Torts:

I. Introduction/Overview

II. Prima facie elements of torts:
- a. Intentional Torts:
  - i. Intent (to act? Or to harm?)
  - ii. Act
  - iii. Causation
  - iv. Damages
- b. Negligence ("accident law"); breach of a duty of care (fault)
  - i. Duty
  - ii. Breach
  - iii. Causation
  - iv. Damages
- c. Strict Liability (no-fault)
  - i. Act
  - ii. Causation Damages

III. Purposes/Goals:
- a. (moral) corrective justice
- b. Law and Economics Deterrence perspective
  - i. Optimal deterrence; acceptable level of risk (costs/benefits)
- c. Other restraints on behavior (other than tort):
  - i. Criminal law
  - ii. Market-driven restraints/incentives (reputational)
  - iii. Regulations
  - iv. Moral

IV. Intentional Torts (and interests protected)
- i. Against a person (physical)
  1. Battery
- ii. Against property
  1. Trespass to land
  2. Trespass to chattel
     a. Conversion (strict liability)
- iii. Emotional
  1. Assault (fear of battery)
  2. IIED
- iv. Defenses:
  1. Consent (*Mohr*)
  2. Insanity (*McGuire*)
  3. Self-defense (*Courvoisier*)
  4. Use of force to protect property (*Bird*)
  5. Necessity (*Ploof; Vincent*)

V. Prima facie torts:
- a. P establishes case with required elements
- b. D raises defenses

VI. Intentional Torts

a. Battery
    i. *Vosburg v. Putney*
        1. Two boys, slight kick (prior injury)
        2. Causation established by medical testimony
        3. Jury found that D did not *intend* to injure P
            a. Paradigmatic intent for int'l torts: intent to harm
            b. But, intention to *act* is sufficient, when act is unlawful
        4. Optimal deterrence rationale
            a. Who should shoulder the burden? Should Vosburg be required to take additional safety measures?
        5. Court prioritizes "moral" corrective justice
            a. Cheapest cost avoider as D
        6. Playground distinction – implied license, implied consent
    ii. *Garratt v. Dailey*
        1. Chair pulled out by child
        2. Intent in battery
        3. Court found D liable, since he intended to act (and knew that P would attempt to sit); no intent to harm necessary
    iii. *White v. Univ. Idaho*
        1. Piano teacher, fingers on back
        2. No intent to harm, but intent to act
        3. "dual intent" – differences across jurisdictions
        4. Tort of battery: to preserve bodily integrity
            a. Includes non-consensual touch
    iv. Damages
        1. Ex contractu (out of contract) v. ex delictu (out of tort)
            a. In contracts, two parties share gains and costs
            b. In torts, victim is taken as found
        2. Insurance
            a. Homeowners: third-party liability coverage
                i. Insurance against lawsuits for liable actions
                ii. Individual assets are often protected from tort suits
            b. Intentional act exclusion
                i. Category insurance won't cover
                ii. Because party can determine whether event, which would trigger coverage, occurs
                    1. "moral hazard"
                iii. Wriggins argues that insurance reform could entail removal of intentional act exclusion (which creates inequities in domestic violence cases)
        3. First party v. third-party insurance

VII. Battery - Insanity defense
a. *McGuire v. Almy*
    i. Insanity not a defense for intentional torts
        1. Suggested that same standard applies to negligence, but does not settle the question

ii. Almy capable of entertaining intention to strike McGuire
    1. Rule does not apply in the absence of intent (i.e. sleepwalking)
    2. Does apply to schizophrenic intent (as opposed to rational choices)
iii. Law and economics theory
    1. Incentive for caretakers of insane person to safeguard persons and property
iv. Moral corrective justice theory
    1. Harm to plaintiff requires redress
v. Court cognizant of difficulties inherent in assessing mental capacity
    1. Does not want to incentivize feigning insanity to shield from liability

VIII. Battery – Consent defense

a. *Mohr*
    i. RN – assumption of risk?
        1. Only applies to assuming risk for accidents
    ii. Employer as liable?
        1. Negligence
        2. Could liability be handled contractually?
            a. As opposed to "paradigmatic stranger" torts
    iii. Informed consent
    iv. Court holds that D is liable for battery, since no consent was given

IX. Battery - Self-defense and defense of others

a. *Courvoisier v. Raymond*
    i. Jewelry store owner shoots police officer in self-defense
        1. D (appellant) laboring under mistaken impression of P's (Raymond's) intentions
    ii. Erroneous instruction to jury:
        1. Holding: jury should be able to consider justification for shooting (riot, self-defense)
            a. Not just whether Raymond was assaulting Courvoisier
        2. Permissible justification?
            a. Reasonable standard of care
                i. Requires assessment of:
                    1. Sheriff's warning
                    2. Context of shooting
                    3. Previous burglary
                    4. Prior situation
                    5. Lighting

X. Battery - Use of Force to Protect Property

a. *Bird v. Holbrook*
    i. Spring gun
        1. Holding: D liable for injury from gun
            a. No way to calibrate proportional response
            b. Would not be liable if notice had been posted
    ii. Posner: competing economic interests (tulips v. peacocks)
    iii. Notice – protect tulips and protect other parties

XI. Trespass - Necessity Defense

a. Privilege to trespass under conditions of necessity
    i. Can also apply to battery, under conditions of emergency

b. *Ploof v. Putnam*
    i. Putnam – owner of dock
    ii. Distinguished from *Dougherty v. Stepp*
        1. D walked onto P's land to survey
        2. Walking onto land is trespass; no damage requirement
        3. "Boundary-crossing tort"
    iii. No trespass when necessity is present
    iv. No right to unmoor the boat because of circumstances of necessity
        1. Usually, owner has the right of exclusion
        2. Also, party may use proportional force to overcome property owner's resistance to their trespass in circumstances of necessity
    v. However, no obligation to assist/duty to rescue
    vi. Foolhardy circumstances?
        1. Necessity conditions can still apply
    vii. User of dock, although entitled to use dock, is liable for any damage resulting
c. *Vincent v. Lake Erie Transportation*
    i. Boat damages dock in storm
    ii. P is owner of dock, D is owner of boat
    iii. In storm, boat had privilege of using dock to moor
        1. *Ploof* citation: ship liable for damages to dock in both situations
            a. Although, contractual basis for *Vincent*, not *Ploof*
    iv. Was *Vincent* correctly decided?
        1. Law and economics justification
            a. Incentives for dock owner to extend altruism (since he knows he will be compensated for any damage)
            b. Incentives for ship owner to limit damage
        2. What entitlements does the law recognize on each side?
            a. In *Ploof*, entitlement to use land in circumstances of necessity
            b. In *Vincent*, an incomplete privilege to use land in necessity
                i. Payment for using entitlement
                ii. Distinguished from self-defense
        3. Libertarian corrective justice rationale:
            a. Between two equals (innocents), place responsibility on the one who **acts** (affirmatively)
            b. Unjust enrichment
        4. Limiting/defining necessity
        5. Under Vincent rule, dock owners will pass on costs to users of dock

XII. Emotional Harm

a. Wriggins critique
    i. Role of tort law in context of civil rights law
        1. *Bullock v. Tamiami Trail Tours, Inc.*
        2. *Gulf, C. & S. F. Ry. Co. v. Luther*
b. *I. de S. v. W. de S.*
    i. Strike on door as **assault**
        1. Link between emotional harm torts and other torts (property damage, physical integrity)

2. Protecting physical/property IS protection emotional wellbeing

ii. Perceived by P →

1. By striking door, D *intended* to frighten? To harm?
2. Unsuccessful attempt of battery or intent to frighten (threat)
    a. Both entail immediacy/immanency

iii. Restatement definition of assault

1. Apprehension distinguished from fear (fear not nec'y)

c. *Alcorn v. Mitchell*

i. Spit- involves physical contact/deliberate invasion
ii. But, still a "dignitary" harm (offensive)

d. *Wilkinson v. Downton*

i. IIED precursor
ii. Court rejects claim that emotional harm tort has to be "parasitic" on another tort

XIII. Wriggins: critical theory (race and gender)

a. Insurance and intentional torts

i. Public insurance (social security, Medicaid/are, etc.)
ii. Private insurance

1. First-party (health, property) → claim from one's own insurance company; guards against risks to oneself
2. Third-party (liability insurance): defends and indemnifies against possible liability ("stands in your shoes" if sued)
    a. Risk (known)
    b. Probability of occurrence
    c. Diffuse costs (common pool)
    d. Class member compensated by pool
    e. Security of protection
3. Criticism of model (econ. Analysis):
    a. Adverse selection: those at higher risk are more likely to buy insurance
        i. Causes more claims, higher premiums
    b. Moral hazard: if risk is insured, parties are less careful re: risk
        i. More torts

iii. Liability insurance

1. Intentional acts exception (exclusion)

b. Int'l torts much less likely to receive compensationWhiteness as default norm

i. Contingency fees enforced minorities' access to legal remedies for torts, although resulting in significantly less damages

c. *Bullock v. Tamiami Trail Tours*

i. Failure to protect interracial couple from assault
ii. 1956 ICC decision prohibiting racial discrimination

1. Custom (not observed)
2. "Mischief in the air"
3. Measuring deterrence

d. *Gulf, C. & S.F. Ry. Co. v. Luther*

i. IIED in waiting room by RR employee
ii. Carrier's liability for employee's actions

1. Common carrier found liable (held to higher standard of care to account for monopoly)
2. Race and gender: railroad must protect racial superiority, must protect woman in absence of man
3. Segregation culture

XIV. Negligence

a. Negligence = "N"
   i. Duty → Breach → Causation → Damages
      1. Breach of the duty of care = negligence ("n")
   ii. Assessed under rule of "reasonable care"
      1. As opposed to strict liability (Act → Causation → Damages)
         a. No duty (no fault)

XV. "Reasonable person" test (legal fiction)

a. What attributes? Jury is instructed to use as standard
   i. Old age? Beginner/expert? Wealth?
   ii. Rule: reasonable person under like circumstances
b. Holmes: an act requires volition, or at least a choice, to confer liability
   i. Libertarian corrective justice:
      1. Between two innocents, he who acts should bear cost of damage (autonomy-based rationale)
      2. But, no end to the causal effects of one's actions
         a. Ex: Striking bystander with stick in self-defense situation
   ii. Holmes values foresight, limitations on liability
c. An objective standard of care?
   i. As opposed to subjective standard, based on an individual's capabilities, etc.
   ii. Can't be applied in all situations (blindness, insanity, etc.)
   iii. Applies to both P and D
d. *Roberts v. Ring*
   i. Infirmities of old age to not reduce one's liability
      1. Party knows of own infirmities, should take precautions
      2. Breach occurred when party with infirmities chose to drive
   ii. When assessing contributory negligence of young boy, age *does* reduce expected standard of care
      1. Infancy not analogous to old age
e. *Daniels v. Evans*
   i. Child held to an adult standard of care when engaging in "adult" activities (driving)
      1. Difficulty in establishing which activities qualify (firearms?)
      2. Rationale: child engaging in adult activities should take same precautions, due to inherent danger of activity
   ii. Beginners v. experts?
      1. Societal interest in promoting activity while protecting the public
   iii. Otherwise, child held to standard of reasonable child of same age
      1. Unless engaging in adult activity (see above)
      2. Or, under five years old
f. *Breunig v. Am. Fam. Ins.*

i. Policy basis for insanity liability (*Almy*)
    1. Someone must be liable for a loss
    2. Induces others to "restrain and control" insane person
    3. Discourages faking insanity
ii. Rule does not apply in institutionalized setting (*Gould v. American Family Mutual Insurance*)
    1. Assumption of risk by institution
    2. Absence of other factors justifying insanity liability (see above)
    3. Worker's compensation structure available?

g. *Denver & Rio Grande R.R.*
    i. The care required of a warehouseman is the same, rich or poor
    ii. Wealth not a factor in determining whether a B of the D of C has occurred
        1. Individual wealth should not affect incentive system imposed by damages
        2. Wealth not applicable for cost/benefit balance of interests on the margins
            a. Except for those who are insolvent ("judgment proof")
        3. "Diminishing marginal value of money"
        4. Income redistribution – objective of tort law?
            a. Or taxation system? Incomes are taxes by percentage
    iii. One area in tort law where wealth is taken into account – punitive damages

XVI. **Hand Formula –** Calculus of Risk

a. Negligence:
    i. Duty/Breach
        1. Reasonable Person
        2. **Hand Formula**
        3. Custom
        4. Statutes/regulations

b. *US v. Carroll Towing*
    i. Hand Formula: B < PL
    ii. Collision damages and sinking damages distinguished
    iii. Did P breach a duty of care?
        1. Contributory negligence of P?
        2. Specify causation (precaution not taken + damages caused)
    iv. Employer's vicarious liability for employee
    v. B < PL: ex ante analysis for determining behavior (precaution)
    vi. Restatement definition:
        1. Balancing approach
        2. Similar to Hand Formula
            a. Adds "foreseeability" and "primary" factors
            b. Foreseeability
                i. Subjective P and L
    vii. Limitations of Hand Formula?
        1. Reasonable person precludes B<PL
        2. Moral corrective justice theories
        3. Law and economics criticism:
            a. Risk to self not considered (so, too little care results)
                i. Net "social costs" argument (total costs are greater)

ii. Hand formula should entail an analysis of the NET burden (not considered by courts)

4. Cooter and Porat analysis (net social costs)
    a. Seat belt broken v. not buckled
        i. Buckling seat belt does not affect probability of accident, but lowers social cost
        ii. If broken, only measure to reduce risk to self (slowing down), which also reduces risk to others
            1. If not synonymous, no incentive to reduce risk to self (higher net social costs)
5. P & L = weighed equally in formula
    a. Assumes risk neutrality between parties
    b. But parties both gamble and buy liability insurance (not risk neutral)
6. Only affects decisions on the margins
    a. Such as, taking precautions A → C may not be cost effective, but A →B may be
    b. Optimal level of precaution/costs
        i. Inducement/incentive effect of Hand Formula
7. How to measure B, P, L?
    a. Some factors have market values, others do not (injury, life)

c. *Andrews v. United Airlines*
    i. Procedural issues
        1. Apply CA law; review facts de novo; diversity action (different citizenships)
    ii. Holding:
        1. Facts sufficient to overcome summary judgment (should be submitted to jury)
        2. Cites "utmost care" of common carriers
            a. Higher standard of care for carriers than Hand Form,ula (cost/benefit calculation)
            b. Justified by monopoly on transportation
        3. Still, does not jettison the Hand Formula
            a. Evidence involving probability of falling baggage, injuries caused, additional possible precautions
        4. System of damages
            a. Optimal level of care is a "cliff"
                i. Damages go from full to zero
                ii. Induces too much care, to account for jury error in determining optimal level of care
            b. Inducement to take too little care?
                i. Where D knows that he won't be sued
                    1. Won't be caught, relationship with P's, too little money at stake, etc. (systematic factors)
                ii. 1/8 of med. Malpractice victims actually sue

XVII. Defining reasonable care through industry **Custom**
    a. Like statutes and regulations, custom as an external standard by which to measure reasonable care
        i. Lesser role for the jury

b. *Titus v. Bradford*
    i. Train cars (curved bottoms, wooden wedges)
    ii. With *Mayhew*, both cases decided in an era of bias toward employers
        1. Both involve jury verdicts (Titus overturned, Mayhew upheld)
    iii. In *Titus*, court views custom as defining the reasonable standard of care
        1. Large numbers of individuals adopting a certain practice
            a. Efficient way of *measuring* a duty of care
        2. Implicates employee's familiarity with custom
        3. Juries can't determine how businesses conduct their affairs
        4. Counter-analysis: had case been decided with Hand Formula, B = visual inspection of wooden blocks (no great B, only visual inspection)
        5. Cons of custom as measurement:
            a. Discourages innovation, development of safer practices
                i. See *TJ Cooper* for rebut
            b. Custom as evidence, not determinative, of reasonable care
                i. But, employer/ee relationship skews customary practices
            c. Custom's role as standard is industry-dependent
                i. Medical malpractice example
            d. Role in defining scope of liability
                i. Rejection of custom in certain fields, preceding expansion of liability
c. *Mayhew v. Sullivan Mining*
    i. Mining shaft
    ii. Custom has no place in definition of *ordinary* care
    iii. B<PL analysis?
        1. No B, P and L severe
        2. Safety mechanisms = additional risk present? Torches
            a. Objective of lowest cost (in all senses) safety mechanism, capable of reducing P and L to acceptable levels
    iv. Reconciling *Titus* and *Mayhew*
        1. Compliance with custom as *evidence* of ordinary care, rather than dispositive
        2. Use of custom as a shield, rather than a sword
    v. Custom:
        1. Stronger role in consensual, ongoing relationships
            a. Distinguishes *Titus* (employee) from *Mayhew* (independent contractor)
d. *The TJ Hooper*
    i. Black letter law re: custom (in med. Malpractice, custom is more important)
    ii. Tug not equipped with a reliable radio
    iii. District Court opinion:
        1. Use of radios so universal as to constitute custom
    iv. Hand:
        1. Unfair to assume general custom, since radios not required by the owner of the tug or by statute
        2. But, a "whole calling" may have unduly lagged in adoption of precaution
            a. Even if no custom, Hand formula and reasonable person test can render a party liable

b. Incorporated in RTT (3rd) = custom as evidence

v. Custom question was left open in *Carroll Towing* (re: the bargee's expected hours on the ship)

e. *Lama v. Borras*

i. Physician's failure to provide conservative treatment

1. Failure to detect infection – hospital's method of recording in medical records

a. No vicarious liability claim for negligence of the physician

ii. Custom: expert testimony reliant

1. National standard of care used

a. Displaced locality rule

i. Rationale: nationalization of board certification

ii. But, limitations can be taken into account (such as re: sophisticated equipment)

2. Causation determination is paramount

iii. Private rules of conduct (internal):

1. *Lucy Webb v. Perotti*

a. Institution has a higher level of care, so court held the institution to its own standards

i. Unfair to punish for increased precautions?

1. But, consumer relies on private standard of care, which induces P to avail the business

XVIII. Informed consent

a. *Canterbury v. Spence*

i. Duty to disclose and negligence

1. Major source of physician liability

ii. Physician (Spence) performed laminectomy, did not disclose risk of paralysis

iii. P sued hospital (for failure to provide post-operative care) and physician

1. If vicarious liability (hospital responsible for acts of physician), strict liability imposed

iv. Duty to disclose

1. Patient's right to make educated decisions (autonomy-based rationale)

2. Patient's unique reliance on physician (role of custom/medical consensus in informed consent)

a. But, physician should have freedom to determine what information to divulge

b. Law itself should set standard for required disclosure

c. Disclosure shaped by patient's needs (autonomy view)

3. Standard:

a. What would reasonably prudent person in patient's position decide, if in possession of all relevant risks

i. Exceptions:

1. Emergency (unconscious)

2. Psychological (if psychological effect of disclosure would preclude patient from making sound medical decision)

a. Physician has privilege to not disclose such info

4. Must entail reasonable effort to convey applicable risks to patient (no requirement that patient understand info)
    a. Pharmaceuticals – doctor as the "learned intermediary"
5. Causation:
    a. Can't rely on patient's testimony re: if they "would have" consented to treatment (testimony is biased by a medical procedure that has already gone wrong)
    b. Can failure to disclose give rise to a cause of action when no injury results? What damages?

XIX. Establishing negligence through **Statutes and Regulations**

a. Often, no explicit right to a private cause of action (no "express right")
    i. Courts have inquired into legislative intent (implied private cause of action?)
    ii. Statute does not explicitly provide for private cause of action, but silently endorses it
    iii. Test entails that no other enforcement mechanism is provided for by statute
b. Use statutes to *inform* whether D is negligent
    i. Requirements for **negligence per se**:
        1. **Class of persons (victims)** who statute was designed to protect
        2. **Class of injuries (risks)** which statute was designed to prevent
            a. Statutory purpose
            b. P use of violation of statute as sword, v. use as shield
                i. Determines whether violation of statute is *evidence* of negligence or *dispositive* of negligence
                    1. Dispositive = negligence per se
    ii. Statute's primary purpose v. ancillary purposes
c. *Stimpson*
    i. Truck driving on streets, too heavy for statute, breaks pipes
    ii. Defending decision in Stimpson:
        1. Incentive to consider statute's ancillary purposes
        2. Purpose of requiring submission to permit process
d. *Osborn v. McMasters*
e. *Gorris v. Scott*
    i. Sheep washed overboard
    ii. Statute orders livestock to be contained, for purposes of disease (not to prevent livestock from washing overboard)
f. *Martin v. Herzog*
    i. Lights, highway
        1. **Negligence per se**
        2. negligence per se = statute as dispositive evidence of the breach of the duty of care
    ii. Exceptions noted: emergency, incapacity
    iii. Still need causation
g. *Tedla v. Ellman*
    i. Statute/custom/Hand
    ii. Split decision, allowing cause of action, allowing exception to statute
h. *Uhr v. East Greenbush Cent. School Dist.*
    i. Scoliosis testing in school district (by statute)

ii. Implied private cause of action in statute? As opposed to "common law negligence"
    1. Three prongs for implied private right of action
        a. Duty → Breach → Causation
        b. Duty = consistent with legislative scheme
iii. Court holds that statutory duty does not imply a private right of action
    1. Such a private right of action would be inconsistent with the legislative scheme
        a. Since liability immunity for misfeasance implied for nonfeasance (failure to administer test)
        b. Since enforcement mechanism is already in place (Commissioner)

XX. Judge and Jury

a. Abraham:
    i. Unbounded (breach of a duty of ordinary care; Hand formula) negligence
    ii. Bounded (custom; statute; res ipsa) negligence
        1. Two categories are amenable to jury/judge decisions to different degrees
    iii. Prima facie case: P bears burden of establishing breach, elements
    iv. Judges:
        1. Regulate evidence, what can be considered by jury
        2. Jury instructions
    v. Juries:
        1. Sentiment in common (reasonable person standard)
            a. Holmes: judges can apply juries' decisions into fixed law → predictability
                i. Judges can remove oscillations between similar cases
        2. More representative? Elected judges?

XXI. **Medical malpractice reform**:

a. Channeling
b. Experience rating
    i. Damages create "internalization link"
    ii. Strict liability removes this incentive mechanism
        1. Experience rating attempts to address this
c. Physicians/Insurance companies/institutional networks
    i. How is insurance industry setting rates? Based strictly on payouts?
    ii. Experience rating for institutions → larger data set than with physicians
d. Epstein: medical relationships should be arranged by contract
e. Hyman: self-reporting failures (communication of errors)
f. Tort liability: leads to defensive medicine (overdeterrence)

XXII. Proving negligence through **Res Ipsa Loquitor**

a. Res Ipsa = narrow doctrine of circumstantial evidence
b. *Byrne v. Boadle*
    i. Barrel falling from flour factory
    ii. Concept of exclusive control
c. *Colmenares v. Sun Alliance*
    i. Escalator case
        1. Diversity jurisdiction, Puerto Rican law applied
    ii. Res Ipsa test:
        1. Accident which would ordinarily not occur in absence of negligence

2. D had exclusive control over instrumentality of injury
3. No contributory negligence
    a. "Prosser test"

iii. Requirement of exclusive control relaxed
1. But res ipsa still applied, since escalator maintenance classified as "non-delegable" duty
2. Respondeat superior

d. Prosser v. Restatements
i. Prosser test (see above) broadened in 2 restatements
1. Loosens requirement of exclusive control (exclusive control only one way of proving responsibility)
    a. Proceeds by elimination of other causes

ii. RTT(3rd):
1. D as member of class of actors ordinarily responsible for relevant negligence

e. *Ybarra v. Spangard*
i. Medical malpractice case → paralysis from appendectomy
1. Prosser test for res ipsa loquitur applied (with exclusive control req.)

ii. Multiple D's →
1. Information-forcing role of res ipsa
    a. D has burden of proof, since one actor MUST be liable
    b. Substituting for P having to make out a prima facie case by a preponderance of the evidence
    c. D's shoulder the burden of "initial explanation", since injuries raise the inference of negligence (unusual results)
    d. Can overcome "conspiracy of silence"
2. Jury cannot find that none of the actors were negligent
3. Criticism:
    a. liable en masse?
    b. Fishing for evidence?
    c. What if "conspiracy of silence" is really just ignorance as to causation?
        i. Other causation doctrines address this discrepancy re: uncertainty
        ii. Expert testimony used

XXIII. Special duty issues

a. **Affirmative Duties**

i. As opposed to intentional torts (misfeasance), negligence (failure to exercise reasonable care)
1. **Nonfeasance (no duty rules)**
    a. When does a duty to act create liability?
        i. What is the source of the duty?
        ii. What is the content of the duty?
    b. One extreme: Where action is not performed, even though action would cost nothing
    c. Problem:
        i. Can rule be defended in moral corrective justice OR law and economics deterrence analyses?
            1. Extreme is less clear

2. Multiple parties failing to act
    a. Difficulty in administering test re: "forced exchanges"

ii. Individual autonomy norm

2. Posner:
    a. affirmative duties would be reciprocal if liability was imposed (better social results)
    b. Attempts to overcome autonomy criticism by creating ex ante contract between all members of society
3. Vermont statute
    a. Shields rescuer from liability while imposing an alternative duty
    b. But, toothless enforcement mech. ($100 fine); no private cause of action (symbolic gesture)
4. Hyman: empirical perspective
    a. In reality, too much rescue (more injuries resultant)

ii. Special relationships

1. Duties of landowners/occupants to land entrants
    a. Trespasser
        i. Owed no duty of care (excepting the willful and wanton)
    b. Licensee (and social guest)
        i. Duty to protect against concealed dangers
    c. Invitee (and business invitee)
        i. Duty to ensure safety
2. *Rowland v. Christian*
    a. No duty to rescue (baseline)
    b. Abolishes tri-partite categorization above (although result would have likely been the same)
        i. Alternative? Classification can still be used, but with a reasonable person standard (so, not determinative)
        ii. Balancing test: factors of causation, relationship, moral blameworthiness, presence of insurance, prevention, etc. considered
3. *Tarasoff v. Regents*
    a. Patient threatens to kill Tarasoff, is released, no warning given
    b. Exception to no duty to rescue rule
    c. Imposing an affirmative duty owed to a third party by spec. relationship between therapist and patient
    d. Dissent:
        i. Net increase in violence
        ii. Confidentiality encourages patients to seek treatment (disclosure will discourage)
        iii. Balancing privilege with public protection
            1. Narrowly-tailored: duty only arises (under CA statute and subsequent RTT provisions) when identity of victim is known
            2. Specificity, predicted accuracy of threat

XXIV. Plaintiff's conduct and Defenses to Negligence

a. P → prima facie case for negligence
b. D → Defenses
    i. General denial
    ii. Affirmative defenses (D bears burden of proof)
    iii. Contributory negligence
    iv. Assumption of risk
c. Notions of causation implicit
    i. What caused the injury?
    ii. To what degree did the breach of the duty of care cause the injury?
    iii. Contributory negligence?

XXV. Contributory Negligence

a. Early common law: harsh doctrine (minimal contrib. neg. as absolute bar to recovery)
    i. Exceptions in later cases (such as "last clear chance")
    ii. Contrib. neg. as "cunning trap" in favor of RR's
    iii. Now, doctrine of comparative negligence has replaced contrib. neg. in most jurisdictions
b. Law and Economics analysis (optimal deterrence)
    i. No need for contrib. neg. → both parties already incentivized to take care
    ii. In negligence-based liability, there is always a residual risk, even with the appropriate level of care
        1. Risk exists even when parties act non-negligently
        2. So, loss would still fall on P
            a. No incentive to exercise too little care
            b. Not so under strict liability
c. *LeRoy Fibre Co. v. Chicago*
    i. Flax fire, proximity to train tracks
    ii. Coase theory of reciprocal duties (reciprocal causation)
        1. Contributed to doctrine of contributory negligence
        2. Who could most cheaply avoid the accident?
            a. What if values are equal? (crops v. meat example with cattle escaping and grazing on another's land)
    iii. Reciprocal v. one-way causation
        1. Moral wrongdoing non-existent in reciprocal relationships
        2. Optimal deterrence?
        3. Absent of a legal rule, what would parties do?
    iv. Holmes: contrib. neg. should still be examined
d. *Gyerman v. US Lines Co.*
    i. Fishmeal sacks stacked improperly
    ii. Evidence = custom (*TJ Hooper*)
        1. Also, contract provides for mechanism to address unsafe conditions
    iii. But, D does not meet burden of proof re: causation
        1. Contrib. neg. not a proximate cause

XXVI. Assumption of Risk

a. *Lamson v. American Axe*
    i. Racks of hatchets, P complained of risk and was injured

1. Ordinarily B < PL analysis

ii. Assumption of risk, employment context
1. No longer relevant in tort, due to worker's compensation (no-fault scheme)
a. Worker's comp:
i. Cabined damages (capped)
ii. But, employer can't raise assumption of risk

iii. "fellow servant rule"
1. Broad rule, denying employer liability
2. Abolished

iv. "Risk premiums"
1. Can measure using worker's comp coverage, wages
2. Argument in favor of assumption of risk defense
3. Implicit assumptions:
a. Freedom to choose jobs based on risk
b. Freedom to bargain regarding conditions

b. *Murphy v. Steeplechase*
i. "The Flopper"
ii. Comparative negligence
iii. Primary AOR: negation duty
1. Only owe duty to avoid reckless breach (as opposed to breach of reasonable care)
iv. Secondary AOR:
1. If P realizes the risk and still acts (even if D is at fault for risk), negation of recovery

c. *Meistrich v. Casino Arena Attractions*
i. Ice skating; P knew that ice was improperly maintained
ii. Negligence in the face of negligence
1. Can be considered with comparative neg.

d. *Knight v. Jewett*
i. Touch football
ii. Comparative negligence

XXVII. Comparative Negligence

a. Legal change:
i. Overtakes contrib. neg.
ii. Legislative provisions
iii. "Pure" comparative neg. v. "50%" rule

b. Fairness/morality
i. Pros:
1. Mitigates "all-or-nothing" quality of contrib. neg.
a. Contrib. neg. was inequitable where joint causation/joint tort feasors were present

ii. Cons:
1. Arbitrary apportionment of blame
2. Already exceptions to contrib. negligence doctrine
a. "Last clear chance"
b. "unclean hands"

c. Deterrence/Incentives for Care:
    i. Cons:
        1. P won't exercise sufficient level of care?
        2. No certainty of information (see p. 365)
d. Administrability
    i. Pros
        1. Practicability of "compromise verdicts"
        2. Juries misinterpreting law in contrib. neg. cases
    ii. Cons
        1. Administrative costs
            a. Impossible to assign blame
            b. Jury: special verdict
e. Legitimacy:
    i. Pro: more respect for judicial system (transparency)
    ii. Con: strain on jury
f. "Hold-out" states
    i. Legislative impetus (industrial lobbies?)
g. Other doctrines under comparative negligence:
    i. Last clear chance
        1. Where the party who has the "last clear chance" to prevent injury bears liability
        2. Designed to mitigate unfairness of contrib. neg.
        3. Under comparative neg., can be evidence used in apportioning blame
    ii. Willful misconduct
    iii. Assumption of risk
    iv. "No duty" rules
    v. Statutory limitations
        1. PA subsection re: skiing
    vi. Strict liability
h. *Li v. Yellow Cab*
    i.
    ii.
i. *Knight v. Jewett*
    i. See above (AOR)

XXVIII. Causation

a. Burden of proof rationale – P must make out prima facie case, by preponderance of the evidence, that action causally related to harm
    i. Empirical – expert testimony
b. Cause in fact/"But For" Causation
    i. Necessitates a counter-factual analysis
c. Legal Causation/Proximate Cause (discussed below)
    i. Directness test (*In re Polemis*)
        1. P injured → look back to D's acts: were there any other intervening acts? 3rd parties? Natural causes? P's action?
    ii. Foresight test (*Wagon Mound Nos. 1 & 2*)
        1. D acts → breach of the duty of care? Inherent risks? Extent to which risks are foreseeable

iii. Tests are not mutually exclusive, but can lead to different results

d. *New York Central RR v. Grimstad*
   i. Grimstad could not swim, wife could not find life preserver; alleges D was liable for not providing life preserver
      1. Holding, D's act was not cause in fact of injury, not liable
      2. Rationale: insufficient to speculate about causation (decedent may not have survived if wife found the life preserver)
   ii. Causation at issue

e. *Zuchowicz v. US*
   i. Danocrine overdose→ development of PPH
      1. Bench trial, sued under Fed. Tort Claims Act
      2. Issue of governmental immunity addressed in Act
         a. Govt. submits to tort liability but is afforded a bench trial (no jury)
         b. Relevant to this case because Danocrine was provided by Naval pharmacy
   ii. Was Danocrine overdose the "but for" cause of the PPH?
      1. Expert testimony – uncertainty
      2. Burden shifting?
         a. D has to disprove causation?
         b. *Lone Palm Hotel*- "recurring miss" problem
            i. Recurring misses: when D's negligence was 50% or less likely to have caused harm; under a preponderance of the evidence rule, such recurring misses lead to under-deterrence
            ii. Evidential loss theory: where negligence also leads to dearth of evidence (in *Lone Palm*, no lifeguard = no witnesses)
   iii. Negligence per se
      1. *Martin v. Herzog*
      2. Injury within the class of harms designed to be prevented by statutory mandate
   iv. "Self-proving causation"
   v. Pregnancy? Exacerbated condition (PPH) but not the cause
   vi. Lost chance: failure to undertake precautionary procedures

f. Joint and Several Liability/Multiple Causation

   i. Multiple defendants
      1. No contribution (*Union Stock Yards*; common law)
      2. Contribution
         a. CA Civ. Pro. Code
         b. *AMA* case
   ii. Joint and several v. joint
      1. Joint: each D responsible for his share of liability
      2. Several: each of the D's is responsible for the ENTIRE loss
         a. Rationale: injuries are indivisible; can't apportion responsibility
         b. Now, modern tort law attempts to apportion responsibility for harm
   iii. *Union Stock Yards*
      1. No contribution rule
         a. "Unclean hands" rationale
      2. Modern rule: allow indemnity
         a. D can sue for indemnity (secondary wrongdoer as passive participant in case)
         b. Statutory and common law reform of rule

c. Reforms similar to collapse of contributory negligence
d. Other statutory reforms:
i. Pro rata contribution rule: divide proportionally between D's
ii. *Li* (1975): pure comparative negligence
1. Permits **comparative partial indemnity** system in *AMA* case

g. Collective Liability

i. Joint causation/concert of action
1. *Kingston*
2. A AND B
ii. Alternative liability
1. *Summers v. Tice*
2. A OR B
iii. Market Share liability
1. *Sindell*
2. *Hymowitz*
3. *Skipworth*
iv. *AMA v. Superior Court* (Cal. 1978)
1. Comparative negligence in *Li*
a. Isolated damages based on proportion of liability (partial equitable indemnity)
b. If innocent P deserves full compensation, who bears the risk of the loss
c. Joint and several liability to account for insolvent D's
2. Partial equitable indemnity: instead of pro rata scheme, proportionate share regime (based on comparative negligence)
v. *Kingston v. Chicago & NW RR*: **Joint causation**
1. Two fires converging (one man-made), either of which sufficient to destroy property
2. Indivisible harm caused *jointly*
a. Modern law – separate injury into distinct causes
3. Acting in concert = with a common design
4. Rationale: both wrongdoers could implicate the other's guilt to avoid liability; so, neither would be liable
vi. *Sommers v. Tice*: **alternative liability**
1. Quail hunting; 2 parties shoot simultaneously and injure P
2. A or B caused the harm
3. Joint tort feasors (two or more), even though the harm was actually only caused by one actor
a. Burden of proof shifted to D's to absolve themselves
i. D's in a better position to provide evidence
ii. Similar to evidential loss theory in *Lone Palm*
iii. Similar to burden shifting approach in respondeat superior cases (conspiracy of silence); *Ybarra*
vii. *Sindell v. Abbott*: **market share liability**
1. P suing 5 D's over DES
a. But, don't know which D manufactured the DES administered to P's mother
b. Also, D's joined were not the only manufacturers of DES (over 200)
i. Not clear that any of the named D's manufactured the DES in question
c. Otherwise, joint and several liability would be imposed on all D's
2. Ct. requires that D's produce a substantial share of the DES on the market

a. D's may be held liable for their proportional share of the market (market share liability)
b. Depends on the fungibility of the product
i. Interchangeable → DES made from same formula, same design
ii. As opposed to the lead paint in *Skipworth* (see below)

3. Rationale:
a. D's better able to bear the costs of the injury
i. But, Ct. in *Denver v. Rio Grande RR* held that tort law is not appropriate method of income redistribution
ii. Where is the line?
iii. Shareholders? Class actions?
b. Market share as a proxy for proportion of harm caused

viii. *Hymowitz*
1. Market share liability based on "overall risk produced"
2. So, exculpatory evidence in individual cases could not be allowed

ix. *Skipworth*
1. Distinguishable from DES cases, since lead paint not a fungible product, and since time period was much longer
2. All decisions attempt to hew to causation requirement

XXIX. Approaches to determining **Proximate Causation** ("legal causation"; as opposed to "but for" causation ("in fact"; see above):

i. →Directness test
1. (*Polemis* formulation – looks backward to examine intervening causes)

ii. →Foresight test
1. (*Wagon Mound* formulation – forward looking test, asks whether harm was a foreseeable result of the negligence/of the type of risk)
a. hindsight bias and other considerations emerge when looking at ex post events from ex ante perspective, as in Hand Formula

b. <u>*Herskovits* and Lost Chance:</u>

i. This isn't a straight-up "but for" causation case –
1. it isn't more likely than not that he would have survived but for the hospital's negligence, because his odds of survival were less than 50 percent to begin with.
2. So if baseline is that it's more likely than not that you're going to die, there's no negligence or malpractice or etc. that could be the cause in fact of your bad outcome using preponderance of the evidence standard
3. Court discussed 14 percent decrease in odds of survival rate (39% → 25%), which is 36% proportionate reduction (**lost chance**)
a. Some jurisdictions have adopted lost chance causation, some haven't; but it's almost always used in medical context.
b. This could be due to the very high stakes (life at stake in these situations), but also due to the fact that medical situations have well-developed, scientific data that allow us to calculate causation based on odds/probability with some sort of credibility

ii. Lost chance cases: allowance for percentage recovery based on probabilistic chance in cases involving under 50% survival odds, allowance for potential 100% recovery is cases involving over 50% survival odds

1. Theoretically, the under-50% odds cases would potentially underdeter (smaller recovery), while over-50% odds cases would potentially overdeter (much larger recovery) –
    a. but ideally, these would balance out (similar numbers and/or equal weight) and the resulting level of deterrence from all cases in aggregate would be set at optimal level.
    b. However, there remain concerns that this will lead to "recurring miss" cases resulting in underdeterrence – widespread negligence with no recovery: won't be balanced out by over-deterrent effect created by fewer or less-weighted cases of above-51%-odds cases

iii. Key term in this case is **probabilistic cause** (increases risk of harm by some percentage).

c. <u>*Ryan v. NY Central RR*:</u>
   i. Fire, result of railroad's negligence, began at shed owned by railroad, fire spreads to plaintiff's house.
   ii. Court found for plaintiff, holding that the damage was too remote a result of the fire set by the defendant for the plaintiff to recover -- "the remoteness of the damage […] forms the true rule on which the question should be decided, and which prohibits a recovery by the plaintiff in this case."
       1. →Test applied is whether damage is the "ordinary and natural result," and court noted the circumstances – atmosphere, wind, degree of heat, etc.
           a. concern about where you limit allowance for causation – concern about "crushing liability."
   iii. insurance of own property and inability to insure neighbor's (at least using first-person insurance policy) – today, however, given liability insurance, this rationale could potentially cut the other way.
       1. Also, cutting the other way for "crushing liability" – imposing liability might increase safety and promote optimal deterrence.
   iv. So the takeaway from *Ryan* is that we need some way of limiting the scope of liability –
       1. of course, we can do better than *Ryan*, and current contenders are the foresight test and directness test (as illustrated in the cases we're about to examine).

d. <u>*In Re Polemis* and Directness Test:</u>
   i. Material facts:
       1. Charterer's employee/servant dropped a heavy plank down into the hold of a vessel; hold contained petrol or benzene; plank somehow caused an explosion.
       2. Findings of fact by jury suggest some potential theory of liability –
   ii. finding: primary theory that breach of duty of care was the servants' negligence
   iii. no cause of action against charterer
       1. Clause 21 of charterparty – seems to allocate risk between charterer and owner, leaving risk of destruction by fire to owner
           a. but this wasn't an ordinary fire, and clause isn't read to protect defendant against its own or its employees' negligence (only accident, etc.)
           b. So, clause 21 doesn't immunize the defendant from liability for the harm resulting from the defendant's negligence.
   iv. Court rejects the idea that foreseeability should serve as the basis for causation – uses directness test instead.

1. However, foreseeability still plays a role in negligence cases, according to the court, in that it helps determine whether an act is negligent in the first place.
    a. (Foreseeable harm provides the basis for negligence.)
2. But once negligence is established, the court argues that it should fall out and the directness test should apply to determine causation.

e. <u>*Wagon Mound Nos. 1 & 2*</u>:
f. *Wagon Mound (No. 1)*:
    i. Defendants (owners of the Wagon Mound ship) discharged oil from ship, oil carried by wind and tide to plaintiff's wharf, molten material fell into oil and ignited cotton waste floating below oil, oil caught fire, dock destroyed.
g. *Wagon Mound (No. 2)*:
    i. Plaintiff was owner of a ship destroyed by the fire, suing Wagon Mound.
h. In No. 1, court found that the plaintiff couldn't recover.
i. In No. 2, court found that the plaintiff could recover.
    i. How is this the case? The ship wouldn't have burned but for the fire at the dock. So Wagon Mound cases presents a puzzle.
    ii. Doctrinally, *Wagon Mound (No. 1)* emphatically rejects *Polemis* – says that it isn't "consonant with current ideas of justice or morality," argues that it shouldn't be regarded as good law.
j. Wagon Mound No. 1 involved servant dropping wick/molten material – break in chain of causation.
k. In absence of multiple tortfeasor/comparative negligence/contributory negligence system (and here, there was such an absence), use of foresight doctrine could be seen as a rough mechanism for allocating risk/responsibility →
    i. Ship owner can recover against Wagon Mound, dock owner cannot.
    ii. Main point here is the paradox of the two cases – the different outcomes look odd – also how certain doctrines work with others.
l. <u>*Palsgraf v. Long Island RR*</u>:
    i. Case was decided seven years after *Polemis* but well before *Wagon Mound*.
    ii. Facts:
        1. man was carrying a package containing fireworks, guard negligently jostles package, which falls and explodes, causing scales on other end of platform to fall, injuring Mrs. Palsgraf.
        2. Why not sue guy carrying the package? →
            a. Not entirely clear, Cardozo seems to regard him as the primary wrongdoer, but for whatever reason, he's missing from the case.
    iii. Holding (Cardozo):
        1. causation:
            a. P can't be vicarious beneficiary of another's duty of care
                i. a risk imports a relation (relational duty)
                    1. within the orbit of duty (implicates reasonable perception; foreseeability)
                    2. moral corrective justice approach
                    3. dicta:
                        a. would use "directness" test (any and all consequences, however novel)

b. so, to whom is the duty of care owed?
2. harm that resulted was of a different type than was risked by D's negligence
a. so, no "transferred intent"
b. circumscribing the duty owed
i. "negligence in the air" is not enough
3. Dissent (Andrews):
a. a wrongful act is a wrong to society at large
b. "stream" analogy
i. foreseeability test for proximate cause
1. can P's withstand summaru judgment motions?
2. allows judicial instructions, different responsibility of jury

iv. Rationale:
1. proximate cause of the injury?
2. what result if Cardozo had held RR to heightened duty of a common carrier?
a. to whom is the heightened duty owed?

m. *Dillon v. Legg*
i. Facts:
ii. Holding:
iii. Rationale:
1. emotional distress and damages: evolving requirements
a. impact – no longer prevailing
b. injury
c. zone of danger
2. IIED (intentional tort) –
a. high threshold (outrageousness, etc.)
3. NIED:
a. bystander case
b. physical harm requirement (modification of physical impact requirement)
i. P's: mother and sister
c. "Dillon test"
i. zone of danger?
1. circumscribed:
a. shock with physical manifestation
b. direct observer
c. close relationship
2. if involving a reasonably foreseeable injury
a. liberal jurisdictions relax one or more of the above three components
ii. underlying fear of P's feigning emotional injury

XXX. Strict Liability

a. Strict Liability v. Negligence
i. products liability context
1. manufacture defects → strict liability
2. failure to warn, etc. → negligence

b. Traditional Strict Liability

i. challenge to negligence principle
ii. injurer liable for harm regardless of whether they breach a duty of care (were negligent)
iii. consider:
    1. agency or instrumentality of harm
        a. animals, ultra-hazardous activities
    2. interests invaded
        a. nuisance, damages to property
        b. conversion, trespass to chattel
    3. theoretical justifications
        a. Calebresi: "Cost of Accidents"
iv. Law and Economics Analysis of Automobile Accidents
    1. no option for actors to bargain, ex ante
        a. ask: what rules would have been chosen prior to accident?
        b. similar scenario/hypo in nuisance example
    2. strict liability:
        a. leads to efficient outcome in auto example (drives moderately)
            i. but information is needed to establish the extent of victim's harm
    3. negligence:
        a. also leads to efficient outcome
            i. but, only if the calculation of the standard of care is predicated on driving moderately
    4. bilateral accidents
        a. includes pedestrian's care
            i. negligence regime: accounts for pedestrian's contributory negligence
            ii. strict liability: does not provide incentive for pedestrians to control behavior based on accident costs
                1. residual risk, after driver acted efficiently
        b. suggestion: strict liability + contributory negligence
v. Activity levels:
    1. for relational situations (not one-off)
        a. experience rating and deterrence
    2. strict liability:
        a. includes frequency of activity (since liability for every accident)
            i. in negligence model, unrealistic to include activity levels in determining level of care
        b. so, less suits in negligence model, but of greater complexity
    3. extra-legal incentives:
        a. moral; market; regulations

c. Ultra-hazardous activities
    i. *Indiana Harbor Belt RR v. American Cyanamid*
        1. Facts:
            a. acrylonitrite spill → abnormally-hazardous activity?
        2. Holding (Posner):
        3. Rationale:
            a. RTT 519:

i. abnormally dangerous act = strict liability
ii. comment (e): extent of protection

b. Posner:
i. why was the manufacturer sued, rather than transporter?
ii. in this case, negligence is sufficient; where neg. is sufficient, no need for strict liability
iii. activity levels: important for economy
1. competing entitlements
a. hazardous chemicals v. residential living
iv. not in common usage
1. related to reciprocity of risk (ex. aircraft and ground damage)

c. RTT 520:
i. six factors

d. Calabresi:
i. cites *Vincent v. Lake Erie*
1. legal rule not dispositive of socially-optimal end result
a. harm paid for by one or the other, in bargain context
ii. cheapest cost avoider:
1. best equipped to foresee risk
a. rotory mowers v. strawberries
2. cost of negotiation
a. smokestack example
iii. insurance as risk-minimizer
1. policing behavior
2. eliminates externalization (onto government, social support mechanisms)
iv. costs of actual harm and cost of avoidance: administrative costs
1. how to spread loss?
a. does not minimize net loss
b. asymmetry of information re: risk levels
v. distributive effects of strict liability not as clear as appears
1. and legal relevance is dubious
2. in most instances, negligence (and Hand formula) can incentivize safety precautions
a. move to strict liability: affects activity levels
i. for example, rerouting chemical delivering would be prohibitive cost

d. Trespass to chattels
i. Conversion
1. strict liability
a. aspects of intentional tort; property torts
2. conversion:
a. assert dominion or control over property at odds with another's ownership

i. bad faith, dishonesty not a precursor

ii. *Moore v. Regents of U. of CA*
    1. Facts:
        a. claiming ownership of own cells, tissue
            i. alleges conversion re: patent line
                1. interfering with ownership interest in property
    2. Holding:
        a. no conversion (no ownership of cells)
            i. declines to extend conversion
    3. Rationale:
        a. fairness; economic incentive effects; rationale for extending conversion
            i. adverse effect on medical research (*Moore*)
            ii. impose liability on innocent parties (whoever possesses the cells), since strict liability applies
                1. but, can obtain patient consent
            iii. no "pressing need" to impose strict liability, since disclosure rules can account for disputes

iii. *Kremen v. Cohen*
    1. Facts:
        a. Cohen liable for conversion (sex.com scam) but cannot be located
        b. so, P looks to Network Solutions, who gave away the domain name
    2. Holding:
    3. Rationale:
        a. *Poggi v. Scott* scenario
            i. wine barrels mistakenly sold
        b. Cites *Payne v. Elliot*
            i. merging of intangible rights with documents
        c. certification:
            i. when fed. ct. (in diversity case, applying state law) must decide an issue that state courts have not yet decided
            ii. ask highest state court to certify the question of law
        d. Responses to concerns re: strict liability
            i. jury could find negligence regardless (that Network Solutions breached the duty of care)
                1. but what about other cases?
                    a. claims no unfairness
                        i. no requirement of intention, knowledge
                        ii. so, innocent parties can insist on indemnification
        e. District Court wary of imposing strict liability
            i. threat of litigation depressing the registration system, since additional regulations are needed
                1. Kosinski in Ct. of Appeals: additional regulation is positive
                2. also, incentivize Network Solutions to find Cohen

            a. as between two innocents, impose liability on the one who acts
        ii. legislative v. courts

e. Trespass to chattels:
    i. *Intel Corp. v. Hamidi*
        1. Facts:
            a. trespass to chattel (computer servers; e-mail system) by mass e-mailing
        2. Holding:
        3. Rationale:
            a. trespass to chattels:
                i. distinct from conversion, since ownership claim is not infringed upon (only possession interest)
            b. land v. chattel
                i. nominal (in name only) damages for "harmless intermeddling" (with land)
                ii. trespass to chattel has DAMAGE requirement (harm)
                    1. rationale:
                        a. hierarchy of interests (land favored over personal property)
                            i. *Dougherty v. Stepp* rationale (crossing boundary is trespass)
                        b. other interests violated in trespass to chattel
                        c. RST: self-help sufficient to protect chattel (reasonable force allowed)
                            i. but, what if self-help fails?
                            ii. perverse incentive to refrain from investment
            c. Intel:
                i. used trespass to chattel legal theory so that they did not have to litigate the content of the e-mails, specify harm (such as with defamation or nuisance torts)

f. Private Nuisance
    i. basis of liability (RST; strict liability; etc.)
    ii. act requirement (actionable as a trespass or non-trespass nuisance; force)
    iii. causation (uni-directional v. reciprocal)
    iv. remedies (damages v. injunctions)
    v. defenses
        1. extra-sensitive P's
        2. "coming to the nuisance"
    vi. Origin of nuisance law:
        1. P as holder of land
        2. typical cases: odor, pollution, water/roots crossing borders, vibrations, etc.
        3. RST def.:
            a. continuous and repetitive nature of activity
            b. unreasonable and intentional
                i. what is reasonable?

1. cost/benefit
2. threshold level of harm, actionable as nuisance
    a. "live and let live"
    b. strict liability framework

4. competing entitlements
    a. P's entitlement must be sufficiently important to enjoin D's activity

vii. Calebresi supplement:
1. Coase efficiency model: efficient outcome generated without legal rule, under cost/benefit negotiation between factory and residents (could bargain to achieve optimal output/damages)
    a. assumes no transaction costs, perfect information, no strategic behavior
        i. strategic behavior:
            1. holding out, extorting for better outcome
2. entitlement to pollute v. entitlement to clean air:
    a. Nuisance (entitlement to clean air)
        i. property rules (injunction)
            1. resident enjoins factory from polluting
                a. factory cannot pollute unless resident allows it
        ii. liability rules (damages)
            1. factory can pollute and pay resident money (damages)
    b. No nuisance (entitlement to pollute)
        i. property rules (injunction)
            1. pollute at will, resident can pay factory to stop
        ii. liability rules (damages)
            1. *Spur Industries*
            2. "purchased injunction"
            3. at time of Calebresi, this box was empty
3. Ask:
    a. Who gets the entitlement?
    b. What remedy?
        i. injunctive relief: can prevent future harm
            1. but, constant enforcement
            2. also promotes strategic behavior
                a. owner of even worthless land given agency to maintain or remove entitlement
        ii. damages: pay as you go liability

viii. *Fountainbleu*
1. Hotel development, casting shade on neighboring hotel's pool
    a. Court refuses to hold D liable for nuisance (no common law doctrine of "ancient lights")
    b. Preserving right to private development
        i. *LeRoy Fibre* rationale

ix. *Prah v. Maretti*
1. repudiated *Fountainbleu* rationale, when shade interfered with solar panel system
    a. threshold of "live and let live"

b. reciprocity of risk
i. absence of reciprocity = strict liability

x. *Rogers v. Elliot*
1. ringing church bell and extra-sensitive P
a. predictability/stability argument
i. law cannot change with every tenant
b. entitlements of bell owners

xi. *Ensign v. Wells*
1. court rejects D's "coming to the nuisance" defense

xii. *Boomer v. Atlantic Cement*
1. pollution from cement plant (and land-owners)
a. seek injunction
b. court denies, imposes damages
i. concerns re: economic effects of closing all cement factories
ii. injunction vacated upon payment of damages

xiii. *Spur Industries v. Del E. Webb*
1. cattle feed lot → decreasing adjacent development's land value
a. court holds that Webb may purchase an injunction (to compensate for loss to P)
i. similar function to indemnification

g. Vicarious Liability
i. Respondeat superior
ii. Holmes:
1. vicarious liability not supported by moral corrective justice rationale

iii. *Ira Bushey v. United States*
1. Facts:
a. drunken sailor, causes property damage on dock
2. Holding (Sykes):
a. enterprise liability = absent the employment, risk falls to zero
b. first test: motive test
i. agency/principal relationship
c. foresight test
i. foreseeable that sailors on dock could cause damage
1. too all-encompassing?
3. Rationale:
a. "scope of employment" requirement
b. strict liability and law & economics justification:
i. ability of employer to control risk of employees
ii. accounting for potential employee insolvency
1. deterrence argument
2. only effective if employee is acting in scope of his employment
iii. loss-spreading rationale
1. vicarious liability = minimize risks and spread losses

a. employer is better able to avoid loss and better able to distribute costs of liability (through pricing, costs of production, etc.)

h. Vicarious liability and medical malpractice
    i. independent contractor v. employee
        1. scope of employment = strict liability
    ii. *Petrovich v. Shore Health Plan*
        1. physician as independent contractors, under authority of HMO/MCO
            a. "apparent authority":
                i. patients assumed physician was employee of hospital (HMO maintained that it was provider of health care)
            b. "implied authority":
                i. agent retains the right of control over the work (control over physicians in testing, etc.)

XXXI. Products Liability

a. Products liability
    i. heard equally in state and fed. ct.
        1. D's eager to remove (40%)
    ii. contracts v. tort
        1. privity limitation (*Winterbottom v. Wright*)
        2. economic harms (*Casa Clara Condo v. Charley*)
    iii. strict liability v. negligence
        1. autonomy-based corrective justice theory:
            a. as between two innocents, put liability on the one who acts
                i. but how to account for intervening causes?
                    1. distributors/retailers, etc.
        2. inference of negligence will not always stand up under res ipsa
            a. under strict liability, injured party need not prove negligence
                i. no evidentiary/elimination of proof problems

b. *MacPherson v. Buick*
    i. Facts:
        1. defective auto, manufactured by Buick, sold by dealer
        2. is manufacturer liable to 3rd party purchaser?
    ii. Holding:
        1. Court rejects privity limitation
            a. when danger is implicit in the nature of the product
                i. sounds in negligence-based liability
                ii. foreseeability of danger (probable, not possible)
    iii. Rationale:
        1. privity limitation:
            a. manufacturer only liable to those who are privy to contract (contracting parties)
                i. no liability for harm to 3rd parties

c. *Escola v. Coca Cola*
    i. Facts:
    ii. Holding:

1. Ct. holds that D's are liable under res ipsa
2. Traynor concurrence:
    a. strict liability: guarantee safety of product, even in absence of negligence
        i. extends *MacPherson*

iii. Rationale:
1. extends concept of strict products liability to 3rd parties
2. responsibility affixed on cheapest cost avoider
    a. loss minimization/deterrence rationale
3. loss-spreading (reflected in pricing)
4. limitations:
    a. product must be in normal use
    b. establishes defenses (contrib. negligence)

d. *Casa Clara Condo. Ass'n*

i. Facts:
1. faulty cement, leading to purely economic loss

ii. Holding:
1. P has no cause of action against the cement manufacturer, unless personal injury or damage to 3rd party's property
    a. contract, not tort
2. Dissent:
    a. P has no remedy under K law, since they were not the contracting party
        i. no other remedies

iii. Rationale:
1. economic losses akin to disappointed economic expectations
    a. protected by contract law, not tort law
    b. unless damage to other's property
2. tort v. contract:
    a. damages
    b. *Vosburg v. Putney*
        i. limitations of contract damages
3. What is the product? How to know whether product has damaged other property? How to establish extent of risk of injury?

e. **Defects**

i. Goal: to minimize accidents

ii. Manufacturing Defects

iii. Design Defects
1. Consumer expectation test
2. Risk/utility test
3. Defenses:
    a. Substantial modification/alteration defense
    b. Misuse defense
        i. Foreseeable misuse?

iv. Failure to Warn
1. Warnings can enhance product safety without requiring design/manufacturing alterations (cost-effective)

v. Restatements
    1. R2 402(a)
        a. strict liability for defects
            i. defect:
                1. not foreseeable
                2. no intervening cause (burden of proof on P)
        b. based on foodstuffs paradigm
            i. so applies strict liability broadly, focuses on manufacturing defects
            ii. rationale:
                1. manufacturer is in a better position to detect/prevent defects (cheapest cost avoider)
        c. strict liability imposed for "unreasonably dangerous" products
            i. consumer expectation test
        d. strict liability:
            i. *Escola* (Traynor concurrence);
                1. strict liability with a res ipsa "bridge"
            ii. *Greenman v. Yuba Power Products*
            iii. *MacPherson*
        e. RTT(2^{nd}) does not address bystanders
    2. Third Restatement
        a. emphatic rejection of RTT(2^{nd}), after explosion of product liability suits
        b. establishes tri-partite system, distinguishing between:
            i. manufacturing defects
            ii. design defects
                1. alternative designs considered
            iii. failure to warn defects
                1. alters test for design/warning, while retaining manufacturing provisions of RTT(2^{nd}) 402
        c. risk/utility test:
            i. negligence-inflected test, invokes Hand Formula and reasonable alternative design tests
                1. do risks outweigh benefits?
                    a. vinyl lining on swimming pools
            ii. versus consumer expectations test
                1. "open and obvious" test
                2. *Campo v. Scofield* (onion-topping machine)

vi. *Barker v. Lull*

vii. *Castro v. QVC*
    1. Facts:
        a. pan usually used for low-volume cooking modified for turkey cooking (25 lbs.), P injured due to pan's imbalance, insufficiency of small handles
        b. dual-use pan
        c. appeal on error of Dist. Ct. in denying jury finding on two causes of action (only allows finding on strict liability for product defect)

i. also alleges violation of express warranty
1. fear of irreconcilable jury verdict
a. if theories determined to be synonymous and jury finds differently on each

2. Holding:
a.

3. Rationale:
a. consumer expectation test
i. if used as expected, would product be unreasonably dangerous?
ii. theory used for warranty claim
b. risk/utility test
i. do benefits of product outweigh its risks?
1. gravity + likelihood of harm
2. feasibility of alternative designs
ii. theory used for design defect (NY)
c. tests have different outcomes, but not irreconcilable
i. since they are for separate causes of action
d. dual-use product
i. risk/utility test could generate different outcomes, necessitating examination of consumer expectation test
1. (which use was advertised?)
ii. when is a dual-use established?
1. if framed by the litigants as dual-use
e. 3rd RTT:
i. test for design defect:
1. feasibility of alternative designs
a. not adopted by most jurisdictions
ii. law and economics rationale:
1. encourages optimal level of risk/utility (most cost-effective level)

viii. *Barker v. Lull Engineering*

1. Facts:
a. forklift case
2. Holding:
a. D held liable
i. D fails to satisfy risk/utility test
1. cannot prove that alternative designs were not feasible
3. Rationale:
a. "Barker test":
i. use consumer expectations test OR risk/utility test
b. consumer expectations test:
i. must involve a product that a consumer is capable of forming expectation about re: use
ii. also, consumer expectation test can be manipulated, by way that product is MARKETED
c. risk-utility test:

i. focused on features of product at time of accident

d. many jurisdictions adopt both tests, since, in absence of specific factors, they should result in same outcome

f. Warnings
   i. Tort suits have involved
      1. Presence of warning and;
      2. Adequacy of warning
   ii. *MacDonald v. Ortho Pharmacy*
      1. Facts: P sued D for failure to warn of specific risk of stroke from birth control (warnings of other risks, such as of blood clotting)
      2. Issues:
         a. Warnings were provided to physician, who provided the warnings to patient (**learned intermediary**)
            i. Learned intermediary defense for failure to warn
            ii. Rationale:
               1. Learned intermediary as a repository for all information; can tailor warnings to particular patient
               2. Complexity inherent in decision to use prescription drugs
         b. Direct duty of manufacturer to warn patient?
            i. P did not join physician as D in the lawsuit
         c. Was the warning provided adequate?
            i. Warning did not include the word "stroke" (FDA later updated their requirements to include the word "stroke"); court held that this unduly minimized the risk
      3. Holding: Manufacturer has duty to warn patient; warning must include specific risk (stroke) to be adequate
      4. Rationale:
         a. Unique properties of oral contraceptives (and other mass-marketed drugs)
            i. Exception to learned intermediary rule when drug is marketed directly to patient
               1. Akin to over-the-counter drugs
               2. Numerous factors noted, specific to birth control (limited consultation with physician, heightened participation of patient in deciding to use drug)
               3. Manufacturer must still warn the physician, but has an extra duty to warn the end user
            ii. Codified in R3 (warnings to patient when physician is not in a position to reduce risks, such as when mass direct-to-consumer advertising causes patients to rely on marketing)
            iii. R3 does not address application for birth control and vaccination cases
         b. Jury capable of deciding that the warning was inadequate, since standard for warnings is: "comprehensible to the reasonably prudent person"
   iii. Learned intermediary defense and managed care structure (HMO's)
   iv. *Hood v. Ryobi* (1999)

1. Facts: P removed guards from saw, blade detached and caused injury
2. Issue:
    a. Substantial modification/alteration defense in failure to warn case?
3. Holding: No liability for failure to warn
4. Rationale:
    a. Increase in warnings results in overall decrease in their impact on end user (information overload; dilution of salient warnings)

v. *Liriano v. Hobart* (1998)

1. Facts: P operated meat grinder after safety guard had been removed, alleged failure to warn; sues both employer (Super), who removed the guard, and manufacturer (Hobart), for failure to warn
    a. Liriano I
        i. Certification decision (certifying an important question of state law to federal court, after case was removed to 2nd Circuit)
            1. intermediate decisions differ in resolving question
        ii. P filed suit in State court, D removed to fed. ct.
    b. Liriano II
    c. Liriano III
        i. Two fundamental obstacles to imposing liability on manufacturer
            1. Obviousness
                a. Court holds that obviousness must be examined in context of all facts
                b. danger was likely not obvious to P, who had only used machine two or three times
    d. Causation
        i. Cites *Zuchowicz v. United States*
            1. Danocrine & PPH case (FDA regulations)
            2. As below, "presume normality". Burden of proof on D to disprove "strong inference" of causation
        ii. And *Martin v. Herzog*
            1. accident and lights on highway case (negligence per se)
            2. Negligence can be inferred to be the cause in fact of injury if accident is of the type that tended to result from such negligence
2. Issue:
    a. Substantial modification/alteration defense in failure to warn case, where the defense would preclude liability under a design defect theory?
3. Holding: substantial modification defense does not preclude liability as in a design defect theory; case remanded
4. Rationale:
    a. No such cost concerns as in design defect, since alternative design would be mandated (no such mandate in failure to warn)
    b. Manufacturer should foresee any reasonable uses of its product after it leaves the line of production (including misuse)
    c. Manufacturer is repository of information re: product, as well as cheapest cost avoider

5. Criticism:
    a. First jury ascribed 95% of liability to employer, 5% to manufacturer
        i. Under worker's comp scheme, Liriano could not sue employer directly
        ii. So, manufacturer held liable for 100%
            1. An end-run around worker's comp?
    b. What does decision lead to, in terms of incentives for manufacturer to provide adequate warnings, post-sale?
        i. Recall?

vi. Compare/contrast *Liriano* and *Hood*:
1. Different results
2. Warnings:
    a. To provide notice of inherent dangers
    b. To provide information about alternatives
3. In *Hood*, numerous warnings were already in place; in *Liriano*, court merely required a warning that safety guard should not be removed
4. Manufacturer's post-sale duty to warn in *Liriano*
    a. Creates incentives for manufacturer to monitor its products, compile data on usage

g. Regulatory compliance

XXXII. Preemption

a. When does a federal statute or regulatory agency's decision preempt cause of action under state common law?
    i. Theoretical implications of tort liability v. safety regulation
        1. Deterrence
        2. Compensation
    ii. Tort liability:
        1. private
        2. ex post, indirect ("pay as you go")
    iii. Regulation:
        1. public
        2. ex ante behavior modification
        3. Pros/cons in each category
    iv. Shevall (reader) argument:
        1. factors in support of tort liability:
            a. administrative costs
                i. Costs are only incurred if harm actually occurs (under regulation, ex ante framework entails costs regardless of risk occurring); "targeted" costs in tort liability
            b. knowledge differential
                i. private actors tend to have greater knowledge re: risks of behavior
                    1. information re: B, P, and L (Hand formula)
                ii. but not always the case (such as in drugs context)
        2. factors in support of govt'l regulation:
            a. incapacity to pay for harm done

b. possibility of escaping suit
i. can't rely on injured parties always bringing suit (and acting as a regulator; "private attorneys general")
ii. difficulty re: causation, burden of proof

b. Nationwide v. local standards/regulations
i. Congressional legislation
1. Ex. Food Drug and Cosmetics Act
ii. Federal agency regulations
1. Ex. FDA (can operate re: the same subjects)
iii. Tort liability system (ex post) arguably allows for simplified ex ante approval process

c. Federal regulation as a floor (or, as asserted by FDA, a floor and a ceiling)

d. Preemption:
i. Express
1. Act/regulation contains explicit preemption provision (as opposing to savings clause)
2. Statutes often contain the term "Requirements"
a. state legislation? or state common law, including tort law?
b. Before 1992, it was assumed that requirements only included legislation; now, both considered
ii. Implied: no express preemption provision; can implied preemption be inferred from Congressional intent?
1. Field: regulatory scheme is so comprehensive that it does not allow room for tort liability (entire field is preempted); ex. FAA preempts field of aviation safety
a. This can be problematic if Congress has not addressed the remedial side
2. Conflict:
a. Impossibility
i. When one cannot follow the mandates of both federal and state law; if obeying state law would violate federal law, for instance (Supremacy Clause dictates that state law is preempted)
ii. Narrower form of implied conflict preemption
iii. High bar
b. Obstacle
i. State law creates barriers, difficulty in complying with federal law
ii. Broader form of implied conflict preemption

e. *Geier v. American Honda*
i. Facts:
1. airbag regulations (Motor Vehicle Safety Act)
ii. Holding:
1. in leg. scheme, Congress intended to give manufacturers a choice of safety measures;
2. so, state airbag regulations were preempted by fed. law
iii. Rationale:
1. MVSA explicitly notes that it is a minimum standard

a. Wanted to allow for a variety of safety options (to avoid downsides of mandating airbags)
b. But, Act's allowance of options resembles an optimal level
c. Otherwise, states would "race to the bottom" to compete for business

f. *Wyeth v. Levine*
   i. Facts:
      1. Injury resulting from improper injection of drug, resulting in amputation
   ii. Holding:
      1. failure to warn claim NOT preempted by FDCA
   iii. Rationale:
      1. D argues implied preemption
         a. Conflict prevention (impossibility and obstacle)
         b. No express preemption in statute (FDCA)
         c. Similar to other statutes, compliance with regulation is *evidence* of non-negligence (only dispositive in Michigan, in drug context)
      2. Evidence of implied preemption?
         a. **Congressional intent** (FDCA)
         b. Agency policy/expertise (FDA) – relevant, but not given as much weight as legislative intent
            i. Sharkey (Reader) – agency reference model (proposed reform); contrary to "agency deference"
               1. tort as regulation does not account for moral corrective justice role of tort liability, as a compensation mechanism
               2. federal regulations rarely address remedial aspect of rule
         c. Express provision (although its absence is not dispositive, due to implied preemption)

g. *PLIVA v. Mensing*
   i. Facts:
      1. failure to warn claim re: generic drug
   ii. Holding:
      1. cause of action preempted by impossibility defense
   iii. Rationale:
      1. Can't sue a generic manufacturer (impossibility implied conflict prevention)
         a. Generic substitution laws?
      2. Generic manufacturers unable to make modifications to drug, only has to ensure that the generic is identical to brand name drug
         a. So, cannot be held responsible to the same degree as brand name
         b. CBE (changes being effected) FDA regulation
            i. Reforms proposed to apply to generics, to address problem of providing name brand (patented) drug with the incentive to monitor new risks of drug (since generics often render sales of the drug unprofitable)

h. sua sponte – "of its own accord"; unprompted

XXXIII. Compensatory Damages

a. Damages:
   i. compensation (moral corrective justice)

ii. deterrence (law and economics)
iii. money as a proxy
1. as opposed to mediation; "eye for an eye"; shaming; etc.

b. Compensatory damages address harm in two categories:
i. Economic/pecuniary; "hard"
1. Medical expenses
2. Loss of wages
ii. Noneconomic/nonpecuniary; "soft"
1. Pain and suffering
a. insurance critique:
i. individuals do not obtain first-party insurance for pain and suffering, so compensating through tort law is de facto third-party insurance
b. fear of an "unhinged" jury decision
i. reform proposals:
1. jury instructions
a. per diem method
b. provide examples from similar cases
2. reserve damages for appeal
3. cap damages
ii. how to measure?
2. Loss of enjoyment of life

c. Law and economics rationale
i. set damages at the "optimal price" to motivate the actor to internalize future expected costs
1. parallel with Hand Formula (optimal level of care)
2. if not optimal, leads to over-deterrence or under-deterrence
ii. wrongful death critique:
1. if damages for permanent injury are greater than for death, actors will be more deterred from maiming than from killing
iii. Insurance theory – typical insurance policies are for anticipated economic liability (for instance, adults who buy life insurance do not buy insurance for loss of a child); so, inappropriate to impose damages for noneconomic harm
1. Contrary argument: for deterrence purposes, noneconomic losses must be accounted for

d. Chamallas: Hierarchy of Bias
i. Loss of future earnings calculations – based on tables that take race/gender into account, so reify past biases in compensative
ii. Devaluation of employment perceived as female

e. *McDougald v. Garber*
i. Facts:
1. brain damage resulting from failed medical procedure; husband files suit and both P's awarded damages
ii. Holding:

1. loss of enjoyment of life damages require cognitive awareness; loss of enjoyment and pain and suffering harms need not be presented to the jury separately, since both entail estimations of nonpecuniary damages
    a. per diem calculation

iii. Rationale:
1. Nonpecuniary losses
    a. Loss of enjoyment of life
    b. Pain and suffering
2. Questions presented:
    a. Should 2 categories of nonpecuniary loss be presented separately to the jury?
        i. Majority: no, since process is only an estimation for both types of harm (both are nonpecuniary)
        ii. Dissent: yes, since the types of harm are conceptually distinct
        iii. Loss of enjoyment of life:
            1. "hedonic damages"
        iv. common law: tort died with the victim; now, wrongful death statutes in every jurisdiction
        v. common law: only men could recover for loss of consortium/wrongful death; transition to married couples, parents/children v. children/parents, extended family members if primary caregivers
    b. Is cognitive awareness a precursor to recovering for loss of enjoyment of life?
        i. Yes, since damages would not serve a compensatory function with no awareness
        ii. Paradox: greater degree of the brain injury inflicted by the D, the lesser the award
        iii. "cheaper to kill the victim than maim them for life"
            1. Perverse incentive

f. *Migdal v. Abu-Hana*
    i. Israeli Supreme Court; used a "national average wage statistic" to calculate loss of future earning of a five month old child
        1. rejected considerations of gender, race, ethnicity, socioeconomic status
            a. otherwise, unequal historical biases are reified (consistent with Chamallas rationale; 9/11 Fund)

g. *McMillan v. City of New York*
    i. Ct. refused to use statistics re: life expectancy for average African-American male in calculating compensatory damages for future medical expenses

XXXIV. Punitive Damages

a. theoretical justifications:
    i. law and economics deterrence rationale
        1. harder to defend under moral corrective justice theory
            a. since compensation can be satisfied prior to imposition of punitive damages
        2. detection multiplier:

a. if wrongdoer evades detection half the time, impose twice the penalty when he is caught
b. but, consistent use of multiplier leads to over-deterrence
i. converts the action into a quasi-class action (by accounting for under-detection), without binding other parties to the judgment or precluding them from suing on the same issue

3. parties might not sue
a. widespread dispersed harms
b. recurring miss problem
c. problem with suing for harm to non-parties
i. *Phillip Morris USA v. Williams*
1. "extra-territoriality" concern
ii. but "windfalls" as incentive for P's to bring suit
d. what if case is "open and notorious"?
i. *Exxon Shipping v. Baker*

4. deterrence rationale ignores the "mental state" element of punitive damages
a. recklessness in product liability (in absence of wanton/willful)

5. attorney's fees demand punitive damages to account for compensatory damages not fully compensating the victim

6. eliminates need for self-help (esp. for dignitary harms)

ii. insurability:
1. compensatory v. punitive damages
a. statutory prohibitions against insuring for punitive damages (8 or 9 states)
b. intentional act exclusion in most policies

iii. "moral outrage"
1. early common law (intentional torts/dignitary harms and punitive damages)
a. purpose of punitive damages distinct from purpose of compensatory damages
b. can outrage be translated into dollar amounts?
i. other protections (criminal)

2. unjust enrichment from tortious activity (disgorgement of gain rationale)
a. not part of the cost/benefit analysis (so, not at risk of over-deterrence)

3. channeling transactions through the market
a. attempt to eliminate efficient breach option

b. Supreme Court's review of punitive damage judgments
i. respecting states' rights to make own law while limiting damages in light of substantive due process
ii. Constitutional prohibition on excessive awards
1. guideposts for determining excessiveness:
a. reprehensibility
i. most important indicium (SC)
ii. physical/economic
iii. reckless disregard for other's safety
iv. intentional malice
v. financial vulnerability of victim

b. ratio
    i. focus of state courts
    ii. PD : harm
        1. comp. damages as proxy for harm
            a. adequate proxy?
    iii. 9:1 maximum intuited (single digit ratio)
        1. any theoretical justification?
        2. 1:1 in *Exxon*
c. comparable penalties

c. tort reforms
    i. capping damages (total amount; ratio)
    ii. applied to pecuniary/nonpecuniary damages?
    iii. jury's inability to convert moral outrage (punitive intent) into dollar figures
    iv. bifurcated (or trifurcated) trials
d. *Kemezy v. Peters*
    i. Facts:
        1. P sues D, a police officer moonlighting as a security guard, for battery
    ii. Holding (Posner):
        1. P need not provide evidence re: D's net worth, but is permitted to
            a. none of the rationale for punitive damages depends on D's wealth
        2. wealth can't be used to justify an otherwise excessive award
    iii. Rationale:
e. *State Farm v. Campbell*
    i. Facts:
        1. auto accident; state farm refuses to settle and loses case against victims of accident
    ii. Holding:
        1. 1:145 ratio is excessive
            a. presumption against reasonableness of such a ratio, relying on the below factors
    iii. Rationale:
        1. cites *BMW North America v. Gore*
            a. ratio
            b. degree of reprehensibility
                i. repeated
                ii. physical/economic
                iii. financial vulnerability of targeted party
                iv. reckless/intentional disregard for others' safety
            c. comparability with similar cases/comparable criminal penalties
        2. guideposts for constitutional excessiveness review
        3. cites *Williams v. Phillip Morris*
f. *Mathias v. Accor*
    i. Facts:
        1. bedbugs in Motel 6; punitive damages of $1,000 per room awarded on top of compensatory damages of $5,000 in total
    ii. Holding:

1. punitive damages not excessive (37:1)

iii. Rationale:
1. SCOTUS will only allow punitive damages in single-digit ratios to compensatory damages?
a. No.
i. Judicial role is to police a range, not a point

g. *Exxon Shipping v. Baker*
i. Facts:
1. Exxon Valdez litigation; excessiveness review of punitive damages

ii. Holding:
1. SCOTUS as admiralty court
2. 1:1 ratio (3:1 ratio in consensus by states encompasses cases all along the reprehensibility scale)
a. in this case, gross negligence/recklessness warrants 1:1 ratio

iii. Rationale: