaching Bentham-ite enforcement level (huge penalties when you finally get caught)
            2. But doesn’t explain the cases, e.g. *Exxon*
      3. Constitutional Limitations
         1. Source of limit:
            1. 8th Amendment only applies to state-imposed fines - *Browning-Ferris*
            2. Procedural Due Process requires limits

Meaningful jury instructions – *Haslip*

Meaningful review – *Oberg*

Originally just “shocks the conscience” until *BMW*

* + - 1. **Three Guideposts under DPC** – *BMW*
         1. Degree of Reprehensibility 🡪 driven by intentionality (Hastie)

Cannot award punitive damages for out-of-state conduct - *State Farm*

Cannot award for harms to nonparties - *Phillip Morris*

Though you can take into account to value the “reprehensibility” of the conduct

Must be connected to the “same conduct” – *SF*

* + - * 1. Ratio between award and defendant’s harm caused/harm likely to result

Few should exceed **single digit ratios** (see also *Exxon* 1:1 limit)

*Exxon* exceptions:

“Exceptional blameworthiness”

“Profit motive”

Low compensatory harm

Low detection

Can consider harm “likely to result” - *TXO*

* + - * 1. Civil or criminal penalties imposed for comparable misconduct
    1. Common Law
       1. Impose in “egregious,” “outrageous,” “rephrensible” conduct cases 🡪 focus on level of mens rea
          1. Problem in corporate case – Deodan punishment
       2. Jury problems:
          1. Conduct vs. value (Hastie)

Juries can make ordinal judgments about reprehensibility

Cardinal judgments about value are all over the place:

Anchoring effect

“Reasonably relate to compensatory harm” – *State Farm*

Ignores multiple liability problem

Problem (maybe) is **variance**, not number – *Exxon*

Imposes **1:1 ratio** in federal CL cases

* + - * 1. Problems with CBA:

“Profit enhancing” as a factor – *Exxon*

Use of CBA as reason to impose – *Grimshaw, Brown*

Why? (Hastie)

Hindsight bias

Focus bias

Aversion to CBA

* + - 1. Defendant’s Wealth
         1. Can’t be considered in liability
         2. But perhaps should be considered for damages:

Deterrence: need to know what will have an impact

Punishment: marginal utility of wealth to impose punishment

Though we don’t do in crimlaw

Accounting problems – *Engle*, *Mathias*

* + 1. Solutions to multiple liability problem:
       1. First to file system
       2. Pay to the state
          1. But encourages parties to settle
       3. Judicial Review or remittitur
       4. Class actions
          1. But must be a limited fund class to eliminate problem
       5. Pay to escrow account until court caps
  1. Restitution/Unjust Enrichment
     1. Source of liability
        1. Unjust enrichment is enrichment that lacks an adequate legal basis 🡪 filling in gaps of tort and contract - § 1
           1. Most cases for money are legal remedies and thus get juries
        2. Types of cases:
           1. Mistake

Payment – *Sauer*

Actual mistake justifies repayment

Improvement – *Somerville*

Majority approach: “buy or sell” remedy

Bilateral monopoly outweighing presumption against forced exchange

Minority approach: allow option to force removal of improvement

Forced exchange more important

Incentives to take precautions

How mistaken?

Actual notice means no recovery 🡪 approaching “officious intermediary”

Or “voluntary payment rule” 🡪 acting in face of uncertainty

Constructive notice not sufficient

If defendant knew 🡪 laches/equitable estoppel

* + - * 1. Quasi-contract

No opportunity to bargain ahead of time, court assumes you would have contracted, e.g. emergency - *In re Crisan’s Estate*

But will deny if you *did* have an opportunity to bargain and ignored – “officious intermediary”

* + 1. Supercompensatory/Alternative to compensatory damages
       1. For intentional wrongdoing, plaintiffs may seek disgorgement of profits/accounting instead of compensatory damages – *Olwell*
          1. How intentional? Like quasi-contract, if you have any reasonable opportunity to bargain, court will award restitution (ex post)/injunction (ex ante) to channel - *Edwards v. Lee*
       2. Functional advantages
          1. Supercompensatory rationale: channeling preference for **voluntary transactions** – *Edwards/Olwell*
          2. Easier to calculate defendant’s gain than plaintiff’s loss – *Maier*

E.g. trademark cases

OR presumed damages

*Contra* patents, which use “reasonable royalty” given existence of “thick markets”

* + - 1. Calculating the award
         1. Courts are allowed to apportion the award to limit restitution to the gains earned from the specific harm – *Sheldon*

Restatement calls “consequential” gains

* + - * 1. Balancing the justification (giving back what you took) with the functional advantages (voluntary/calculation)
        2. **LEVINSON’S Four Factor Test**

Pushing award up:

**Optimal deterrence**/supercompensatory

Balanced against *over*deterrence of chilling legal behavior – *Sheldon*

*Maier* and *Snepp* as no risk

And moral hazard problem of IP trolls waiting to sue

**Valuation**/computation: avoid difficulty of apportioning

E.g. *Maier*, *Snepp, Three Music Boys*

Pushing award down:

**Causation**: plaintiff entitled only to “wrongful” component of defendant’s gain – *Sheldon*

**Moral proportionality** between defendant’s wrong and defendant’s gain

Pushes *Olwell* down to just the egg washer

* + 1. Constructive Trusts – *Ruffin*
       1. Doctrine: Can you identify a specific *res* (asset) or what it has transformed into? If so, court awards constructive trust to give it back
          1. Justification: defendant breached fiduciary duty to plaintiff by misappropriating the *res*
       2. Advantages:
          1. **Tracing Rules**

Can trace the asset even if it has changed/appreciated in value

Has the asset retained its “essential form”?

Has it been **comingled**?

Can you specifically trace the source? - *Snepp*

* + - * 1. Preference in bankruptcy 🡪 now a secured creditor

*Ruffin* court says you can’t use to intentionally get *around* bankruptcy

* + - * 1. Equitable remedy 🡪 bench trial