An Introduction to American Law

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Abstract

The following document is a collection of lecture notes that I took while taking the Coursera course "An Introduction to American Law", which is taught by 6 University of Pennsylvania law professors who specialize in their respective law fields: Tort Law, Contract Law, Property Law, Constitutional Law, Criminal Law, and Civil Procedure. These professors offer a brief overview of the 6 different areas of American law, allowing students to gain insight into the complexities and dilemmas that arise from the application of law in different settings and highlighting what is distinctive about uniquely American approaches. Any errors and omissions in these notes are naturally entirely my own, and all credit for the content goes to these professors. Needless to say, these lecture notes are by no means a substitute for this awesome course. Rather, consider this document as my way of remembering the highlights and notable takeaways that I frequently reference and want to remember, and if you find value in these lecture notes, then I highly recommend that you try out the course on Coursera. It's free and can be found here. Also, notable shout-out to Rainer Groh from the University of Bristol, who granted me the source files to his own notes on the Coursera course "Model Thinking" by Scott E. Page, and upon whose work this document's format is based.

1 Tort Law

Hi! Welcome to my notes for "An Introduction to American Law", a course by the University of Pennsylvania taught on Coursera. This course is broken down into 6 big sections, and in this first big section, we're going to talk about Tort Law. This section is taught by Prof. Anita Allen, who is the Henry R. Silverman Professor of Law and Professor of Philosophy at the University of Pennsylvania Law School.

1.1 Tort Law, Part I

American Tort Law, as distinguished from English Tort Law, emerges out of a 19th century case called Brown vs. Kendall. The story goes as follows: these two men owned two dogs, and one day, the dogs broke out into a vicious fight. Concerned about the safety of the animals, Kendall took a long stick, about four feet long, and began beating the dogs, hoping they would separate. Brown stood behind Kendall, observing his efforts. Unfortunately, an accident occurred. At one point, Kendall took a few steps backward in the direction of Brown while continuing to swing the stick. He just didn't see how close he was to Brown, and he inadvertently struck Brown in the eye, causing severe injury. More on this story in Part II.

Like the unfortunate Mr. Brown, people are injured every day. They're injured in car collisions, while operating machinery, at work, or by medical procedures. They're injured by pranks, by invasions of privacy, in natural disasters, when ferries capsize, in train and air crashes, at sporting events, in fights, in war, and in acts of terrorism. The property that people value can be damaged too. Animals can be poisoned, cars dented, jewelry stolen, bicycles swiped, homes burned down, smart phones borrowed and left out in the rain. Tort law is a response to the problem of injuries like these. Typically, tort law allows someone injured, like Mr. Brown, to seek monetary damages from someone who causes an injury, like Mr. Kendall.

American tort law is part of our common law, which is law primarily made by judges and their decisions. It is typically distinguished from other areas of common law, most notably from contract law, which arises out of mutual agreements, from property law, which regulates ownership, and criminal law, which penalizes wrongs on behalf of the public.

We use the term tort action to refer to a civil lawsuit based on a claim that someone has violated judge-made rules or closely-related civil statutes that serve as precedent and authority for adjudicating private disputes. As noted, tort actions usually seek money to compensate for the harm done, and where injury is ongoing, someone fed up with it might seek a court order to enjoin the action, be it the noises, the smells, the pollution, or other nuisances or harms that are affecting them.

American tort law is embedded in an adversary system of procedural justice. Each party hires their own lawyers and expert witnesses to persuade judge and jury. The adversary system relies upon the use of non-expert juries to adjudicate facts, and upon professional lawyers to bring and defend claims before professional judges and to negotiate settlements.

Tort law is primarily a part of substantive law, which is the set of laws that governs how members of a society are to behave. It is contrasted with procedural law, which is the set of procedures for making, administering, and enforcing substantive law. Substantive law defines rights and responsibilities in civil law, and crimes and punishments in criminal law. It may be codified in statutes that are modified from time to time, or, in the case of tort law, primarily existing through precedent in common law. Tort law empowers victims of injury to receive justice from those whom judges and juries consider responsible for their injuries. But what kind of justice? The justice of money?

It's often said that the main purpose of tort law is to compensate victims of injury to achieve what some Western philosophers call corrective justice. Corrective justice is a justice that seeks to redress wrongs by placing the injured person back in the situation he or she was before they were injured, or the status quo ante, as we say in Latin. You can't give a man who's lost an eye a new eye, but you can give him enough money to buy a fake eye, a prosthetic eye, visit his doctor, replace lost wages, and afford a lifestyle similar to the one he enjoyed prior to the injury when he had two eyes. However, tort law is not just about corrective justice. Judges have recognized other aims of tort liability. These variously include deterring careless and aggressive behavior, punishing recklessness and malice, encouraging insurance, and forcing businesses to internalize their costs.

As law students quickly discover, American tort law consists of a very, very large number of judge-made rules and principles. The rules differ slightly from state to state, so American tort law is really 50 different sets of tort law. But there is much commonality in state common law. The law doesn't change much from New York, for example, to California. In fact, some of the rules and principles that comprise tort law are centuries old, inherited from English common law. Some are only decades old. Some even newer. Tort law changes. Judges can change the rules.

One of the distinctive features of the rules and principles of U.S. tort law is a decided preference for imposing liability only where someone is at fault. In other words, we blame. But there are numerous pragmatic exceptions. With respect to some classes of injury, courts think liability is so important for policy reasons, for the sake of social goals like reducing the frequency and severity of accidents, for example, that they assign responsibility without fault.

American law recognizes three main categories of tort liability corresponding to three broad sources of injury. One, injuries stemming from intentional acts. Two, injuries stemming from negligent acts. And three, injuries stemming from dangerous activities or defective consumer products.

What keeps tort law interesting are the stories of how people get hurt, and whether the rules and principles of tort law can be brought to bear to make things better. Tort law is mainly taught by asking students to read and discuss the stories that comprise case law, which is the body of reasoned opinion that judges write to explain their decisions in the individual cases brought before them. Judges do their best, but they don't always get the rules right, and they don't always make

sense. Their published opinions become the authorities, though, upon which we rely to guide our behavior and resolve our disputes. We try to be critical but also respectful.

Our judges are storytellers, and learning common law torts is learning the stories and the significance of the stories that judges tell about our personal and public calamities.

1.2 Tort Law, Part II

Now back to the story of the dogfight. Mr. Brown, who was hit with the stick, wanted money as justice from Mr. Kendall, but Kendall didn't think Brown deserved it. Brown brought a tort action against Kendall in a Massachusetts state court, hoping to force Kendall to pay. In other words, Brown was the plaintiff and Kendall the defendant in an adversarial court case that American legal history has now come to know as Brown v. Kendall. We can speculate that Kendall was very unhappy about getting sued when he intended no harm to Brown; after all, no one really likes getting sued. But why? Well, first of all, lawsuits can damage one's reputation as a good and careful person, or a good and careful employer or business. Second, lawsuits are time-consuming. They can drag on for years. You might be injured in 2014 and not see your case resolved until 2020. In fact, Mr. Kendall died before Brown's case against him was resolved, and the case against him had to go on against his estate represented by his wife. Third, sometimes it seems litigious people sue just for revenge, to annoy, or to get easy money through an out-of-court settlement from someone with deep pockets, such as wealthy defendants or an insurance company.

Experts disagree about the exact percentage of U.S. lawsuits that are frivolous and unjustified. But I tend to think there are fewer lawsuits than would be warranted by the facts. There'd be more lawsuits, but people don't want to be hassled. They don't have access to lawyers, and they can't manage the distractions.

We can speculate that Mr. Brown probably needed the money he was suing to get. Most Americans who suffer serious accidental injury are not wealthy and have a practical need for money to pay medical expenses or to replace lost earnings resulting from their injuries. In the U.S., we've never had a national health insurance plan that provides free healthcare for ordinary people (we have lots of problems in our heath care system, but luckily socialized medicine is not one of them), and no job guarantees this for all time for injured workers. Today, we do have Social Security Disability programs that didn't exist in Mr. Brown's day to help permanently disabled people, but the amounts that people get from the state are very small compared to what they might earn in a lawsuit. Furthermore, bringing and defending lawsuits is expensive. You have to hire a lawyer. The America legal system is far too complex for the average man or woman to understand on their own (unfortunately). The many deadlines and procedures that must be followed are known only to local experts, attorneys who have completed law school, passed the state bar qualifying them to practice law, and have gained practical experience. The rules of common law, which differ somewhat in each of the 50 states that comprise the United States, are not easy to research and learn. Now, plaintiffs with a decent claim can generally find someone to represent them on a contingent fee basis. The plaintiff's lawyer who agrees to work on a contingent fee basis only gets paid if the plaintiff wins, and that lawyer generally earns nearly half the winnings or more. In the U.S., if you get named as a defendant in a lawsuit, you generally have to hire a lawyer, a private lawyer, to represent you and pay them a large hourly fee. Hourly fees are likely to be ten times or more than that of a typical worker.

In the case of Brown v. Kendall, Brown successfully convinced a judge and a jury, who again were made up of members of his own community and assigned to find the facts. He convinced them

that he was truly injured by Kendall, and that the injury was the specific sort that the common law defines as a tort, a civil wrong. But Kendall did not consider himself a tortfeasor, a wrongdoer. He considered the accident something for which he should not be held responsible. He admitted his actions with the dogs and the big stick, and that they contributed to the serious injury that his friend suffered, but he believed he'd done nothing wrong. He had not wanted to wound the plaintiff. He'd only wanted to separate the dogs for the legitimate purpose of protecting them from mutual destruction.

Kendall's attorneys appealed the decision against him to the Supreme Judicial Court of Massachusetts, and in this higher court, he won. Kendall believed he'd acted lawfully in trying to separate the dogs, and that he had not been negligent in the way he used the stick. Indeed, it could be argued that if any one was negligent, it was Brown. Arguably, Brown was standing carelessly close to Kendall and that's why he got struck in the face. Since Kendall was intently watching the dogs, Brown should have been intently watching out for himself. An old common law rule called the contributory negligence rule will prevent an adult whose carelessness helped to cause an accident from recovering in a lawsuit for accidental injury. Now, today we compare the fault of those but for whom the accident would not have occurred, and we apportion blame, reducing by some percentage the amount a contributory negligent plaintiff can recover in their lawsuit.

Chief Judge Shaw ruled on appeal that the trial court had not properly instructed the jury. The jury should have been told clearly that Kendall would not be liable to Brown unless he'd injured him either intentionally or negligently. Brown and his lawyers failed to persuade Judge Shaw and the high court that the correct rule of American common law was a rule of strict liability. Under a rule of strict liability, if you cause an injury by deliberate act, even if you don't mean to do it, you're liable no matter how careful you may have been.

Brown's lawyers wanted the court to follow, in essence, the logic of an ancient English case sometimes thought to be evidence of a common law rule of strict liability. This case is called the Case of Thorns. In the Case of Thorns, a man trimming hedges on the property line between his land and his neighbor's land crossed over to clean up some fallen branches. He was found civilly liable for trespass even though his intentions were kindly rather than a deliberate effort to trample and destroy with force and arms a neighbor's land. He was simply trying to pick up his trash. Nonetheless, he trespassed and was found liable.

So, in the end, it was found that Kendall would not have to pay Brown unless in the new trial ordered by Judge Shaw, Brown could show that Kendall acted negligently or intentionally in injuring him.

1.3 Tort Law, Part III

Mr. Kendall's victory before Chief Judge Shaw happened more than 150 years ago. But it tells us something about American tort law that remains true today. Brown v. Kendall pronounced that America's tort system is, and should as a general rule be, a fault-based system. If a man or woman is to be found liable for an accident in a typical case, it must be shown that they were at fault.

He or she is at fault only if they acted intentionally (we now say, "knowingly" or "purposefully"), or if they acted negligently. A negligent person is one who acts without the ordinary care or prudence suitable for the circumstances. In other words, they act as a reasonable person of ordinary prudence. Judge Shaw, and influential state judges after him, rejected the strict liability interpretations of the common law.

In fact, a New York court bluntly rejected English strict liability rules as unsuitable for a new

world, a nation-building nation, in the case of Losee vs Buchanan, where a boiler exploded in a paper mill, damaging adjacent property. The owner of the property went to court to recover based on a strict liability theory, but the New York court, like the Massachusetts court, decided that plaintiffs need to establish fault. The injured plaintiff had to prove by a preponderance of the evidence that the owner of the boiler either intended the harm, which he clearly did not, or had been negligent, which was possible but not proven. It was not enough that his boiler exploded; rather, the question for the judge and jury is whether the boiler exploded as a result of the negligence of its owner or his employees. Thanks to courts in Massachusetts and in New York, liability for accidental injury is generally based on a proof of negligence, and American scholars today debate whether the rules of negligence are more efficient or fair than rules of strict liability.

Some legal historians claim the Rule of Fault was embraced by the 19th Century judges because it was implicitly or explicitly thought to be helpful to the cause of American Capitalism. The spirit of entrepreneurship and innovation can fly freer if one doesn't have to worry about being strictly liable for inevitable, but unwanted accidents. It has been suggested that in the American Rule of Law, our social contract promises us security and freedom. Tort Liability, based on the fault principle, arguably enhances our freedom, while respecting our need for security. How so? Well, negligence liability disincentivizes carelessness and unreasonable risk taking. Free enterprise, an opportunity open to all, exploits dangers with hopeful benefits for all. As an example, trains are dangerous but beneficial to the public, and so are factories, tall buildings, bridges, chemicals, boilers, and dams. The price of utter safety would be a lack of progress and productivity. This ideology forms a central feature of American tort law.

Bringing this back to Brown v. Kendall, one man injured another accidentally. Under American tort law, if this accident were the result of negligence, there would be liability. However, if the accident were not due to negligence, there would not be any liability. So what, exactly, is negligence? Well, the contemporary definition of negligence builds on the 19th century concept articulated by Judge Shaw. In contemporary tort law, negligence is defined as a breach of duty of care owed to others, which causes injury to a third person or a person's property. The duty owed in most cases, the law says, is the duty of the reasonable person of ordinary prudence under the circumstances. So American courts and legal experts suggest that the reasonable person thinks about cost and benefits. If a small inexpensive expenditure of care can avert a more expensive and probable injury, that care should be undertaken. The cost of that burden of care is far less than the cost of foreseeable injury that could arise. If Brown's lawyers had argued that Kendall was negligent because he didn't shout a warning or raise his voice when stepping back, he might have been able to win a portion of his costs back.

1.4 Tort Law, Part IV

The fault system recognizes negligence as one kind of fault and intent as another. Let's change the story. Suppose hypothetically that Mr. Kendall were angry at Mr. Brown. He struck him in the face with a stick on purpose, injuring his eye. Now, he would be civilly liable not for negligence, but for an intentional tort, the tort called battery. Battery is defined as purposefully or knowingly causing harmful or offensive contact with another. Remember, Kendall can be taken to court by Brown if he negligently caused injury, or if he intentionally caused injury.

By the way, and this is an important point, some torts are also crimes. Battery is also a crime in American law. So if you hit someone on purpose or stab them or shoot them, you can be prosecuted for a crime by the public authorities and be fined or jailed. And on top of that, your victim can sue

you and recover money damages. If you steal from someone, you could be publicly prosecuted for theft as a crime, but also privately sued for the tort of trespass to property or conversion. There are many intentional torts. Battery is only one. Assault is another, along with false imprisonment, trespass to land and chattel, conversion or civil theft, infliction of emotional distress, defamation, invasion of privacy, interference with a contract, and a few others. The list of intentional torts is finite, and like all of tort law, subject to change. It used to be a tort to steal the affection of a man's wife or daughter. It no longer is in the age of gender equality. For another example, invasion of privacy was not a tort until the courts began to recognize it in the early 20th century in response to technology that made it possible for commercial photographers to use people's photographs without their permission.

The fault system allows for defenses and excuses. With a good defense or excuse, you can avoid tort liability even for intentionally harming somebody or their property. Let me introduce another true story, this one involving a case of intentional injury from 1971. A woman and her husband, Mr. and Mrs. Briney, owned a house inherited from her parents. The house was in a remote area and they preferred to live elsewhere, so they boarded up the house, furnishings and all. Now, for many years, whenever they would visit the house, they discovered that thieves had broken in and stolen various household items. The husband got fed up. He decided he would address the problem by setting up a shotgun trap in the bedroom of the house. He wired up the gun such that opening the door of the bedroom would cause the gun to go off and injure the lower body of an adult-sized person in its path. Mr. Katko and a friend went to the Brineys' house to steal bottles and jars for their antique collection. They ignored a large no trespassing sign posted outside the house. They broke in. When Katko opened the bedroom door, the gun trap went off just as Bernie had planned, and Katko was shot in the legs, causing severe permanent injuries and deformities. Katko sued Mr. and Mrs. Briney for battery, but they snapped back with a defense that has tempted many Americans, defense of property. We have a right to defend our property from thieves, they argued. The appeals court decided differently. Although property is important, human life and limb is more important. If thieves threaten a person in their home, use of a gun in self-defense is often permissible. But use of a gun to protect property in an unoccupied house is not justifiable according to the courts.

1.5 Tort Law, Part V

The fault system is not the whole story of American tort law by any means. There are areas of tort law where a person can be held liable for an injury, even though he or she has not been negligent or intended harm or offense. Tort law does include doctrines of strict liability. One might find this surprising in light of Brown versus Kendall. If a fault-based system is so just and practical, how can doctrines of strict liability, liability without fault, also be just and practical?

One way to understand the situation is this. While generally speaking, American tort law holds people liable when they are at fault, some activity is so dangerous the law holds those who engage in it to a higher standard, a standard of liability without regard to fault. Therefore, the exception to the fault principle for very hazardous activities may function to discourage it. As examples, the doctrine of strict liability for injuries caused by the possession of wild animals and for blasting (as in, with blasting munitions) operations rules as part of our law. So if a person keeps dangerous wild animals, say snakes, poisonous snakes, or adult chimpanzees in their home, and the animal bites a guest, the animal's keeper will be strictly liable to the injured person. Or if a person is engaged in a business involving the use of blasting or explosions, he or she'll be strictly liable for resulting

injuries there too.

American tort law also holds the manufacturers of consumer products strictly liable for injuries caused by manufacturing defects. The argument for departing from the fault principal here is different. It's not so much that manufacturing consumer products like make-up, or motorcycles, or medicines is itself dangerous. It's that the public has expectations of safety and cannot protect themselves from risk and dangers of which they may not be aware. Some courts recognize near strict liability for unreasonably dangerous product designs and poor product labeling. Courts and commentators sometimes stress the justice or good public policy of asking those who profit from enterprises to internalize the true cost of their businesses and to assume the burden of redistributing injury cost through their insurance pricing and thus to seek the optimal levels of investment in safety.

Even when liability is based on fault, American tort law eases the burden of proving fault to make it easier for plaintiffs to recover. Sometimes it's not practical to expect someone who's been injured to prove exactly in what way they were injured through negligence, and the injury itself strongly suggests negligence. For example, if a barrel of flour falls out of a second story window and hits a pedestrian on the head, doesn't that mean that whoever was in control of the barrel of flour had to have been negligent?

Res ipsa loquitur we say – the thing speaks for itself. If a bottle of Coca-Cola explodes in the hands of a waitress, can we assume that that particular bottle was negligently manufactured? If a patient wakes up from abdominal surgery and his arm is paralyzed, can't we assume that somebody in the operating room was negligent, even though the patient who was under anesthesia cannot prove it? Doesn't the thing speak for itself?

Sometimes tort law makes one person responsible for the wrongdoing of another. Employers, though faultless, are liable for the negligence of workers that takes place in the scope of duty. The pizza delivery guy employed by Joe's Pizza causes an accident while recklessly speeding to make his next delivery, let's imagine. Well, Joe's Pizza is vicariously liable, or *respondeat superior*, as we say.

So, American tort law is a system of fault-based liability with several important exceptions. However, tort law is not the only way in which America deals with problems of injury. In most states, automobile drivers are required to have no-fault insurance policies that pay for personal injuries without regard to fault. Also, workers who get injured at work due to the routine negligence of their employers are not permitted to sue those employers. They must apply for compensation through an insurance program, the worker's compensation insurance system.

In addition, various victim injury funds, some ad hoc, some standing, compensate people injured by vaccines, hurricanes, oil spills, and terrorism. Such funds heal nationally felt wounds and free the courts from a large number of related but factually complex cases. In the case of vaccine compensation, the tort alternative means that drug companies that make vaccines need not fear liability for providing tools essential to our public's health.

1.6 Tort Law, Part VI

American Tort Law can be understood as a principled system of fault-based liability with some exceptions for dangerous activities and consumer product defects. However, as we dive into the rules of Tort Law in detail, it can look less and less principled, like a mishmash of policy, politics, and pragmatism. Some doctrines seem harsh or unfair; for instance, the law allows civil suits against small children, even as young as four or five years old. Mentally ill people whose actions stem from serious psychiatric delusions are liable for intentional acts. As between two innocents, some courts

say, the person who caused the injury should pay. Moreover, the law recognizes liability for highly offensive invasions of privacy and outrageously intentional inflictions of emotional distress, but not for racial epithets and slurs, however hatefully intended. American Tort Law has traditionally not required that we lend a helping hand to people in danger unless we put them in the path of danger ourselves or have a special relationship to them. So for instance, if I see man drowning in a shallow pond, I'm not liable to him or his family if I simply let him drown, even if I'm a strong swimmer. Furthermore, the law does not require me to warn strangers of dangers. If I see a train coming and notice a blind man on the track, I'm not obligated to warn the man of the danger or pull him to safety.

Lately, there's been a trend in American Common Law to expand the understanding of who owes a duty of care to whom. Tort Law is becoming more compensation driven, more strongly deterrent, more generous to those who may be aggrieved. Psychologists now have a duty to warn potential victims of their mentally ill patients. Schools are responsible for protecting children from harm. The government is responsible to people they take into custody. There's also a trend in American Common Law to hold businesses responsible for crimes caused by third parties. Suppose you're out shopping and get robbed and beaten up in the parking lot of a major retail chain store like Wal-Mart. Even though your injuries were caused by a criminal and not by Wal-Mart, a court might hold Wal-Mart responsible if the store could have seen that a lack of security in the parking lot would make customers vulnerable to crime.

But modern Tort Law is not consistently compensation driven. Politics get in the way. It took many, many years for courts to find that cigarette manufacturers were responsible for cancer, death, and disability. Even though gun violence is a major problem in the United States, courts have not generally held gun manufacturers tortuously responsible for criminal and accidental gun injuries caused by other individuals (which is a good thing! Same for knife companies for stabbings. If a device is used incorrectly, or correctly but for an unintended criminal purpose, I would hope courts don't run these companies into the ground because of the actions of a separate hateful and harmful group).

The political climate of the United States is highly relevant to Tort Law. Lobbyists for physicians have had an impact on the creation of statutory caps on the amount of money that can be recovered in a medical malpractice action. Lobbyists for manufacturers have had an impact on the creation of caps on damage awards for pain and suffering and punishment. Product liability laws make it harder in some states for plaintiffs to prove a design defect. Whether the mix of pro-business, pro-victim tort rules and policies serve the public is a vital question, distinguishable from the question of whether they have good origins in politics and power.

Let me summarize and conclude. Americans believe that injuries caused by others deserve a just response. Tort Law is widely presumed to be a just response to the felt need for society to compensate, to deter, and to punish injury. Through its Tort Law, American society empowers individuals who are injured through intentional, negligent, and dangerous activities or the use of defective consumer products to file civil complaints through the courts. Such complaints may seek financial payments and other remedies from blameworthy private parties or state, local, and federal governments. With a good lawyer guiding them and a strong enough claim, an injured man, woman or child can secure a certain kind of justice, the satisfaction of the claim in a courtroom before a judge and jury or in a negotiated out-of-court settlement.

The Tort Law fault system is one of the means by which our rule of law respects freedom and security. We are free to engage in a wide, wide range of conduct subject only to the demand that we not hurt others intentionally or negligently. If we do, justice demands that we restore them to

their status quo ante, the position they were in before the injury we caused. We cannot bring back their vision or their ability to walk without a painful limp, but we pay them a sum of money that a judge and jury believes fairly compensates them and deters others from causing these injuries.

The fault system is motivated philosophically by the goals of compensation and deterrence. We want people to be made whole when they're hurt and someone else has been at fault; after all, it's only fair. But we also want there to be fewer instances of injury. We want a safer world. We want to create incentives for safety and restraint. And so we impose greater liability to increase the odds that people who are able to behave differently do indeed behave more reasonably.

The fault system is also motivated by the goal of punishment, though that is mainly the job of the criminal law. If people are very malicious and reckless, the civil courts may award money damages, called punitive damages, to punish and very strongly deter future wrongdoing by the defendants and others who don't want to suffer the same fate. Some activities are so dangerous, we assign liability to responsible parties not at fault. And because of dangers to consumers of defective products, we impose strict liability and modified versions of strict liability in negligence rulings assigning blame. The trend of holding third parties responsible for crimes and recognizing special relationships as the basis of duties to warn and rescue, reflects that compensating people for injury is increasingly seen as more important than freeing people from the burden of payment.

Finally, we have discovered that Tort Law is not a fully adequate response to the problem of injury. Some victims of injury are cared for through private, no-fault insurance managed by the state. Workers' compensation, managed by the state. Or special victims' funds, some managed by the state or federal governments. The Common Law of Torts is a mixture of old law and new law. From time to time, there are demands for tort reform. From time to time, there are tort reforms by statute. But the wisdom of common law and that of judges is the foundation of American Tort Law. This law is as relevant as ever. It's workable and welcome to evolve as we evolve.

And thus concludes our brief overview of Tort Law. Next up, Contract Law!

2 Contract Law

This 4 part overview of Contract Law is taught by Prof. Tess Wilkinson-Ryan of the University of Pennsylvania Law School, which was founded in 1790. She specializes in contract law and law & psychology.

2.1 Contract Law, Part I

Let's start with the definition of a contract. A contract is a promissory agreement, a set of promises, that people make to each other and that the law recognizes and enforces. Contract law is the law of exchange, the legal rules that enforce agreements trading one thing for another.

Now let's introduce two foundational facts of contracting that both motivate and explain many of the doctrines I'll discuss in this section. I'll call these facts mutual benefit and time.

First, voluntary exchanges make people better off. Second, lots of mutually beneficial exchanges take time.

Let's start with the idea of mutual benefit. Why do people engage in exchange at all? They trade because it makes them, to a person, better off. Take a simple example: imagine a world in which I have an oven but no wheat, and my neighbor has wheat, but no oven. Now imagine we contract for an exchange of oven time for wheat. We both like this deal, right? Because we both want to eat bread. My neighbor cannot turn inedible raw wheat into bread without a heat source. And though I have the tool to bake with, I can't make bread dough without wheat. This means that the exchange has value just by trading, we have both gotten something we wanted and didn't have before. If you're inclined to think in terms of utility, you can think of this deal as creating utility or value. It's not just redistributing goods, it's actually creating value where there was none.

This holds true for more common market exchanges: money for goods or services. When I agree to pay the cable company a monthly fee for Internet services, I might complain about the exorbitant rates and the terrible service. And I may not feel like I really profited, but in the end, I'd rather have internet and cable than the money that they're charging. So I part with the money and take the internet in return, making both me and the cable company better off than we were before the deal.

This fact of mutual benefit gives us some information about the subjects of contract law that we don't necessarily have about the subjects of other kinds of law. We might know that on average, people prefer laws against theft, or that generally speaking, societies function better when there are robust civil protections of property interests. But we don't know for certain that a particular claimant really preferred to be bound by the state's criminal code, or believed himself better off in a legal system that permitted his neighbor to sue for trespass. In contract law, though, we know that each of the parties prefers this particular legal obligation, and we know it because they specifically chose it. Of course, this is not to say that every party to a contract thinks the terms could not be improved; rather, only that the parties preferred this contract to the available alternatives, including no contract.

Now we come to the second foundation of contract law, which seems very simple on its face: time. Contracts can create mutual benefit, but unfortunately contracts cannot create time. Time, though, turns out to be an important motivating and complicating factor in the life of an exchange.

So, take for example, the wheat-for-oven-time exchange. Now, one way that exchange could go down, is that every time my neighbor wants to bake bread, he shows up at my house with his bag of wheat, and his bowl of bread dough. And if my oven is free, and I'm in need of wheat, I take

the wheat and put it away, and I put his dough in the oven for him. In fact, we don't even need a contract, much less a law of contract to make sure that this exchange happens. We don't need a state enforcement mechanism making us trade. We'll just trade because we both want to.

But now imagine for a moment that my neighbor is not going to have any wheat for me until after the next harvest, but need to use my oven in the meantime. He says, I promise to deliver the wheat to you next month, if you will let me use your oven this weekend. This is still an exchange, and it still makes us both better off, but now I, the oven owner, am worried.

If I let my neighbor use my oven now, how can I be sure he's going to deliver the wheat later, as promised? And this is where contract comes in. The contract is the legal mechanism to enforce my neighbor's promise and give me the assurances that I need to participate in this beneficial exchange. It permits me to rely on the deal. In this way, contract law facilitates the creation of mutually beneficial deals, especially if they require planning or multi-step performances. Thus, in order to protect a party's investments in their deals, contract law enforces each side's promises to one another.

So time can make exchanges better. The ability, for example, to plan to plant more wheat. But of course, time also makes exchanges worse, because it means that things can change. The world might change, with shifts in the market making the deal actually a losing proposition for one of the parties, or the parties' own preferences and goals might change such that they're no longer interested or benefited in the same way.

When those things happen, the law of contracts gives people essentially a revised cost-benefit analysis to do. They have to ask themselves whether it's worth it to go back on the deal, in a world in which they'll have to compensate the other party with something; typically, money. Breach of contract is really about what happens to a deal over time. We're typically not talking about people who have lied about their intentions to participate in a deal, but rather about people who have changed their mind for one reason or another in time.

What I've said about benefit and time, these concepts are really universal. They explain why humans have promissory exchange mechanisms like contracts. So now let's say what is distinctive about the evolution and role of American contract law at a very broad level, and then I'll show you how this plays out in particular doctrines. American contract law enforces the right of autonomous agents, that would be us, to bind our future selves. In the common law tradition, the will of the party in question is central. Common law courts are very liberal about letting people choose to bind themselves to whatever deals they want, while also protecting them from contractual liability they haven't explicitly undertaken.

The second theme of American contract law is the notion that the role of contracts in our society is as an economic tool. The Subject of Contract is economic exchanges. This might seem obvious, given what I have said about beneficial trades. But we'll see how narrowing the analytical framework of contract, from the promissory obligation broadly speaking, to one of economic exchange more narrowly, has serious doctrinal implications. So we have both an underlying principle of autonomy and freedom of contract, but with legal enforcement essentially confined to the commercial domain.

2.2 Contract Law, Part II

From here on, I'll structure this section on contract law by tracing how contract law approaches each stage in the life and death of a deal, which I'll do with references to examples of five seminal cases in contracts. I'll start with how we know when we have a contract (agreement), move on to how we know what's in the contract (interpretation), identify which promises the law cares about

and which it does not (which promises?), and then discuss what legal enforcement of a contract looks like (breach and liability).

We start at the beginning, in the basic case of a bilateral contract where we have two parties, each of whom want something from the other. In the traditional view, what was required for contracts was a meeting of the minds (agreement). So, this is a fairly straightforward case, right? Let's say Joe has a leaky pipe in his kitchen, and he calls a plumber. The plumber comes out and promises to fix it in return for a $100. Joe and the plumber look one another in the eye and shake hands; their minds have met. At a single instant in time, they both agreed and understood each other to agree to the deal.

In fact, this meeting of the minds happens even if the parties' agreements are staggered in time. So let's imagine for a minute that Joe solicits bids for his plumbing work via some online service. Our plumber at hand emails Joe at 9 AM and says, I'll do it for $100, let me know. The plumber then waits by his computer, ready and willing to get to work. Joe checks his email at 9:30 AM, sees the offer, and replies that it's a deal.

Their minds have still met there. At 9:30 AM, the plumber was ready to go, and Joe knew he was ready to go, because the plumber had made the offer and hadn't taken it back. So, when Joe agreed & replied, there was a meeting of the minds (and mutual assent, with an offer and acceptance).

In fact, though, although it's nice when it happens, a meeting of the minds is not always actually necessary for agreement to take place. Now let's make things a bit more complicated, which we will do in the traditional way – namely, by getting everybody drunk.

In Lucy v. Zehmer, in a rural Virginia tavern in 1952, A.H. Zehmer wrote a particular contract to sell his farm to an acquaintance, W.O. Lucy, for $50,000. When Lucy tried to enforce the contract, Zehmer responded that when he wrote the deal up, he was high as a Georgia pine, and that in fact, they were just a bunch of two doggone drunks bluffing to see who could talk the biggest and say the most (actual quote, I believe). Well, what now?

Assume that Zimmer is telling the truth, that he was essentially just kidding the whole time that he wrote that contract up. If that's the case, then there really is no real meeting of the minds because when Lucy assented Zimmer did not. He was thinking to himself, no contract, so if we're serious about contract as a voluntary obligation only, then you might say: look, you can't hold Zimmer to this contract that he didn't really want to be a part of. And that's essentially what Zimmer argued in court.

But here's the problem. No one forced Zimmer to write and sign this contract to tell Lucy that he was ready to sell the farm. Zimmer has voluntarily assumed the obligations of this deal in so far as he has done the things that a person does to indicate that they agree to something.

The court says, mutual assent is of course essential to a valid contract, but the law imputes to a person an intention corresponding to the reasonable interpretation of his words and acts. Which is to say, as long as Zimmer's communication (that is, him writing and signing that deal) is reasonably interpreted as assent, then it it is indeed assent. People are bound by the normal rules of human discourse, and so promising and then saying you don't mean it is not a way of getting around voluntariness. In American contract law, this threshold question in whether or not the parties consented to be legally bound is determinative. If you don't have it, you don't have an action in contract.

You can imagine situations, I'm sure, where this seems unfair. Two parties are negotiating for a long time, spending lots of money on research and legal fees, trying to work out a deal that they both seem to want, and then one party quits negotiating altogether with no obvious reason. In many

civil law jurisdictions, we might actually see recovery of damages based on the idea that one of the parties is at fault for the failure to contract, which means even in pre-contractual negotiations, the parties owe each other some kind of duty. But not in the US, holding aside very rare recovery and promissory estoppel (recovery where consideration, the exchange, does not happen but reliance on a promise caused pre-contractual action to the detriment of one party) cases. Here, even reasonably relying on the prospect of a deal does not create an action in contract law. In American law, the availability of remedies in contract is essentially switched on by the manifestations of assent, and turned off before then.

Usually, in normal conversations, we talk about agreeing to something. We don't particularly give much thought about agreeing to agree. In fact, though, contract doctrine essentially deals with form and substance separately. That is, we ask if there's an agreement first and then we ask what there was an agreement to. So, there's a question of whether or not the parties manifested intent to be legally bound to an agreement (assent), and then there's a separate set of doctrines that are about the content of the deal. And we talk about these doctrines as questions of contract interpretation. Interpretations are kind of a big deal because we can't know breach and damages without it. If we know that Jack and Jill have agreed to a joint irrigation venture, we can't hold Jack liable for failure to perform until we know exactly what he agreed to.

In American contract law, there are very little background principles about what the content of a contract should be; rather, the court is primarily in the business of enforcing the will of the parties. Interpretation tells us whether or not the parties have made a deal, whether they have breached the deal, and what the liability for breach should be.

So, I'm going to make a somewhat unusual claim in that many of the doctrines in this area are actually very easy. Rules about, for example, when to permit outside evidence to help interpret a contract, when a court should supply terms that are missing from a contract, or how a court should fix mistakes. The various contract doctrines that deal with these issues all boil down to the court's attempt to create a reasonable reconstruction of what the parties actually meant to do, and if that's not possible, then what the parties would have done, had they thought about it.

The tough cases are going to be where the parties appear to each have had different views of what the contract meant. That is, they were agreeing to two different deals. Thus, if a court cares about enforcing voluntary obligations and voluntary obligations only, this puts the court in difficult position. Let's compare two cases.

In Case 1 (Raffes v. Wichelhaus), we have a contract for the sale of cotton being delivered onboard a ship named Peerless. Only, surprise, the Peerless indeed does have a peer, and it is also named Peerless. So, what does the court do? The court says, if there's no way to determine which Peerless ship was preferred, and which ship the cotton is on does matter, then there's actually no contract. The parties agreed to two different things (with the specific Peerless ship being the question), which means that they didn't actually assent to a single deal.

Notice here that the court ultimately decides to under-enforce. So, this is a case in which nobody is going to get the benefit of the bargain he thought he was making. Rather than let one party be subjected to a contract he didn't agree to, and had to reason to think he was agreeing to, the court chooses not to enforce at all. 300 years later, we see the same argument come up when two parties realized that they had different things in mind when they made their contract for the sale of chicken.

In Frigaliment Importing Co. v. BNS International, the seller of chicken thought that they just meant chicken, any chicken. The buyer, however, thought that that they meant young chicken, like fryers or boilers, rather than stewing hens. The court here ruled that if you want to use a word in

a particular way that wouldn't be obvious to your counterparty, the onus is on you to make that clear. This isn't like Peerless; in this case, the court ruled to hold the buyer liable for a contract he didn't agree to, but had reason to know, that he was agreeing to whatever kind of chicken came his way.

One of the functions of contract law, as I said earlier, is to permit parties to rely on the deal over time in order to protect a party, who's made himself vulnerable, by trusting that the deal will happen. We see this concept of trust come up in the context of assent and interpretation too. In order to make deals with one another, we need to be able to use a common language, and each party needs to be able to trust that the other is using language in a normal way. In this way, the court can now be a bit more expansive about holding the parties liable, given that they had clearly manifested an intent to be legally bound but botched it badly enough such that now the court is forced to get involved.

2.3 Contract Law, Part III

By now, we've talked about how parties make deals, and how to figure out what's in those deals. Here, we're going to narrow the field a bit and think about which promises are actually the subject of contract law.

The realm of voluntary obligations is actually pretty enormous. Most of us have lots of voluntarily assumed obligations (e.g. I'll call you in 10min, when maybe it's a bit later) that we don't think are legally enforceable and we don't think should be legally enforceable. What this means is that the set of promissory obligations is a lot bigger than that of legally enforceable contracts.

In fact, for hundreds of years, common law courts have refused to enforce certain kinds of informally made deals, largely because they've been worried about fraud; thus, the resulting doctrine of the courts is called the statute of frauds. It requires that a written document be created in transfers of land and in sales of goods over a threshold dollar amount. In these cases, the court uses this doctrine to force parties to prove their seriousness; that is, we're not going to enforce your agreement to sell a house, if you didn't get it in writing.

What's frustrating about this doctrine to students and scholars is that it draws a very clear line. Even when we have great evidence that the parties made a real oral contract, these are cases in which we won't enforce for failure of a written document. Sometimes, this means that the rule might actually be a bad fit for it's stated purpose, but the purpose itself, which is weeding out contracts that weren't actually made, is pretty uncontroversial.

Okay. So the court wants to avoid enforcing fake promises. Let's now talk about social promises. Almost nowhere will courts be willing to get involved with social exchanges. There are costs to involving the state in private disputes, not just monetarily, but also arguably to the social fabric.

So let's say for a minute that I'm going to a gathering at my sister's house and I write her a note that morning promising that I will be over early enough to help her make dinner, but I don't make it in time. Let me assure you that contract law has zero interest in this promise, no matter how formally I write that note. Maybe my sister will levy some informal interpersonal sanctions, but I certainly cannot be taken to small claims court if I wander in after the other guests have arrived and find a frozen pizza thawing on the counter. Whatever you might say about my inconsiderate behavior, I surely didn't intend to be legally bound here. To reiterate, contract law does not enforce this kind of purely social promise.

This brings us to the most controversial constraint on contract enforcement. American contract law explicitly limits its jurisdiction to bargained-for exchanges, which is called the doctrine of

consideration (i.e. what are the considerations, or motivations, for each party?). One way to understand this by relating this concept back to Part I, where we said that each party to a contract is made better off by that contract. In a promise to give a gift, we have a recipient who is surely better off, but a gift giver who gets nothing; who, by some measure, is now worse off. That promise to give a gift is unenforceable under the doctrine of consideration.

Of course, thinking about this in terms of who's better off and who's worse off, obviously doesn't give us the answer, because it sure seems like if I choose to give money away, it's because there's some measure of utility by which I'm better off with less money. I may feel better, like there's a warm glow in my heart.

So a better way to think about what's going on here is that there's a line between promises we want people to be able to take back and those we want the law to get involved in. And one way to draw that line is to say, well, what interest does the political system have in enforcing contracts? Is it to make people behave morally? Is it to regulate interpersonal relationships? Not particularly. It is really all about commerce, about economic relationships, and one way to identify those contracts is by looking for true exchanges. We want to enforce deals in which each party is in the contract for what they're getting out of it. What this means is that we enforce exchanges in bargains, and notably, we don't enforce gifts. Most of the time, it's very easy to find consideration. If I promised to sell my car to my neighbor for $10,000, we know that I'm giving up my car because I want what the neighbor is offering. And that my neighbor is giving up the money, because what she wants is a car. But some times, things get messier. So let's take the famous 1891 case of Hamer v. Sidway.

In this case, an uncle was worried about his wayward adolescent nephew. Wishing to bring his nephew into line, the uncle declared that if the nephew would abstain from drinking, smoking, and gambling until he reached age 21, the uncle would reward him with $5,000. And lo and behold, the nephew stopped drinking, smoking, and gambling for the next six years.

Well, when the nephew brought the claim, the court had to figure out whether this were a true exchange, or if it were just a gift with strings attached. An exchange is enforceful, and a gift with strings attached is not. There's an argument here about whether the uncle really gets anything out of this deal, or whether the nephew really gives anything up. After all, surely the nephew is better off after six years of sobriety, even with out the money. But the court says no, this is not what matters.

What matters, is, literally, the considerations. What motivated these parties? If their ascent is induced by the promise of the other party's performance, that's enough. We might think that the uncle doesn't get much out of his nephew's good behavior. But as long as he's paying money in order to get his nephew to perform, to abstain from drinking, smoking, and gambling, we're okay.

What's troubling I think is that the bargained-for exchange in Hamer v. Sidway sure doesn't feel like it's central to American economic life. On the other hand, things like promises of a bonus for work that the employee has already promised to do, this kind of promise sure feels like a valuable economic tool that is going to run into consideration trouble.

So take the following: a firm has employed someone who's near retirement age. The boss sends the employee a letter thanking her for her years of service and promising to pay her a bonus on retirement by way of recognition for her contribution to the firm. No strings attached. The boss writes that this letter is legal proof of the company's agreement to pay you a retirement bonus, and not only is it signed, it's even notarized. So we have ample proof that the boss wanted this to be a legally enforceable agreement. The employee's very happy, and she stays in her job looking forward in sort of a non-specific way to having a slightly more luxurious retirement.

So let's do the first check: assent. Did the boss agree to this deal? Yes. Did the employee?

Certainly. Can we be sure that the boss intended it to be legally bound? Absolutely. So can the employee take this letter to court to enforce the contract? No. This contract is a promise, but it's not an exchange. And contract law is about bargains. The doctrine of consideration is unique to the common law, and it is key to understanding it.

2.4 Contract Law, Part IV

Most contract law courses at US law schools actually begin the semester at the end of the contract, with damages for breach of contract. Although this usually strikes students as unnecessarily confusing at first, there are good reasons for it; namely, that finding the appropriate remedies for breach of contract, one must also understand the distinctive properties of contract. In other words, they work backwards to ascertain the reasonings for breach remedies, and by doing so, encapsulate what we've just discussed.

In order to hold parties liable, we need to know that they assented, and to what they assented. That's how we make sure we're holding people to the right contract. And only by knowing what the deal was, do we know how to compensate for the deal's failure.

So, let's start with an example to help illustrate one of the central rules of American contract law, which is the rule of expectation damages. This is the case of Hawkins v. McGee. George Hawkins, as a child, got an electrical burn on his right hand, resulting in a scar that was noticeable enough to trouble him and his parents. Their family doctor, Edward McGee, noticed the scar while treating George's younger brother for pneumonia, and evidently got very excited, because while in Europe during the first World War, he had seen successful skin grafts, and thought George was a perfect test case. So, for a few years, he would periodically offer to the Hawkins family that he could fix George's hand by graphing skin from George's chest, onto his hand, thereby creating a 100% perfect hand. Well, to give you a sense of how things turned out, the case is colloquially known as the Hairy Hand case. So, whether because it was a bad idea at the outset, or because the doctor couldn't execute the surgery skillfully, George Hawkins wound up with a disfigured and disabled right hand.

Okay, so we have a contract. George Hawkins promised to pay money, and Dr. McGee promised him a perfect hand. Then we have a breach of contract. George Hawkins paid the money, but Dr. McGee gave him a deformed hand. So, how do we compensate George Hawkins? Well, Dr. McGee argues that he should be made to give George's money back, and compensate him for any harm done.

Let's pause for a minute, and change the hypothetical. Let's say for a minute, that George was going over to Dr. McGee's house for dinner, and the doctor accidentally slammed George's hand in the door, causing George significant pain and disfigurement. Well, now Dr. McGee has to compensate George for sure, right? With the goal being to put George back in the position he was before the doctor injured him.

Okay, so what's different about these two cases? What's different is the relevant counterfactual. A counterfactual is just the state of the world that we're comparing the current situation to. The counterfactual in the hand in the door case, is that George's hand doesn't get slammed. The counterfactual in the surgery case, is instead that the surgery doesn't fail, and George gets a brand new hand.

What Dr. McGee wanted was to pay George the difference between the hand he ended up with, something horrifying, and the hand he had before, something uncomfortable. But Dr. McGee voluntarily entered into a contract to give George a perfect hand. So, the court says, what we want

to do here is to put George in the position he would have been in if the contract had been performed, which means paying him the difference between his current horrifying hand, and a perfect hand, and that's going to be a much bigger number than what Dr. McGee had wanted to pay.

In contract, the remedy of expectation damages is the default remedy. And it puts the non-breaching party, like George, in the position he would have been in, had the contract been performed. What surprises many students of contract, though, is not necessarily the measurement of damages, but rather the decided preference for damages over specific performance. Specific performance means making the parties do what they said they were going to do.

With the exception of real property transfers, as in land sales, American contract doctrine severely restricts the ability of the parties to actually get the thing they wanted from the deal. So, on the one hand, American courts are very focused on getting the number right, making sure that the damages award reflects exactly the amount of commitment that the parties actually intended. But on the other, the courts don't hold parties to their actual promises; perhaps underscoring again, that what we're doing here is enforcing economic exchange, namely, where it's reasonable to think that the benefit can be easily expressed in dollars, rather than enforcing such economic promises. Indeed, in American courts, the idea that expectation damages provide the right incentives to the parties has been highly influential. The notion that some breaches are actually efficient, that they leave the breacher better off than he was in the contract, and the non-breaching party no worse off, has influenced the normative attitude of courts toward breach, toward a view that breaching and paying expectation damages is essentially a morally neutral choice.

This is in keeping with the trajectory of American contract law, beginning with the Industrial Revolution, with the realization of the courts that executory contracts, contracts for stuff you're going to do later, are economic tools, financial instruments. This insight leads us to a modern challenge in which this financial tool increasingly mediates the relationships between consumers and firms.

Building off that, perhaps the most important modern challenge to contract doctrine is the phenomenon of unread fine print. In the United States, there are many contracts that are not the object of the common law of contract. Insurance contracts are regulated separately. Employment contracts are part of labor law. Securities contracts are regulated by Article 9 of the Uniform Commercial Code. But other countries have taken a different, or at least additional approach to taxonomizing contracts, based not so much on what the contract is, but rather on who the parties are. Further still, some other countries have included form contracts as a separately regulated area of contract law.

So, let's just step back a minute. As a general matter, we can think about contracts as belonging to three categories. The first category is contracts between individuals. For example, the deal that I make with someone who is selling a used car on Craigslist, or the agreement between Dr. McGee and George Hawkins, or the sale of a house from one homeowner to another, or an uncle's promise to pay his nephew not to be a wastrel. These deals are some of the easiest ones to fit into a contract paradigm, because we have actual people who negotiate and draft an agreement. And since these are humans like us, we know what it means when we talk about their motivations and their intentions.

The problem is that these are the deals for which contract doctrine is arguably the least relevant, largely because these are the deals least likely to be resolved by the courts. First, these deals are just too few; unless you're Warren Buffet, it's unlikely that you're drafting that many contracts. Second, the financial stakes in these contracts are usually quite low, meaning that the cost of bringing an action is often going to swamp the expected value of the resulting litigation. Third, the social and

psychological stakes of deals between individuals can often be quite high, such that parties often prefer to figure things out informally in a way that's the least destructive to their relationships or to their standings in the community.

Some scholars would argue that American contract law really isn't made for these cases, anyhow. What it's really about is commercial deals. And indeed, this should resonate with the description of the development of modern contract law in the context of the Industrial Revolution that we talked about. When we have two commercial actors, whether it's a farmer and a bodega, or Apple and Google making a deal, we have a nice robust role for contract doctrine. Additionally, we're going to be talking about parties who are represented by counsel, meaning that they are going to know what the rules are. These deals are frequently big enough that the prospect of legal enforcement has real effects on how the parties draft and then perform their deals.

Now it's true that it gets a little bit trickier to talk about stuff like a meeting of the minds when the actors are entities rather than humans. But there are always humans involved, of course, so it's really just a matter of locating where the relevant humans are. And also we can rely on doctrines like objective assent to make it clearer and easier to understand what it means to agree.

The third category of contract, which is the category that most of us have the most experience with, is between individuals and firms. In other words, the form contracts that you have with AT&T and Comcast, and iTunes, Facebook, Vanguard, Chase, and Visa, et cetera. These are take-it-or-leave-it deals between consumers and companies. And by a simple head count, these account for the vast majority of contracts active at any given moment.

But these contracts pose real challenges for contract doctrine, and the consequences of how we deal with these challenges are increasingly serious as consumer contracts are increasingly central to how individuals participate in American economic life. The normal ways that we talk about negotiation, promise, and assent – they only fit uneasily in a form contracts context, where most everyone acknowledges that only the drafting party, the company, knows what's in the terms, largely because most consumers don't read them.

Other jurisdictions, including civil law countries as well as the UK, have taken legislative action to constrain the content of form contracts. But American courts and legislatures tend to view substantive restrictions on contract terms as sort of overly paternalistic, preferring to let the market weed out unfavorable or unfair terms.

As we watch this area unfold over time, we'll see both how the norms and patterns of everyday commercial interactions push contract law to adapt and also how increasing contractualization affects the American economic and social discourse.

3 Property Law

This 4 part overview of Property Law is taught by Prof. Shyam Balganesh, who researches and writes in the areas of property and intellectual property law.

3.1 Property Law, Part I

This section covers two topics: property law as a general matter, and then follows up with what is distinctive about American property law. So let's start with the first topic. What is property law?

Property law represents the legal rules governing human interactions as these interactions relate to various identifiable things. This is rather straightforward but fairly abstract definition, and it involves three separate but related components.

So what are the three components of this definition? First, property law is about human interactions. So to put it very simply, it is about the dealings, the rights, the duties, the privileges, and the immunities that people have because of each other and their interactions. It is not, however, about the relationships that humans have to external or outside objects. This is a common misnomer, at least as it pertains to the American common law system of property.

So that's the first aspect that the definition captures. The second element of this definition is that the interaction, the human interaction, must relate to a thing. This is perhaps the most important component of the definition. Now, the nature of this thing can, of course, vary. The most ordinary and basic form entails that the thing in question is mediating the human interaction, or the relationship. What does this mean? Here's an example.

Let's say you're walking through a public parking lot filled with cars of various kinds. Now, while you don't ever know the exact identity of the owners of each car, you know that they are indeed owned by distinct individuals. Thus, by dealing with the parked cars, say by kicking, colliding, or by trying to pry open a door, legally speaking, you are also dealing indirectly with each owner, even though you don't know their actual identity. In this way, in dealing with each individual owner, you are doing so through the thing in question, namely the car. That's what we mean when we say that the thing is mediating your relationship indirectly to the owner of the object in question.

Now, the mediation need not be the only form in which the relating can take place. The thing can also be the subject of a transaction. For example, a sale. Here, the transaction to buy and sell a car is a contractual agreement, but the subject of that transaction involves a thing, namely the car. When this happens, property law now begins to interface with contract law. And what we begin to see, is that ideas, devices, and concepts from both areas begin to intermingle. A very good example is the law of leases. Now, a lease is a contract, but it is imbued with ideas from property law for the simple, undeniable reality that it always relates to a land, building, or other object. Regardless of what the thing is, it forms the subject of the interaction in question.

Let's move to the third component of the definition. Namely, that the thing in question can be of various kinds. It can be immovable, it can be movable, it can be intangible, or better still, it can be notional. So as long as we have some minimal level of identifiability, and identification is critical, that's all the law cares about. The precise level of such identifiability can, of course, vary.

Let's quickly talk about each of those variations. Immovable property involves land and other things permanently attached or affixed to the land. Movable property is just the opposite: it involves what we call in the law "chattel", or things that are not permanently attached to land in any way or form, and that can be freely moved. Intangible property is a separate category, and this would cover things that are more ephemeral in nature. Like information, expression, or brand

names for example. So these are the three principal categories, immovable, movable, and intangible. However, property law, especially American property law, recognizes another category, which we can call notional property. Notional property in American property law is a reference to the idea that sometimes legal roles themselves create fictional assets, or fictional objects, within a particular context, and attach consequences to it. So, in other words, the legal rules themselves mimic the workings of an ordinary tangible object.

Here's a very good example: the right of sepulcher, which is the right of next of kin to have control over the disposition or the way in which something is treated, namely a dead human body. Now, since this right is said to originate in the mystery and sorrow of death, the law hesitates to characterize the dead human body as a usual, movable, tangible property. Thus, legal rules create a property regime functionally over the human body without ever explicitly describing the human body as a form of property.

So this is the third component of the definition, namely that the thing can be of various kinds but nonetheless, going back to the second component, there must be a thing, and going back to the first component, the thing must form the basis of the human interaction.

In reality, about 75% of property law interfaces with the area of tort law, the law of civil liability, that provides for certain kinds of civil causes of action in relation to the object. And another 25% of what we call property law interfaces with contract law, or the law of consensual agreements, relating to these objects in question. But the object is the key focal point for what defines property law. So in other words, what makes the subject of property law distinct from these other areas, despite this tremendous overlap, is its continuous emphasis on the thing in question at all times, which, in other words, simply put, injects nuances into those other areas.

We saw how this works with the law of leases, which combines the law of contracts and the law of property. Let us give another example. Consider the tort of trespass upon land, the civil claim that allows an owner of land or other immovable property, to commence an action against anyone who intentionally enters upon his or her land without prior authorization. So, there must be an intentional entering upon the land without prior authorization, and this is the civil action of trespass upon land. We've all come across the word trespass, it normally relates to this civil action. However, unlike a vast, vast majority of other types of torts, the law of trespass upon land doesn't care one bit whatsoever about the plaintiff, that is, the, the land owner, or the owner of the immovable property, showing that he or she sustained any actual harm from the invasion. So, a simple 30 second boundary crossing is enough to trigger the action. Just cross over the fence with your foot and technically there is an action. Also, the law doesn't care at all whether the trespasser, that is the person crossing onto the land, did so maliciously or mistakenly. As long as the act was intentional, in the sense of being volitional, where the actor knows the physical consequences, not necessarily the legal consequences of the action, the action of trespass upon land can be brought. So, the law doesn't care about actual tangible harm, nor does it care about the state of mind of the person actually crossing on to the land.

Why is this so, you might ask? Here's a little bit of history which explains this anomaly, so to speak. The action of trespass upon land emerged historically as the principle or primary way by which owners could have the boundaries of their property determined authoritatively. So in other words, to figure out what the actual contours of one's land were was in many ways dependent on bringing the action of trespass upon land. The action came to perform a function known in the law as the vindication of ownership, where the dispute forms the basis for determining the boundaries of the property owners' land or the boundaries of the ownership, so to speak. And for this to work, and for it to work effectively, tort law's otherwise extensive emphasis on fault, or the state of mind

of the actor, and the harm, tangible or actual, suffered by the owner, had to be thrown out, or jettisoned.

And so it's because trespass upon land relates to a thing, the land, that American property law, in trespass upon land actions, effectively got rid of both fault and harm as requirements for the cause of action. So despite its reliance then on tort law, the law of civil liability, and contract law, or the law of consensual agreements, for its formal structure, American property law has never once suffered from what we might describe as a coherence anxiety. It's always known what its fundamental precepts and underlying foundations were. And the reason for this is because of its analytical, or architectural, so to speak, connection to the thing. The thing in question as the lens through which to approach human interactions in various contexts and various ways has always, and at all times, seemed intuitive, simple and undisputed to property law.

3.2 Property Law, Part II

So now what is distinctive about American Property Law? To be sure, there are several distinctive features about American Property Law. But here I will focus on what I see as the three most distinctive characteristics of American Property Law. So, of course, you will see exceptions to these generalizations which I'm making in various specific areas. But I do believe that as a whole they represent the rule rather than the exception.

So these three distinctive features are:

1. American Property Law is principally common law in origin
2. American Property Law bears the imprint of legal realism
3. American Property Law is excessively pragmatic in structure and content

So, let's go to the first of these, which is that American Property Law is principally or primarily common law in origin. Much like its English counterpart, American Property Law is almost entirely the creation of courts. That's what common law in origin means. The law developed through the formulations of rules created within the context of individual disputes between parties, and these rules had the chance to develop incrementally over extended periods of time. In the process, they adapted to various changing various contexts, circumstances, and demands from society and around.

Now, to be sure, there are indeed areas where the legislature, either at the Federal-level or at the State-level, has stepped in to either codify, crystallize, supplement, or modify court-made property law or court-made common law of property. But for the most part, it remains true, that American Property Law is judge-made. So you may wonder, then, what is so American about this common law method of property if it exists in England as well?

The key lies in that, unlike in England, here in America, we do not have one common law. Instead we have multiple common laws, since common law in the United States is primarily state law. In other words, it's a creation of individual states, of which we have many. As a result, we have the Common Law of Property developing in each individual state over time. And through the individual decisions of state courts, we have a plural set of common laws, so to speak.

Now this multiplicity of Common Laws for Property certainly provides us with a common minimum denominator of law, and the variations are fairly minor across the states when viewed as a whole. Yet this multiplicity allows different common laws to experiment with different property rules and ideas before settling on one and choosing to remain with that one over time. And in the process, this provides other states with a menu, so to speak, of property rules whenever there exists a

variation. And this, believe it or not, was a central idea behind the American System of Federalism. Where states are, to paraphrase Judge Brandeis, seen as laboratories of experimentation in the law. And that's the reason we have different state common laws and different state common laws of property.

So let's, let's take an example: the Law of Adverse Possession, which is a fairly well-known common law of property doctrine. The Law of Adverse Possession is concerned principally with insuring the optimal use of land, and it works by seeking to reallocate land whenever it is encumbered or burdened by stale and old claims. So Adverse Possession, when this happens, requires a plaintiff, a person who is in possession of the land, what we would colloquially call a squatter, to show that his or her possession of the land was actual, exclusive, continuous, and additionally and perhaps most importantly, adverse or hostile to the true owner for the entire period of what we call a Statute of Limitations. So in other words, when a squatter can show that his or her possession of the land meets these different elements for a particular period, either 10 or 20 or 30 years, varying from state to state, the law says that squatter can go to court and upon showing these elements become the owner of the land. The land then gets transferred from the previous owner who wasn't in possession to the squatter or the adverse possessor, so to speak.

So Adverse Possession is, put very simply, a doctrine that redistributes land. Now the big debate in Adverse Possession Law has been, what exactly adverse or hostile means in the plaintiff possessor's state of mind. Does the plaintiff possessor have to occupy the land knowing that it wasn't his or hers, perhaps in actual bad faith? Or should he or she have merely mistakenly believed that it was indeed his or her land; in other words, good faith? Or should the subjective state of mind matter at all? Should we just deem it irrelevant?

Now, very importantly, each permutation correlates with what the Law of Adverse Possession chooses to emphasize as its principally stated purpose. Should it be incentivizing innocent but efficient use by the possessor? Or should we be deterring non-use by the original owner, who slept on his or her rights? Or should we be deterring intentional squatting, because that behavior is bad faith?

To be sure, different states developed different approaches. Maine, in what's called the Maine Rule, developed a rule that the plaintiff, or the adverse possessor, needed to show an intent to possess the land of another for it to satisfy the adverse or hostile element. Connecticut, meanwhile, in the Connecticut Rule, developed the idea around the same time that intent was altogether meaningless, and that the law should be focus on something else called the Absence of Permission. So as long as the adverse possessor, the plaintiff, didn't go and seek permission from the true owner, that's all that was necessary to satisfy the adverse element.

Now to date, there remains a plurality of views on the question, with the Connecticut approach being the most dominant one today. This plurality of views can, of course, be seen as confusing at first blush, but on further reflection, you'll see that it allows different values and ideals to be debated during the conversation about the law, and perhaps more importantly, for an actual empirical examination of the effects of different rules to be seen before selecting one. This, in turn, allows change in the law, in American Property Law, to have a credible basis in courts, as one state borrows from the experience and learnings of courts in another state. And through this process, American Property Law becomes richer and more dynamic in nature and content. In fact, the State of Maine has now itself come to abandon what we called the Maine rule.

So in summary, this is the first distinctive characteristic of American Property Law, that it is principally and primarily common law in origin. And when we say common law in origin, it's not just a structural question, but by it's nature, the common law method has certain values and virtues

because of the way in which it works in the United States. It allows for a plurality of American Property Laws with, of course, a minimum common denominator, but also for extensive variation and experimentation on the margins whenever necessary.

3.3 Property Law, Part III

Let's move on to the second distinctive characteristic of American property law, which is the reality that American property doctrine bears the indelible imprint of legal realism. Now, Legal Realism is perhaps the single most uniquely American legal innovation. Simply put, it refers to a broad movement that began to take shape in the first four decades of the 20th century across the United States, where scholars began arguing that legal rules, concepts, and tests were on their own, insufficient to decide actual cases.

The law and its rules internally were until then seen as largely autonomous and determinative in character. So if you had an actual dispute, the argument went, up until this point, apply the law and legal tests to it, and voila. You will get an actual answer to your dispute. Now this old approach was termed, rather appropriately and of course pejoratively, as mechanical jurisprudence. Legal realism challenged this and argued that judging and deciding individual cases involved more than just applying the law.

It involved, the legal realists argued, interpreting the law. Especially when the law wasn't clear, which occurred rather frequently on the margins. And perhaps more importantly, it also involved choosing among multiple laws and legal rules to determine which one applied. You had to actually choose, they said, since as any good lawyer would know, you can always find a rule to support your point of view. That's the essence of lawyering. So, legal realism argued, that in applying legal rules to an individual case, judges were making normative choices.

They were actually choosing, and that this was especially true in common law disputes. Why? Because each decision rule, or the rule being applied by a judge to decide that case, was also creating law for future decisions. And judges knew this. And so began the basis of legal realism, that judging in the common law was a craft, not just a science, where judges marshaled a wide variety of sources and ideas as human beings, and these sources and ideas were often unspoken in the actual decision. It is a forceful, and rather convincing, critique of mechanical jurisprudence, also known as a legal formalism.

The legal realist critique generated a very crucial inflection point in the development of American Property Doctrine. Instead of simply continuing to insist, as judges do in many other common law countries, that deciding cases was very simply applying the law, as settled in past decisions, to the present dispute, American courts themselves, when deciding property cases, internalized the learnings of legal realism and began introspecting a good deal during their actual opinion.

Deciding cases was more than just applying the law mechanistically; rather, the idea that interpreting the rule, choosing which rule to apply, and then interpreting the facts to then apply the rule to those facts all involved important choices. And these were choices among competing, normative values and ideals that the law could embrace, and that property law could choose to embrace.

These could be the ideals of economic efficiency, individual personal autonomy, distributive justice, corrective justice between the parties, or fairness. The critical part was that it was a choice. So legal realism, in other words, left an important impact on the very way in which property law cases were and are today actually reasoned by judges deciding them. In other words, the inflection resulted in the legal realist critique coming to be internalized by judges who are deciding cases and

in the process making property law for future cases.

Let's give a few examples, starting with the law of Landlord/Tenant Law or the Law of Residential Leases. As a historical matter, all leases as I mentioned before, including residential leases, were treated as property contracts. They were contracts, or consensual agreements, which related to a thing. And because they were contracts to begin with, courts interpreted them as like other contracts.

The presumptive idea behind applying contract law to these leases was the belief that there was some basic parity, or equality, in bargaining power between the parties. That's the basis of contract law, consent, and consensual agreements. The parties were equal, and they agreed to it. But, by the 1960's, this was understood to be untrue in the context of residential leases. In various parts of the country, there was a severe housing shortage, certainly in urban areas, which produced rather inhuman living conditions for many people in the country.

Yet, as a formal, structural matter, the law of leases continued to follow a model that remained premised on market freedom, the idea that you have two parties negotiating and agreeing on something through the principle of market freedom. So, landlords in this period grew to be extremely powerful, in terms of their market power. And so, they would have residential tenants sign leases which included clauses that said things like, premises are leased as-is, or they would introduce clauses that said that the landlord has no repair obligations. This was done in order to minimize the landlords' continuing responsibility during the actual residential lease. And all of this while charging the tenants high, very high at times, rates of rent. And the reason they did this, of course, as with any market situation, is because they knew they had significant power. So in other words, the demand for housing in the rental market was greater than the supply, and the landlords knew that they had the power and the ability to do leases this way, and courts deciding property cases came to recognize this. So began, in the 1950s and 1960s in the United States, what many have described as a revolution in the law of landlord/tenant in the area of, especially, of residential leases.

And to bring about this change, this revolution, courts had to grapple with the basic reality that contract law was historically made for conditions of simple market freedom, of equality and bargaining position; yet, in bringing about this change in each individual decision, what we see is courts and judges openly reasoning about the role of the law and legal roles in promoting certain social values.

And so in other words, the revolution, in the law of residential leases, will happen explicitly in the actual reasoning of individual property cases. A very good example, in fact, is an opinion by Judge Skelly Wright in a case known as Javins v. First National Bank, a decision of the DC Circuit Court of Appeals for the United States.

The facts of the case are relatively straightforward: a residential tenant had leased an apartment from a landlord, and after a few months, stopped paying rent all together. When a claim was brought by the landlord to force the tenant to pay rent, the tenant claimed that he hadn't paid because the landlord had refused to make repairs to the apartments. And the tenant said, he could prove that these failures amounted to about 1,500 violations of the local housing code.

So the tenant claimed, the apartment was basically unlivable. As a practical and as a legal matter he said, even though the contract, that is the lease, the residential lease, obligated him to pay rent regardless, the question for the court was: should the tenant be forced to par rent even when the residence is, for all intents and purposes, unlivable?

Judge Wright recognizes that he was dealing with, what we can show, a bulletproof contract. The landlord had used a good lawyer to draft a good contract, and the contract obligated the tenant to continue paying rent. He also recognized that the rules of contract law were premised on

the basic ideal of market freedom and party autonomy, and that the parties were equal in nature. As such, a simple doctrinal or formal approach would have unquestionably resulted in a decision for the landlord, if it were interpreted as a simple contract premised on market freedom. Yet, the court recognizes that there is a major housing crisis in the country, and to quote Judge Wright, it is overdue for courts to admit that these assumptions are no longer true with regard to all urban housing.

The court goes on to say further, our approach to the common law of landlord and tenants ought to be aided by principles derived from the consumer protection cases, recognizing that the tenant now needs protections like a consumer would. So the court then developed what is today known as the implied warranty of habitability. The implied warranty of habitability, or the I.W. H., obligates every residential landlord to warrant, or promise, that the premises are habitable or risk liability. So in other words, unstated in every residential lease, is a promise from the landlord that the premises are livable.

Further still, Judge Wright says, to make it clear that the court's motivation was, indeed, protecting the tenant because of a disparity in market power, it sought to entrench this warranty of habitability as a mandatory rule, rather than as a default rule which could be waived or contracted out of by the parties. So what the court says is, this implied promise is a rule that the parties cannot waive or get out of by a simple contract, because otherwise, the landlord, who has a disparate amount of market power, would simply say to the tenant, please waive the warranty in this residential lease, maybe for a little extra money. And then the tenant would be without this protection. To prevent against that, the court says the implied warranty of habitability is a mandatory rule that you cannot contract away.

So what is important to appreciate in this case is how instead of just interpreting the doctrine and applying it mechanically to the facts as what contract law demands, the opinion is extremely forthright and honest about the choices that are embedded within the doctrine and in choosing which doctrine it wanted to apply. It recognizes rather explicitly that the court is making a choice among competing values in order to do justice as it sees necessary.

Now, let's consider another case which is a good example of this phenomenon: the doctrine of trespass upon land. This is a case that comes from the Supreme Court of New Jersey, known as State versus Shack. And the facts were rather interesting. Here we have the owner of a large tract of farmland who employed hundreds of migrant workers on the land in each season in order to help with the actual harvest. All of these migrant workers lived on the land, and the landlord, the owner of these farmlands, provided them with food and shelter as part of their employment.

Now two individuals who worked for non-profit corporations, one providing health services, and the other legal advice, wanted to visit these migrant workers to discuss their rights with them, document the conditions that they were living in, and provide any help that they could. So they sought permission from the land owner to go on to the land and meet with the migrant workers.

And, he refused. Disobeying his instructions, they entered anyway upon his property to meet the migrant workers and indeed did meet with them. When the landowner heard about this, he was naturally upset. They had disobeyed his instructions. He was the owner of the land. And he commenced an action of intentional trespass on land against the two individuals.

The matter eventually reaches The Supreme Court of New Jersey, and this is what the court begins its analysis with: a statement that many regard as the starting point of a social value analysis in property law. The court says, rather importantly, that property rights serve human values, and they are recognized to that end and are limited by it. Inherently, property doctrine is infused with various social values, and the court must be sensitive to this reality.

So the New Jersey Supreme Court engages in a rather detailed discussion of the conditions of the migrant workers, especially in the state of New Jersey, and describes how, very importantly, the protection of their interests, while directly at stake as a factual matter in the case, finds no presence at all in the doctrinal posture of the case. Remember, this was a case brought by the landowner against the lawyer and the health worker, and the migrant workers weren't parties in the case. Their interest, however, was what was motivating the defendants.

The court says rather starkly that it sees no profit in trying to decide upon a conventional category and then forcing the present dispute into it. This was in response to an argument that the migrant workers were tenants and a formal category should be used, namely the Law of Tenants in order to decide the case. The court says, instead, that no trespass had occurred at all. Why? Because the court says there was no right to exclude to begin with.

The court concludes that the right to exclude, a central right that obviously the property owner has, was not absolute in this case. The court says, while the property owner has a right to exclude, it is not an absolute right, but instead, it is contextual and needs to be balanced against competing interests. In the end, then, the court concludes that there was no invasion, and that the claim had no merit. It finds for the defendants.

Both of these cases show that American property doctrine, not just its structure, but also its content, are influenced by an imprint of legal realism. Judges deciding individual property disputes, in marshalling different doctrines, recognize that they're making a choice. A choice among competing doctrines. A choice in interpreting the doctrines. And a choice among competing normative values that are hidden underneath the doctrines. They're explicit about the fact that they are making these choices in deciding the case, and in the process, formulating the law for future cases. Legal realism then, in short, is a characteristic feature of American property doctrine, and it is distinctive of American Property Law.

3.4 Property Law, Part IV

And this brings us to the third distinctive characteristic of American property law, that it is extremely pragmatic in structure and in content. By pragmatic, we're referring to the law's ability to fit itself into the needs and requirements of different circumstances and contexts. In other words, its adaptability as demanded by the facts of any given situation. And in this process of adapting itself, the law comes to embrace different normative ideals and values, adopting a genuine amount of value pluralism because it embraces different values over time and from different contexts from the practical necessities of different disputes.

So, American property law embraces a plurality of intellectual and normative ideals, no one of which characterizes or dominates the entire realm. Though of course, in each different area, different values tend to dominate. So, in a sense, then, the concept of pragmatism that I'm talking about here is a simple rendition of the idea that American property law is heavily practical and acutely aware internally of the needs of society at different points in time.

Judges developing property law to individual cases are, as a result, quite willing to change and adapt the law to fit their conceptions of what justice demands in any given case and what other values might demand in those cases. And at the same time, just as importantly, they are very willing to abandon formal categories, not just work with them, when those categories work as impediments to the realization of their conception of justice in an individual case.

So, pragmatism, as I describe it here, as an attribute of American property law, entails two different things, though they are connected. One, common sense, and two, pluralism. Let's look at

an example by considering a doctrine known as trespass to chattels in American law.

Trespass to chattels, and remember chattels mean movable property, is an action that allows the owner of a chattel, or movable property, to bring a claim against someone who interferes with that chattel. Now, unlike a connected tort, the tort of conversion, trespass to chattels doesn't involve the owner asking for the entire replacement value of the chattel in question, but rather, compensation for the harm sustained. Okay? This is important. The tort of conversion would be an action that the owner of a chattel brings, seeking full replacement value of the chattel. In a trespass to chattels action, the owner is seeking compensation for harm sustained.

Now, in most common law countries, a simple physical interference with the chattel is sufficient and enough to trigger the action. In these countries, just like it is with trespass upon land, where if you cross a boundary and step on another person's land, you invite liability, so too in these other countries, if you touch someone else's movable property without permission, you invite liability. So, for example, if you go to the National Gallery of Art in London, hypothetically, and without the curator's permission or without anybody's permission, you move one of the exhibits slightly. Let's say you think you have a better aesthetic sense of how they should be positioned. You could be sued for trespass to chattels under UK law. Well, not so under American property law.

Why? Because under American property law, for a trespass to chattels claim to even be brought, the plaintiff, namely the owner, needs to show either a dispossession, that he or she was dispossessed of the use of it, or alternatively, some actual physical harm to the chattel itself. Mere notional harms, like touching, are not enough under American law for a claim even of nominal damages of $1 or even a claim at all to be brought.

Here's the most striking example of this for you to understand and digest the implications. Let's say you park your car on a street overnight. You forget to lock it. You think it's a safe neighborhood, you don't lock the car, or you don't double-check. In the middle of the night, an individual who is, let's say, inebriated, is looking for a warm and comfortable place to spend the night before heading home the next day in the morning.

This individual walks by your car, looks inside, sees comfortable seats, and tries opening the door. And realizes, and is pleasantly surprised, that the door is unlocked. He finds that your back seat in the car is empty and as comfortable as it gets. It's as comfortable as his sofa bed at home, and therefore, that night, he decides to spend the night in the car, and sleeps in there, and leaves in the morning when the effects of whatever he was inebriated with wear off. The next day in the morning, you notice no signs at all of that person's entry into the car. You have no signs to see on the seat in the car at all, no smell, nothing.

But when you happen to look at a nearby building's CCTV camera, let's say, you see that person's actions. You see that that person got into your car and spent several hours in it. You're angry. You can even identify this person. However, American law says you are out of luck. Why? Well, you were not dispossessed because you were not using the car. It did not interfere with your enjoyment in any way. You'd just parked it there. And the chattel, the car, suffered no harm, no scratch, no smell, nothing at all. So, American law assumes that there are better ways of dealing with this than promoting litigation and recognizing an action to be brought. Instead of allowing an action for every tactile or touch-based interference and then hoping that people are sensible enough not to sue, the law says, let's just incorporate a basic idea of live and let live into the law.

So, instead of worrying that we have a law and that everyone who bumps into the other person's luggage in the New York subway might indeed bring an action and we have to filter it out later, let's just now ensure that these actions don't lie in the first place. If you want to ensure additional protection, say, because you really value your chattel or car, you, as the owner, ought to bear the

burden of additional protection via self help. Park it in a garage, buy a more expensive lock, or monitor it in better ways. Let's not live with the idea that you have an action and people will decide not bring them, the law says.

So, to digress for a moment, this position in American law has a very interesting origin. It actually dates back to a case in 1843 before the Supreme Court of Illinois, known as Johnson v. Weedman. And in this case, a rather bright, young 34-year-old lawyer for the defendant convinced the court, the Supreme Court, that a defendant's, or his client's, riding around on a plaintiff's horse for 15 miles without any visible damage to the horse was ok because there was no dispossession as the plaintiff had handed over the horse, and the horse seemed to enjoy it. He convinced the court that the defendant's riding around was not actionable. And that was the basis for today's law, trespass to chattels, that eventually now provides that in the absence of actual harm to the chattel, no action will lie. You can't even get nominal damages. You can't even get an injunction, the law says in some extreme positions.

This young lawyer, believe it or not, would go on to become the 16th president of the United States, Abraham Lincoln. So, he's responsible not just for the 13th Amendment, but also for the law of trespass to chattels. Pretty cool!

Let's now go to another example from the American law of licenses. It's another area where the law is deeply pragmatic and consciously abjures the rigid categories and reasoning of the traditional common law, which you see continuing in other common law countries. So, let's start with the basics. At its simplest, a license is a permission granted by the owner of property to someone to do something in relation to that property and resource without incurring any liability. In other words, it's a form of immunity granted by a property owner to some strangers, saying, I will not sue you when you do something in relation to my property.

The question that soon emerged was whether a license that is granted by a property owner to someone else could indeed be revoked, whether it was indeed revokable at any point in time, and what are the conditions under which it could be unilaterally revoked. So, could a property owner who grants a license to someone unilaterally change his or her mind after allowing someone onto the property? And should it make a difference at all if the person who had been granted this permission paid good money for the permission?

Now, this began to assume importance in relation to tickets that began emerging where members of the public paid money to go onto someone else's property to do something or to see something on that other person's property. So, the question more concretely that emerged was whether the owner of the premises could unilaterally throw someone he or she didn't like off the premises. And did it matter at all that that person had paid money for the ticket?

Now, to answer this question about whether the owner could unilaterally revoke the license, English common law drew up what can only be described as bizarre distinction between a mere license and a license coupled with a grant.

English common law said that if the license did no more than promise not to sue, if it simply said, I will not sue you and no more, it could be revoked at any time. But English common law said that if it also granted affirmative permission to do something, rather than simply said, saying, I will not sue you, it would operate as a grant of an interest in the land, and it then couldn't be revoked until that interest had ended.

And believe it or not, courts spent all their time and energy figuring out whether tickets were mere licenses or licenses coupled with a grant, and engaged in all sorts of convoluted logic to draw out this distinction. Some English courts said, for example, that when you get a ticket to watch a movie, you get a property interest, temporarily as it may be, in the movie theater until the movie

ends. Imaging the implications of that. Each time you buy a ticket to a movie, you get a temporary ownership stake in the premises itself such that you can't be thrown out.

American law, on the other hand, saw problems with this absurdity rather early on. So, we have this case in 1913 known as Marrone v. Washington Jockey Club, a decision of the United States Supreme Court. And in this case, the plaintiff had bought a ticket for money to see a horse race. The owners of the club didn't like the plaintiff personally. It turns out that in previous occasions, they'd accused him of doping and drugging horses to rig the races, so they were deeply suspicious of him and didn't want him on the premises. So, once he dropped his ticket into a box by the entrance, as he walked onto the premises, they accused him of not buying a ticket at all and had him ejected from the premises. They threw him out, unceremoniously out of the club.

He then sued the club, saying that their reasons were wrong and that he had indeed bought a ticket. And he claimed that his ticket granted him an irrevocable license for the duration of the race that he had come to witness. So, he said, when he bought this ticket for a race, he got a property interest in the land for the duration of the race, and until the race ended, he couldn't be thrown out. So, he claimed it granted him a property right in the race track for the race. The matter reached the U.S. Supreme Court, and in an opinion by the famous Justice Oliver Wendell Holmes, Jr., the court denied his argument. Justice Holmes saw the absurdity of the position that the ticket holder was trying to make, and also recognized what the implications would be if the law came to recognize every ticket holder to be a property owner with an irrevocable license.

The court, through Justice Holmes in a rather short but interestingly worded opinion, concluded that the ticket was not a conveyance of any grant or interest in the land. Why? Justice Holmes said, rather starkly, "because by common understanding, it did not purport to have that effect." That's the key. Common understanding. He then says that there would be obvious inconveniences if the ticket purchase were construed otherwise. So, common sense, coupled with the long term effects, were what was motivating him as his primary guide. In half-page opinion, in contrast to English decisions on the same question that span 15 or 20 pages, he concludes that the ticket did not grant its holder an irrevocable license, but was a mere license. Justice Homes, representative of American property law, says that common sense and the avoidance of inconveniences were his primary guide.

These two examples, one drawn from the law of trespass to chattels and the other from the law of licenses, together illustrate the proposition that we began with, namely that American property law is extremely pragmatic. In deciding individual property cases and in crafting law for the future, courts are driven by a commitment to common sense and the need to adapt the law to the circumstances of the case and the needs of society, even if that means abandoning formal categories in the pursuit of justice.

In conclusion, the three most distinctive characteristics of American property law were: the idea that American property law is primarily common law in origin, that American property doctrine bears the imprint of legal realism, and that American property law in both structure and content is extremely pragmatic.

In conclusion then, I would say, putting this all together, that American property law represents the best, the very best, of everything that is uniquely American about our legal system. Between its commitments to plural values, common sense, and realism, it is rich, textured, complex, and at the very same time, sensitive to changes in the socioeconomic sphere. It is an area of law, very importantly, where simply knowing what the law is is never enough. If you are a lawyer, student, scholar, or judge, understanding and appreciating what goes into it and how it works is perhaps as important, if not more important than knowing the exact black letter doctrine of law and of the

subject.

So, in closing, I would add that it is probably an area which places the most acute importance on the virtue of thinking like a lawyer, so much so that in my humble view, to graduate from law school without having ever taken property law would amount to intellectual malpractice, even if you are otherwise qualified and passed the bar.

4 Constitutional Law

This 4 part overview of Property Law is taught by Prof. Theodore Ruger, who teaches constitutional law and health law at the University of Pennsylvania Law School, which is just a few miles from where the constitution was framed over two centuries ago.

4.1 Constitutional Law, Part I

Welcome to this section on the US Constitution. We'll begin by asking some fundamental questions: what is the American Constitution in relation to American constitutional law, and what is its distinct place in the world?

Scholars and visitors to the US have long recognized the US Constitution as unique. Going back almost 200 years, Alexis de Tocqueville, on his visit to the United States, remarked specifically about America's unique constitutional culture, saying that the obligation to base decisions on the Constitution as opposed to the law itself was peculiar to the American judge. What he meant was that many other countries, of course, had common law regimes and statutes, but our written Constitution was something different entirely. Much later, in marking the Bicentennial of the US Constitution in 1989, Time Magazine released a special issue in which it called our Constitution "a gift to all nations", proclaiming proudly that 160 of the 170 nations then in existence had modeled their own constitutions upon ours.

Around the same time, Guido Calabresi, an influential judge and former dean of the Yale Law School, described the other countries in the world as our, quote, "constitutional offspring". And while it is true that the US Constitution is distinctive, what we'll see is that if other countries are our constitutional offspring, as Judge Calabresi has said, then they're offspring that have take very different paths in some key ways than the US constitutional development.

In this segment I'll explore four different major themes. First, I want to talk about the basic text of the Constitution and the long history of interpretation that has taken place in American legal culture, which itself is virtually unique in the world and forms a unique and distinctive aspect of American constitutionalism.

Second, I'll look at a few different kind of broad clusters of constitutional rights and structures. Our constitution divides the government twice, both vertically between the federal and state governments and then horizontally across the federal government itself into the three different branches: the legislature, the executive branch, and the judiciary. Unfortunately, there are some current debates that resound even today about the proper allocation of those different governmental structures.

Next, I'll turn to what many of us think about when we think about the constitution: namely the individual rights that we hold dear, and the government's and courts' struggles to mediate and strike the proper balance between things like freedom of religion, or the right to be free of race discrimination, or the right to bare arms, or the right to assemble as we choose. All of these form a core part of the American constitutional tradition. And although we don't have time in this segment to explore each one in great detail, I'll explore some general themes that I think cluster around the general area of independent individual rights protection in the American tradition.

Finally, I'll conclude by talking about the US Constitution's distinct influence in the world, and the manner in which many other countries that have recently adopted written constitutions based somewhat along the US model. They have chosen different paths and gone in different directions than the US has in ways that in turn shines a light on what's truly unique about the American

experience.

Now I'll turn to the first substantive section of this segment, which deals with the Constitution's basic text, history, and interpretation. The first most basic question we might think about, and it's one that people have been struggling with for the entire life of the US Constitution, is what is the US Constitution. Where is it? Where do we find it?

Now, at first glance, we might think that's a very simple answer. Of course, we have a written constitution. It has a text. And we might say, well, that's it, and that's all there is. As I'll assert in the next few minutes, I think that is dramatically wrong, both as a descriptive matter of the way the Constitution has been interpreted, and as a normative matter of how we ought to interpret it. But, let's talk about the text and the history a bit to start out with. The full text of the Constitution can fit inside of a little booklet.

As you'll see this is a slim document, and as I'll describe in detail in a few minutes, this is the world's shortest constitution. And the brevity of our constitution itself is so important, because it creates a kind of interpretative imperative. These words in this little document are often vague and unspecified, and they don't interpret themselves. And much of what the American constitution tradition has been over the past many centuries has been an effort to translate and give content to these very sparse and undefined words. So we might say, where is the Constitution? Is it in the text? I would say, yes it is. But it's not fully embodied there. Where else might we look, then?

We do need to think about the text, because the text is one thing that endures. But as we look at the history of constitutional development in the United States, we see the role of time. And here I mean the several centuries that this constitutional text has been with us, which is important, and is foundation in how we think about the document. The document stays with us, but we as a people change over time. And that inflects and affects the way we interpret the document. And we can see real life examples in the Supreme Court of the way the court itself changes in its own interaction with the document.

We also have a crucial role in American history in the institutions that shape and contest constitutional meaning. When we talk about those institutions, obviously the primary institution we talk about is the United States Supreme Court, a group of, these days, nine unelected judges who sit in Washington D.C. Originally, for much of the nation's history, the court had fewer than nine justices, but when we talk about constitutional meaning, we need to look beyond the court and think about all of the other institutions in our civic society that participate in interpretation. Legislatures, indeed in the early days, it was primarily legislatures, and non-judicial actors that participated in constitutional interpretation. The executive branch, certainly at the federal level, as well as the state level, is a focal point where the vast majority of decisions about constitutional rules are made, much more so than the very few cases that reach to the Supreme Court. And then, much more broadly, and in ways that constitutional scholarship has started to take account of within the last decade or two, these words at the top come right from the constitution itself, We the People, the American people, in all of our kind of diverse and often contested debates over constitutional meaning – we play a leading role in interpreting the Constitution and in updating its meaning through the generations over the past two centuries.

Let me say a bit more about the text and history by returning to where these all started, in the old city of Philadelphia here in a building called Independence Hall. It's important to note that the framers of this country, and of the Constitution, met here twice, separated by more than a decade. They met in 1776 while still part of the British Empire to frame a document that's central to our political tradition called the Declaration of Independence, declaring that this nation would form free of Britain and and chart a course as a new nation. And we celebrate that day, July 4th, 1776.

One day we don't celebrate is July 12th, 1776. Because after the Declaration of Independence, which we all remember, the framers drafted a constitution for this new nation. It was called the Articles of Confederation. And the draft was issued and initially approved by a vote on July 12th, 1776.

Now today, that is not a date we celebrate in United States history, because the original constitution was in many ways a failure. And so the framers had to come back again in 1787 to essentially do version 2.0 of the constitution. And this is important for the way we think about the constitution, because our constitution that endures with us today, was in fact born out of a failed experiment in constitutionalism called the Articles of Confederation.

What was wrong with the articles? They created a government that was too weak. There was no central executive, there was insufficient power to tax, and at the national level, there was insufficient ability to reign in the self-interested and counterproductive behaviors of state governments that would do things like enact their own internal tariffs, engage in their own foreign policy, and things of that sort. Simply put, the Articles of Confederation was no way to run a serious nation-state.

And so when the framers gathered in 1787, they were trying to do two things, which were in tension then and remain in tension today, sparking some of our greatest constitutional debates. They were trying to structure a government that was both restrained and yet also protected individual liberty. And those values remain important and central to our constitutional tradition. At the same time, keeping in mind the failures of the Articles of the Confederation, they were trying to create a government that worked, and that had the strength and efficacy and capability to address national problems on a national scope. So, it's these conflicting impulses that we see today.

One of the most important Founding Fathers, James Madison, was aware of this internal tension and expressed it in important writings called The Federalist Papers. In Federalist 51, he wrote "in framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place, oblige it to control itself." Consider Madison's words in the context of our present debates today which bear the same internal tension. First, we want a government that is strong enough, robust enough, to control the governed and effectuate legitimate solutions to the problems we face as a nation. But we also want a governmental structure and we want a constitution that controls the government itself and protects individual liberty, structuring governmental decision-making in a way that promotes the optimal functioning of our republic. These are the things that the men who met here over two centuries ago struggled with and attempted to strike a balance with. And it's the very same balance that in our own constitutional debates and interpretation we attempt to strike today. Let me now turn to some specific choices the framers made in 1787 about the document itself that still have major interpretation implications for the way we think about the constitution.

So what is unique about the actual text of the constitution? The first thing that's unique, and that we take for granted a bit as most countries in the world have now followed our lead, was the very fact that it was written. Lots of countries, including most notably Great Britain, have long constitutional traditions, but until very recently, those traditions and the constitutional culture and rules of those societies were not captured and collected and written in a single short document.

Another unique feature about the US Constitution is not just that it was written but how few words the framers used in their writing of it. The Constitution comes in at just over 4,000 words, which is remarkably short by comparison to other constitutions in the world. By comparison, the Constitution of India, in its English language version, is almost 120,000 words long. The longest constitution would be the constitution of the state of Alabama, which clocks in at over 300,000 words. By this standard of course, using a few thousand words to set up an entire government

structure is incredibly sparse.

Not only is the US Constitution extremely short, it's also extremely difficult to change. Among the world's constitutions, it is the hardest to amend the text. The provisions for amendment are set forth in a very short provision of the Constitution called Article V, and the most important point is they require extreme super-majority approval by the US states. By super-majority, I mean far more than 50%. Indeed, three quarters of the individual states need to consent in order for any amendment to be made to the text of the Constitution.

The difficulty in amending the Constitution carries with it extreme interpretive implications. Because the text is so hard to change in order to update constitutional meaning with a text that is largely set in stone, the interpreters of the Constitution, led by the Supreme Court, occasionally must revise or update their understandings of constitutional meaning. This is something we see over time, over the generations at the Supreme Court, and it's a central part of out constitutional culture, that the text itself stays the same, while the legal interpretation of that text changes over time.

The US constitution is the oldest continuously operating constitution in the world. As was alluded to before, written constitutionalism backed back a strong supreme court is becoming the world's norm. But for most countries, it's a phenomenon that has happened only in the past century. The US, with a constitutional tradition stretching back over two centuries, has a much longer process of institutional development than other countries, which itself is a key feature of our constitutional culture, and it affects interpretation even to the present day.

Consider this phrase from Article 2: the executive power should be vested in the President. This is one of the most crucial foundations of the modern bureaucratic state. This power, the executive power, on which our entire administration is founded with almost a million employees (probably too many!), everything we think of as the federal executive branch and its authority, rests on this clause. Yet the basic phrase here, the key operative phrase, executive power, is not defined anywhere in the Constitution. In order to give meaning to that, what judges and other participants in constitutional debates have had to do over the past 200 years is contest, debate, and fill in their own interpretation of what executive power means. Likewise, in the key provisions that protect our individual rights, some of the most important phrases are inherently vague and ambiguous. The eighth amendment prohibits excessive bail. What does excessive mean? The Constitution also prohibits cruel and unusual punishments. What's cruel to one person may not be cruel to somebody else. These are clauses that come without definitions and without explicit user instructions, and this is important and this was intentional by James Madison and the other framers. They did not want a document that would be fixed in time with explicit "user code"; instead, they envisioned a document where each generation would supply its own definitions for these grand, but yet inherently vague, provisions in the Constitution.

We have in our constitutional order a predominant institution for giving meaning to the Constitution. It's called the US Supreme Court. And although it wasn't perhaps envisioned as such by the framers, very early on in America's constitutional development, the Supreme Court became the leading institution that gave meaning to the vague phrases of the constitution. Historically, I want to mention Chief Justice John Marshall, the first great chief justice of the US Supreme Court, who served for the better part of the early 19th century. Marshall and his colleagues on Supreme Court in this era where the ones who began giving the Supreme Court the prestige that it enjoys today as the leading interpreter of the Constitution in the US.

And Marshall had a very specific vision for interpreting the constitution. He said in the early case of McCulloch v. Maryland that we must never forget it is a constitution we are expounding. Now

what does that mean? He was distinguishing constitutional interpretation from the interpretation of many other sorts of legal documents, like wills and trusts, the ordinary stuff. The Constitution in Marshall's vision was something different, and it was something that was intended to endure for much longer.

Recall what I said about the extreme brevity of the Constitution. And the fact that it doesn't come with definitions clauses. For Marshall, as for many people who have followed him, what this means is that judge and other interpreters of the Constitution over time need to supply their own interpretive effort and interpretive analysis to these clauses. Moreover, although the Constitution's text remains fixed, it's interpretation does not. And here we see Marshall arguing that it would be unwise to provide immutable rules which would lock constitutional meaning in place. Instead, Marshall and many who have followed him argue for more evolving constitutional culture. So given the necessity of subsequent interpretation in our constitutional tradition, who does the interpreting? Which institutions, which people?

The central point is that interpretation is diffused, pluralistic, and multi-faceted in the US constitutional tradition. Yes, the Supreme Court has come to be the leading constitutional interpreter, but by no means is it the only key institution infusing the constitution with meaning. In the earliest days of the American republic, the Supreme Court was largely on the sidelines; instead, the most heated debates took place in the halls of Congress, in the chambers of state legislatures, and in the public square itself, with the public and the media of the 19th century being explicitly and intently involved in constitutional interpretation. So today, although the US Supreme Court has ascended to a predominant place in American constitutional interpretation, by no means is it the exclusive interpreter. And on some issues, it is not the most important interpreter of constitutional meaning. What has happened over the past 200 years through the rise of what we call strong form judicial review, is that the court has attained a predominance in constitutional interpretation to a degree that the framers probably didn't foresee. And this started to happen early on and indeed John Marshall, once again, was a key architect of this strategy. In a famous case in 1803 called Marbury v. Madison, Marshall, for the first time, asserted that the Supreme Court itself is tasked with giving meaning to the Constitution. Marshall said it is emphatically the province and the duty of the judicial department to say what the law is.

Let's now speak about the role of two centuries of time and historical development in creating the constitutional culture we have today by focusing on three separate Supreme Court cases, separated by almost two centuries. The first of these was the case of Worcester v. Georgia.

This case, arising in 1832, involved a review of the state of Georgia's forced expulsion of the Cherokee Indian tribe. Georgia had enacted policies in taking steps to oust most Cherokees from the borders of their state, and this was in violation of Supreme Court-held laws and treaties of the United States. What happened in the aftermath of that decision was telling about the weakness of the Supreme Court in this prior century. As history tells us, President Andrew Jackson allegedly said, "John Marshall has made his decision, now let him go enforce it." And, of course the justices of the court had no means of enforcing this. And what happened is the sad story that the Cherokee tribe was indeed ousted from Georgia despite the fact that they had won a legal victory in the Supreme Court. It was an empty victory because the other institutions in American life, which would have had power to enforce that decision against Georgia, stood on the sidelines and let Georgia unlawfully oust the tribe from its borders. Very different story with the passage of a hundred years later, in another contested decision also involving a southern state. Cooper v. Aaron involved efforts to integrate the Little Rock, Arkansas, schools just a few years after the landmark Brown v. Board of Education decision in 1954. The law of the land, as articulated by Brown, was

that segregated schools were illegal, and that the African American students who wished to attend high school in Little Rock had an airtight constitutional right to do so. But again, the opinions that the Supreme Court issues are merely words on a piece of paper.

Tellingly, President Dwight Eisenhower mobilized the 101st Airborne and sent federal troops down to Little Rock, who stood guard over the Little Rock High School and ensured that the African American students who had won their legal victory had that translated into the actual victory of being able to attend school in Little Rock. So the Supreme Court's legal ruling was accompanied by immediate acceptance and enforcement by other branches of government. And we saw this even much more recently in the hotly contested Bush v. Gore decision involving the 2000 presidential election.

Both sides claimed victory in the election. Both sides claimed to have the law on their side. But the minute that Vice President Al Gore had been declared to have lost the election by the Supreme Court in a very controversial decision, within a day of that decision, Vice President Gore was on TV conceding the election and allowing a peaceful transition of power to President George W. Bush. This is something that would not happen in certain other countries even today, and would not have probably happened in the United States in the earliest days of the Republic. The point being, we've had the Supreme Court for over 200 years, but this nuanced and sophisticated acceptance of the role of the Supreme Court, and the enforcements of its decisions in our constitutional culture, is something that it took quite a bit longer to attain. And this is a lesson, and an instructive one, for those who say that US constitutionalism is being exported around the world to other countries. It is true that that is being done, but to truly export the US constitutional structure, we need to do much more than export the text. Instead, we need to export the text and the institutions, and in some cases, perhaps wait for the passage of time in other nations that don't have a constitutional tradition in order to have the kind of framework that we have here.

4.2 Constitutional Law, Part II

Let's now turn to the next segment, which deals with the structural provisions of the constitution; that is, how the government is set up and structured. When the framers met in Philadelphia in 1787, they were principally concerned with this part of the constitutional ordering. Bear in mind, they had just split away from a government which they thought was terribly structured, giving far too much power to the whims of a given monarch.

And in setting up the new American constitution, in light of the failures of the Articles of Confederation, it was important for the framers to get it right and give the right kinds of power, and the right amounts of power, to different parts of government. Here, we turn once again to the views of James Madison, one of the most important of the framers who was a student of governmental structure and proper allocation of authority, who thought quite a great deal and wrote quite a great deal about the best way to structure government. He acknowledged a basic challenge which I've alluded to before: first, the framers sought to give the government enough power to control the governed, but then structure it in such a way, to use Madison's phrase, as to oblige it to control itself.

For Madison, the solution to this dilemma lay in the fundamental ambition of the people who occupy spots in our government. Recognizing, then, as now, of the inherent ambition of people who would seek places in government, Madison and the other framers sought to build a government where this ambition was a built-in feature, one that would perhaps solve the problem of too much ambition in one place. So, as Madison said, ambition must be made to counteract ambition.

To accomplish this, dividing power and creating incentives for one branch of government to counteract the other was, in his view, the best solution. We call this separation of powers, or checks and balances. And the framers cared so much about this that they didn't just do it in one dimension, but they did it in two dimensions: first, horizontally, by splitting the government into three branches (executive, legislative and judicial), giving each one of them certain powers to own where they would be somewhat jealous of another branch's power, and second, vertically, between the National Government and the various state governments. This is a principle that we call federalism, and it is very important even today, as certain important policy choices are situated with the states, even as many important policy objectives have come to be viewed as national government prerogatives.

And it's on these two dimensions, the horizontal separation of powers within the federal government and the vertical separation of powers between the states and the federal government, where our greatest debates over governmental structure continue to reverberate in the Supreme Court and in the broader public policy debates. James Madison's fundamental insight that power was more safely reposed in government when it was broken up into smaller chunks and given to different branches or even different scales of governments as between the national and the state government is one that remains important today even as we debate the precise boundaries of those divisions.

Supreme Court Justice Anthony Kennedy, in a representative statement in a case called U.S. Term Limits v. Thornton, called Federalism "our Nation's own discovery", and he talked about how the framers splitting the atom of sovereignty was a genius idea, giving our citizens two political capacities, one state and one federal, each protected from incursion by the other. Now, to be sure, Justice Kennedy's statement may be a somewhat idealized version of our federal order. In reality, many, perhaps most, public policy issues are shared between the state and federal governments, who cooperate or conflict or wrangle over the proper sphere of authority. But still, for many citizens and many judges, and many policy makers, this question of where we allocate authority in our constitutional system remains crucially important and as hotly debated today as it was over 200 years ago in Philadelphia.

The development of specific doctrines in particular cases is how these concepts of the separation of powers become codified and operational. Recall what I said earlier about how the basic framework parts of the constitution don't come with definition clauses or users guides. It has been the task of subsequent generations over the past 200 years to give content to these broad general principles, like executive power, legislative power, judicial power, or the broad principles stating that there ought to be some separation between the states and the national government. And the way the Supreme Court has done so is, over the past 200 years, to very gradually, very incrementally, craft these doctrines, called the federalism doctrines.

The Supreme Court has applied these doctrines of the Constitution over the past two centuries in ways to control the states and limit state behavior, and even state misbehavior. Increasingly in recent decades, these doctrines have been used to restrain the Federal Government against the States, to say that there are some spheres where the Federal Government can't legislate, no matter how powerful it may claim to be. Occasionally, the Supreme Court will address cases that ask questions like: is the president exercising too much power, or has Congress overstepped its bounds?

I want to highlight yet another debate in this area, which is the question of who should decide these major separation of powers dilemmas. To be sure, the Supreme Court has asserted that it has the right to decide these fundamental questions of governmental structure, just as it does other questions of law and other questions of individual rights protections, but there is a long scholarly tradition rooted in constitutional history that suggests that these basic structural choices about the

constitution ought to be what we call non-justiciable, or in other words, decided outside the courts by the major political branches of American government. After all, remember James Madison's phrase that ambition must be made to counteract ambition. For Madison at least, the government is already properly structured such that if the President overreaches, Congress ought to step in and reign in Presidential power, and conversely, if Congress is exceeding its authority, perhaps the President will refuse to enforce that statute. And so there's a real question about whether the Supreme Court needs to referee all these disputes. On the other hand, developments that Madison and his colleagues never could have foreseen have complicated the separations of powers mix on all of these dimensions, and perhaps given rise for stronger arguments for judicial supervision.

For instance, the framers for all of their wisdom, never anticipated modern political parties and the modern two party state. And the implications that the two party system would have for separation of powers. When the same party controls both Congress and the White House, the assumption that ambition will counteract ambition, and Congress will reign in the President, falls apart in a world of strong party discipline.

Likewise, the framers never foresaw the dramatic rise and the size and scope of the federal Executive branch that has taken place over the past century. In the early days of the Republic, the federal government had only a few thousand non-military employees. Today the federal government has over a million such employees. Growth of the federal government over that phase has, some would argue, fundamentally tipped the power of the presidency relative to the other branches.

Now let me go somewhat more systematically through these different areas of doctrine. The first area where federalism doctrines have been applied by the Supreme Court and are baked into the Constitution deal with controlling state behavior, or even state misbehavior. Indeed, if we were to travel back in time to 1787 and ask the framers what they worried most about, they would not have worried about an overreaching federal government. After all, recall how weak the federal government was under the Articles of the Confederation. What they were worried about, and the reason they came back to Philadelphia in 1789, was that states were behaving badly. States were printing their own money to let their own debtors off the hook. They couldn't agree on state boundaries. They couldn't agree on foreign policy, or policy toward the Native American tribes. Each state was going in its own direction. States were enacting internal tariffs and trade barriers of the sort that today we see between nation states, but this used to happen between e.g. Pennsylvania and New Jersey.

The Framers regarded this as no way to run a proper country. And so one of the first things that the Constitution did was provide doctrinal grounds for courts to prohibit states from engaging in this kind of individualistic behavior. A later justice, an important justice from mid 20th century named Justice Robert Jackson, said that these clauses taken together were to declare something he called a Federal Free Trade Zone. So if you imagine efforts such as in the European Union to turn individual markets into a national free trade zone, that was a major impulse of the early days of the Constitution, and largely successfully enforced by the Supreme Court over the last two centuries, such that these debates occur, but occur much less frequently than they would have in the early days of the Republic.

Modern debates over the scope of federal government authority often grapple with the fundamental tension and inconsistency that's built into the Constitution. On the one hand, the baseline rule in the Constitution is that all power resides with the states and the people to start with, and the national government only has those powers specified in the document. This is called the doctrine of enumerated powers. And it is often invoked by people who say that the federal government is over-reaching its authority, because it can't point to a certain enumerated power.

On the other hand, some of the enumerated powers themselves are extremely broad and extremely vague. The most important of these is the Commerce Clause which gives the national government the authority to regulate commerce among the several states. And today the Commerce Clause stands as the foundation of much national government authority. Now, the meaning of this clause is not defined in the Constitution, and has been contested heatedly over the past two centuries, indeed over the past few decades, in the context of major statutory enactments like the Affordable Care Act.

It's possible to think about the Commerce Clause and the history of its development in four main historical epochs, and I'll summarize these briefly here. First, for much of the first hundred years of the Constitution's life, until about the 1870s or 1880s, Commerce Clause cases were few and far between, precisely because the National Government didn't do that much. In a series of decisions, in this period, that might surprise modern observers, the Supreme Court took a very narrow and formalistic definition of the Commerce Clause and issued decisions saying things like manufacturing in a major sugar plant was not commerce and therefore that company was not subject to basic anti-trust laws. Or even more strikingly, a factory that employed child workers was not engaged in commerce, and that therefore, the national government had no authority to issue basic child labor legislation.

This was a constitutional regime which seems anachronistic to us, and indeed it proved unsustainable in the New Deal in the 1930s and the 1940s. After the Supreme Court struck down some of President Franklin Roosevelt's most popular and important recovery initiatives, President Roosevelt capitalizing on public dissatisfaction with a court that seemed to be stuck in the past and proposed what would have been a radical solution, namely adding more justices to the Supreme Court in order to reverse those rulings. Perhaps sensing the public outcry against its decisions and wanting to avoid the constitutionally problematic strong-arming from President Roosevelt, the Supreme Court, by the middle of the New Deal, reversed its prior narrow interpretation of the Commerce Clause and adopted something much more familiar to the doctrine we have today from the court; namely, that commerce is defined pretty broadly to include any activity that affects the national economy, however small, so long as if taken in its totality in an aggregate sense it has an economic impact. So this is the law today, and indeed the law from about The New Deal Era up until the 1990s was that Congress could do pretty much what ever it wanted under the Commerce Clause. There wasn't any real enforcement of federalism limitations in this area.

We are now in a different era, with a more aggressive, robust Supreme Court, where at least five justices on the current Court maintain that there are limits to national government power and that the Court ought to enforce those limits. And we saw such a case just two years ago with the major Affordable Care Act case of 2012, where a slim majority of the Court felt that a key part of that statute, the individual mandate, was beyond the Federal Government's authority on Commerce Clause grounds, because it sought to legislate in the Court's view, people who weren't employed in the economy and weren't doing anything but sitting around.

And indeed the entire validity of the Affordable Care Act was only upheld on a different ground, the so-called taxing power, because the burden or the penalty that falls on people who didn't pay the individual mandate is operational through their tax returns. So we're in an era now where federal government authority is vast but the Supreme Court assertively maintains its prerogative to enforce that.

There are many scholars and many in the policy world who feel that these kind of federalism restrictions to control federal government overreaching are important but ought not be enforced by the Supreme Court. Indeed, keep in mind the structural provisions that are built into the so-called

political branches, that are built into Congress itself. And so the argument goes that there are plenty of protections for the states. Each state gets two votes in the Senate, no matter how big or how small, so that a state like Wyoming has as much representation on a state-by-state basis as a state like California despite vast discrepancies in population. For many observers, this suggests that state interests are fully protected in the actual voting procedures and political process in Congress, and that the Supreme Court ought not get involved in policing this boundary. It ought to stick to protecting individual rights and standing up for the rights of entities and individuals who don't have a voice in the political process, whereas states do have such a voice. But clearly, as a statement of current constitutional law, the Supreme Court has come out strongly in the other direction, saying that it can and will enforce these federalism restrictions. This, in a world of strong party allegiance above all else, helps provide a more robust check and balance that would be lacking if Congress simply applied tyranny-of-the-majority rules.

The precise contours and boundaries of those separation of powers concepts between Executive, Legislative, and Judicial branches have become ever more muddled as the government has grown, changed, and become more complicated. For instance, take an agency like the Food and Drug Administration, which regulates the safety of food and therapeutic products. The FDA is an executive branch agency. We know it is within the executive branch, and so if we look at some of its functions, it does some things that look like executive enforcing of the laws. For instance, it has the authority to inspect and enforce rules, say, against pharmaceutical manufacturers. But some of what it does looks a lot more like a legislature. Like many agencies, the FDA has authority to write rules which are binding and generally applicable and look a lot like statutes. We call them regulations and thus place them in the executive branch, but functionally, that behavior looks much more legislative.

Other agencies have the ability to adjudicate actual cases and disputes. For instance, the Social Security Administration has its own judges who hear debates or hear disputes when somebody claims to be denied the proper amount of benefits, exercising very much a judicial function despite technically being in the executive branch. For this reason, the growth of government in ways that the framers never could have intended have put pressure on these basic definitions inherent in the horizontal separation of powers and confounded easy judicial techniques for drawing bright lines between such branches. Today in this area, courts are struggling with issues like national security surveillance by the executive branch, the power of the President to wage war in foreign countries despite not formally declaring war, and the growth of congressional behavior and congressional oversight activities which raise questions about congressional overreaching. In these areas, there's a real question of how much the Supreme Court, or any judges, can do to meaningfully police these boundaries.

Articulating meaningful doctrinal standards to channel and cabin these different types of power have proven over the past two centuries to be largely unworkable. Moreover, many of these decisions, such as whether or not to send troops to a foreign countries, are probably the worst kind of decisions to vest in a group of unelected judges who take a long time to hear cases, and perhaps ought to be worked out more within the political process. Certainly, James Madison and the other framers envisioned that Congress and the President would be their own best check on each other. That Congress would check the President when he or she overreaches, and that the President would refuse to enforce or would veto congressional laws that represent overreaching.

And here I will return to a problem that the framers never foresaw, but that is essential part of our political community today, which is the rise of disciplined, powerful political parties. Although the framers envisioned politics, they didn't envision the notion of a strong disciplined party con-

trolling both Congress and the White House which undermines many of the structural protections that Madison and the other framers thought would work to control over-reaching. Simply put, when the President and Congress are of the same party, who will rein in an overreaching President if the President indeed is the leader of his party? There are many examples in recent years of unchecked Presidential power where Congress has ceded enormous grounds to an elected 4-year dictatorship that has become the Presidency. This is something the framers never foresaw, and it's a fundamental component of our political process which puts pressure, and perhaps stretches to the breaking point, some of the basic allocations of authority in in the national government.

When it comes to judicial control of national government authority vis-a-vis the states, the current Supreme Court has been, not so much lately but historically, very assertive, very robust, and very articulated with very clear rules. On the other hand, when it comes to presidential authority and overreaching, many feel that the court has not done enough to articulate clear meaningful standards to cabin executive power in the 21st century, as it grows in ways that the framers never would have imagined over two centuries ago. So this is a huge challenge that the court and the rest of our constitutional culture will need to address going forward.

4.3 Constitutional Law, Part III

This next part addresses a part of the Constitution that many people think of first and foremost when they think about the American Constitution and the protections that it affords: individual rights.

Rights such as freedom of speech, freedom of religion, the right to be free of discrimination based on race, the protections that one has as a criminal defendant, etc. These are the rights which many people associate most predominantly with constitutionalism and constitutional protection, and they are a part of the American constitutional order that was there almost from the beginning, but has developed in dramatic fashion over the past 50 or 60 years. The regime we have today for protecting individual rights looks dramatically different than it did 100 years ago, and certainly dramatically different than it did 200 years ago. This is a subject which can, and does at many law schools, occupy an entire semester-long course, but here, rather than focus on specific individual rights, I want to draw together and emphasize some general themes that I think situate the individual rights jurisprudence of the American constitutional order within the longer textual and historical tradition that I've been talking about throughout this time.

And so there are a few major points along this line. First, as I've alluded to before, the text of the constitution vis-à-vis individual rights, just like it is in other sections, is remarkably sparse and undefined, and the mere words on the page don't do the work in protecting the individual rights that our constitutional culture has come to want them to do. Second, we've seen dramatic changes over time in the national enforcement of individual rights guarantees. Our constitutional world is fundamentally different today than it was a century ago, and and it is even changing even year by year, decade by decade. Third, I want to address two fundamental general doctrinal innovations that the Supreme Court has operationalized over the past century in building the constitution of individual rights that we have today.

The first of these doctrinal innovations is the concept of incorporation, the idea that the rights which as written in the document's text to apply and constrain only the national government have been made applicable and universalized within the American constitutional order to now bind all government actors, national, state and local. This was a key judicial move that was unforeseen by the framers, but that has done a great deal to operationalize the culture of individual rights that

we have today by making terms that in the Constitution only apply to the Federal government also apply to State governments. And the Supreme Court did this for most of the core individual rights protections that we hold dear, such as freedom of religion, freedom of speech, or freedom of association.

The other is the concept of balancing, where the basic notion is that no individual right is absolute. In our constitutional discourse, the claims of individual rights holders are and must be balanced against compelling claims by society at large. And this, to a great extent, is the project of American constitutional law in the individual rights space. It is the specification of which rights are worthy of special protection that they therefore demand especially good or compelling reasons for the government to affect those rights. And it's this shifting denomination of which rights are important enough to demand particularly good reasons from the government that forms a large part of what the judges have done in construing the Constitution over the past half century or more.

Fourth, I'll briefly address what's evident when one considers the development of individual rights doctrines over the past several decades, the permeable boundaries between formal constitutional doctrine and public opinion about those rights. Simply put, as society decides that protecting a given interest is relatively more important, we would expect to see and we do see doctrinal shifts in the judicial protection for these rights. This swaying to public obedience has serious ramifications, and there are those who wonder, is the court too powerful or too supreme in this area? It may well be. The call to legislate from the bench is quite strong, and it must be tamped down to ensure a clean separation of powers.

A question to consider is whether our rights would be even more firmly grounded if we asked and expected legislatures, executive officials, police departments, and other institutional actors to take seriously these rights, instead of leaving them for judicial resolution. Something to consider is how inadequate text is when sitting on the page alone when enforcement is cast aside.

The North Korea constitution also has such text as a freedom of speech, and we know that despite these paper protections, citizens dramatically do not have the same protections as they do elsewhere. And this is a vivid and perhaps almost too extreme example of the disconnect between mere words on a page and the institutional and cultural protection of those rights. If the North Korea example seems extreme, I'll turn to a historical example from our own constitutional development.

This text comes from our own Constitution, the 14th Amendment, which we call the Equal Protection Clause: no state shall deny to any person within its jurisdiction the equal protection of the laws. It today is one of the most fundamental personal protections against government discrimination, and it forms a core fabric of our Constitutional rights. This amendment was enacted in the immediate aftermath of the Civil War, in the late 1860s, and so it has been on the books for almost 150 years as the constitutional law of the land of the United States. Now, as our history shows, for the majority of this amendment's life, these words were as unenforced as the words of the North Korean Constitution I showed you a few minutes ago. These words were on our books through a period in the late 19th century and early 20th century of brutal oppression and Jim Crow segregation in the South. As these examples illustrate, words on the page by themselves are inadequate protections of personal freedoms.

What is needed is a thicker, richer institutional culture of enforcement and acceptance to operationalize those words. To illustrate this point further, I'll use the words of Dr. Martin Luther King Jr., very early in his life as a high school student, when he gave an award-winning speech precisely on this issue of the empty promise of amendments on the pages of the Constitution without more

effective enforcement. King said America gave its full pledge of freedom 75 years ago and backed it with amendments to the national constitution where there should no discrimination based on race or other immutable criteria. But as King notes in this writing long ago, "Black America still wears chains. Thirteen million black sons and daughters of our forefathers continue to fight for the translation of the thirteenth, fourteenth, and fifteenth amendments from writing on the printed page to actuality." It's this notion of translation that has been a theme of this segment, whether it be in the separation of powers area or this individual rights area. The words on the page don't interpret themselves, and they certainly don't enforce themselves. That requires an ongoing and evolving societal commitment.

One of the things that's clear when one thinks about individual rights is that no matter how important a given individual right is, that right becomes problematic when it is applied in an absolute sense to an extreme at the expense of all other rights or all other public values. We live in a complex world where often there are difficult and fundamental trade-offs between, for instance, the widely-held desire for privacy in our personal communications and the equally widely-held desire for national security and defense against threats. We value freedom of religion deeply, but we also realize that there are certain commitments and behaviors that we need to regulate universally in society and not allow religious exemption. This fundamental tension generates much of the debates about individual rights in our in our legal culture.

And in response, justices on the Supreme Court over the past half century or more have articulated a set of doctrines which apply broadly across individual rights that attempt to balance these different competing considerations. And we think of these as levels of scrutiny.

The basic principle is that most of the things government wants to do, it can justify against lawsuits if it can articulate a merely rational basis. So for instance, the government in its tax code draws lots of distinctions between how certain things are taxed or different levels of tax that some people pay as opposed to another. Clearly, it creates inequality. But that inequality is not, according to judges and others who participate in constitutional interpretation, the kind of equality that we ought to care about deeply from a legal perspective.

To say we care deeply, in a doctrinal sense, is to say we give certain problematic dimensions of inequality something called strict scrutiny. An example would be when the government treats people of different races differently, we are going to apply the strictest possible scrutiny, given the problematic history of racial differentiation. It doesn't mean the government can never differentiate on race, it just means that the government better have an especially good, or compelling, reason for doing so.

This debate became overt and becomes overt again whenever the Supreme Court takes a case about affirmative action in education, as it did most substantially over a decade ago in the Grutter v. University of Michigan case. And in that case, the court upheld the University of Michigan Law School's use of race in law school admissions, but only because the law school made a compelling case that governmental consideration of race in admissions was necessary to build the kind of law school class that produced the kind of graduates that employers and other elements of society wanted. Of course, affirmative action does not produce an optimal learning environment, as merit is no longer considered the highest achievement when race is now a trump card, weakening all those who are affirmative action cases by reducing them to the color of their skin all over again, but nonetheless, it serves as an illustrative point that the government can override its own principles with enough public support.

Changes in public attitudes gives a certain dynamism to constitutional interpretation, where some interests which even in very recent memory were disregarded suddenly become more important.

Thurgood Marshall, who himself as a attorney arguing before the Supreme Court in the 1940s and 50s helped shape our changing constitutional understanding of race discrimination, then gave voice to this when he became a justice on the Supreme Court.

He said that the spectrum of interests clearly shows variations in the degree of care with which the court scrutinizes classifications. The way the court strikes this balance depends, in his words, on the constitutional and societal importance of the interested party adversely affected. Simply put, these constitutional doctrines about individual rights have a certain judicial structure but they are not entirely apart from the social structure of the broader American community, and the values and weights that America puts on given interests.

Nowhere is Justice Marshall's sentiment more evident in recent years than in the dramatically shifting doctrine that the Supreme Court has articulated involving the constitutional protections of same-sex relationships. As recently as 1985, in the case called Bowers v. Hardwick, a majority of the Supreme Court upheld making it a crime for two consenting same-sex adults to engage in sexual relations. Less than two decades after Bowers, in 2003 in a case called Lawrence v. Texas, the Supreme Court considered and explicitly rejected its ruling in Bowers on the permissibility of criminalizing same-sex consenting adult relationships. In Lawrence, Justice Kennedy, writing for the court, declared the right to choose one's own intimate partner as sacred and undeniable and wrote an opinion which explicitly overruled the court's prior precedent from only 18 years before. Of course, the Constitution should have no bearing on relationships of this sort at all, as this should be a matter for the States to make their own rulings as evidenced by this not being an enumerated right of the Federal government, but legislating from the bench has been an unfortunate occurrence lately. This flip-flopping modality, anyway, is something that we've seen on other occasions through Constitutional history, for example in the Plessy v. Ferguson decision from the 1890s that was overturned in Brown v. Board of Education in 1954, thus correcting some errors of past courts and the rulings of their members who have their own biases to wrangle.

The speed with which the Supreme Court overturned its Bowers precedent corresponds with an equally quick shift in public attitudes on the acceptance of same-sex relationships, highlighting that the court is not inherently sealed or divorced from the public opinion in the broader society. And this is one of the engines that generates constitutional change. It's not that the Constitution is living, but that we the people are living, and our changing attitudes clearly inflect and ultimately affect the way that the Court interprets this document.

It's important to remember, as the framers did, that all involved in government and society have some role in protecting these basic individual guarantees. Indeed, a society that relies exclusively on a group of unelected judges as the sole guarantors of individual rights is risking those rights diminishing in dramatic ways. This is particularly true in areas where individual understandings of rights, such as privacy, are under increasing pressure, and technology is changing so rapidly that the law struggles to keep pace with it.

In such areas, individual rights protection will be most effective if the more responsive branches of government, like the executive branch agencies and the legislature itself, are at the forefront of protecting these rights. And sometimes even the justices themselves recognize this, that they are not the best institution to stand as a bulwark against these rapid technological changes. Justice Alito, in a recent Fourth Amendment case called U.S. v. Jones, which involved whether a continuous GPS surveillance device attached to a car for many days created a Fourth Amendment violation, expressed this notion of institutional competency where the best solution to privacy concerns may be legislative and not post-behavior.

Alito's views are shared by others on and off the bench, particularly in areas like this. We've

seen it also in such areas such as race discrimination, where Brown v. the Board of Education in 1954 was an iconic and important Supreme Court decision in outlawing segregated schools. But for the lives of minority individuals in the United States, much greater gains came a decade later with the Civil Rights Act in 1964, a congressional statute which, because it was backed with the full enforcement apparatus of the federal executive branch, worked much greater change in people's lives than the Brown v. the Board of Education did. So this is the last theme to remember as we talk about the importance of individual rights. The importance of the court in translating and enforcing those rights is that as much as the Court does, we cannot ask the Court to do everything in protecting these rights, and it's important for any Constitutional culture to remember the role of other branches and the public itself in operationalizing and giving shape to these foundational individual guarantees.

4.4 Constitutional Law, Part IV

Finally, I'll end this section by talking a bit about the role of the United States Constitution in the broader world. You'll recall from the beginning of this section that the U.S. Constitution is the oldest constitution in the world operating today. It was quite unique when it was framed in 1787! And it has been held up by commentators both in prior centuries and very recently as a model for constitutionalism around the world. To a great extent, it was an outlier, and it was viewed as a novel experiment in writing down the rules of the governance.

Today, that novel experiment has become the world's norm, which is a testament to its story of influence. Virtually every country today, with only a handful of exceptions, has a written constitution and a Supreme Court which exercises some form of judicial review power. They also generally have a culture of both governmental structure and individual rights that mimic, at least faintly, the American Experiment from two centuries ago.

So this is, on a very broad, very general sense, a triumphant story of influence, of written constitutionalism and strong form judicial review around the world (strong form, meaning judicial rulings bind other branches of government, as contrasted with weak form, where judicial rulings can be cast aside by other branches if they do so openly and in the public view).

But, nothing's that simple. When we look more carefully at the constitutions in other countries around the world, we can see the influence of the basic written model, but we see a number of other design choices that these other countries have made. Particularly, those countries that have written constitutions within the last 50 or 60 or 70 years that take their constitutions in very different directions than the U.S. model. So, although the U.S. Constitution has been tremendously influential in the general, broad sense in promoting a regime around the world of written constitutionalism, the actual choices other countries have made have diverged dramatically from the U.S., leaving the U.S. Constitution still quite unique in some ways.

First, as I alluded to earlier, the U.S. Constitution remains one of the most difficult to amend vis-à-vis the text in the world. Requiring three-quarters of the states to agree to anything in order to make textual amendment means that the U.S. Constitution is largely frozen, with only sporadic episodes of amendment over the past 200 years. This, in turn, requires interpreters like Supreme Court justices to deal with the fact that the text stays the same even if societal attitudes toward that text have changed dramatically. In many other countries, it's easier to amend the constitution, which leads to more textual change, which in turn might reduce the frequency or need for strong form judicial interpretation to change constitutional norms.

Second, although the US is not alone in being a federal system, recall what I said about power

being divided between the national government and a number of subunits (though just as important! Remember: enumerated powers, and States have all of the rest!), here in the U.S. called the States. There are clearly other federations in the world, and many other countries have a national government and some subordinate units, be they states or provinces or other units. The U.S. is perhaps unique, though, in the disproportionate weight it gives to the states, no matter what the population is. As I said before, Wyoming has the same amount of votes in the Senate as California, despite having only a fraction of its population. Most other legislatures in countries that are federations give representation to the sub-units, like states or provinces, and make some effort to equalize for population. No country has copied it quite as dramatically, but giving equal weight to States independent of population means that some States aren't ruled by population majorities of other States.

Third, although virtually all national constitutions protect a broad swath of individual rights, or at least say they do, very few give the strong protection to gun ownership rights, or religious freedom, or even the broad freedom of speech and particularly commercial speech that the U.S. Constitution does. So when we look at what other countries are doing to copy the American Bill of Rights and individual rights protection, a lot of them are copying and editing in the sense that they don't put all of the amendments in. And they don't protect speech in the same ultra robust way that we do. And these are values which, of course, we debate in the American context. For the rest of the world, they would just as soon form their constitutional order without some of these elements, but we think they are very fundamental.

Next, while every country that sets up a new constitution attempts to do something, or at least says they do, about judicial independence, about creating a court system where judges are free to make decisions without concern for being fired or thrown in jail, almost no country writing constitutions recently chooses to give judges life tenure like we do. At least not Supreme Court judges. Most other countries have Supreme Courts with judges that sit for eight years, or ten years, or even fifteen years. But they're unwilling to say that a judge gets his or her seat as long as they keep drawing breath on this Earth. And, many scholars, even of the US Supreme Court, looking at the super long tenure, sometimes more than 30 or 35 years, have said that this may be a part of our Constitution that we might reconsider if we could. Certainly, a staggered approach to the Justices being elected would be necessary to ensure it doesn't function as a Presidential election 2.0, but having it set up this way, with the President electing Justices, does ensure that Justices don't need to be popular to be elected or stay in their seats. This cuts both way, as you might imagine.

Perhaps because of the age of the U.S. Supreme Court and the age of the U.S. Constitution, our Supreme Court is still very shy and very reluctant to support and cite other Supreme Courts around the world considering similar structural or individual rights cases. Many other high courts look to their neighbors, or look around the world to colleagues, and attempt to get some judicial guidance. Many justices on the U.S. Supreme Court have asserted fairly categorically that that kind of judicial looking around is impermissible, and we're in that sense somewhat unique.

Perhaps even more importantly for the lives of individual citizens, although the U.S. protects lots of individual rights against government action, what we might call negative rights, or negative liberties, which means the ability to say to the government e.g. you may not throw me in jail for giving this speech, the U.S. Constitution by and large does not protect positive entitlements, positive freedoms: the right to health care, the right to housing, the right to education. And many other national constitutions do, so the U.S. is an outlier in the strong dichotomy that it draws in its constitution and the court's interpretation between negative liberties against government tyranny and affirmative rights to inputs into one's good life.

As all of this shows, the U.S. Constitution is tremendously influential around the world, but its influence was more in generating this culture of written constitutionalism rather than in specifying the exact content of the new constitutions that have emerged in most countries over the last half century.

I'll conclude with the words of James Madison, who said "What is government itself, but the greatest of all reflections on human nature?" And this fits with several themes I've tried to bring out in this segment. Over 200 years ago, Madison and his colleagues met in Philadelphia to produce a canonical text that's remarkable in its innovation, remarkable in its brevity, and remarkable in the number of subjects it tried to cover in relatively few words.

But the framers, as evidenced by Madison's quote here, weren't disconnected from the realities of we the people, a phrase they put right there in the constitution. They realized that this text they wrote was not going to interpret itself, and that it doesn't give easy answers to the questions that it raises. It doesn't contain definitions, it doesn't contain a detailed users guide. And the constitutional law, and constitutional culture that we have today, not only reflects the text that they worked on two centuries ago, but it also reflects the intervening generations and most importantly, the present generations', interpretation of life values that we infuse with the Constitution. The Constitution embodies ideals, and it is not living, but we are, and that's an imperative that ought to guide our interpretation as we grapple with struggles today. We should aim to reconcile those words with our times and seek to remain true to the ideals contained therein. Thank you.

5 Criminal Law

This 4 part overview of Criminal Law is taught by Prof. Stephen Morse, who teaches criminal law at the University of Pennsylvania Law School. He's also a psychologist who specializes in forensic psychology.

5.1 Constitutional Law, Part I

Let's begin. As is well known, the American political system is federal, and the states and the federal government are independent but related entities with their own legal systems. Thus, there are essentially 51 sets of criminal laws, one for each of the 50 states and one for the federal government. This section will attempt to provide a general overview, but you should recognize that there may be substantial variation concerning particulars across jurisdictions.

U.S. criminal law is very similar in most respects, but not all, to the criminal law of other developed, post-industrial countries. Law is distinctive and can be thought about as a way of regulating and ordering our lives together. Consider what kinds of creatures we are. As Aristotle famously observed millennia ago, we are social creatures, but so are ants and chimps. What is different about us, we human beings, is that we're the only creatures on earth that have both linguistic abilities and are able to be guided by reason. We have biological predispositions like the other animals on earth, and these probably set limits. But we are the only creatures that self-consciously, and intentionally, create systems of rules and institutions to help us order our lives by giving us reasons to behave one way or another. There is great diversity among human beings and how they order their lives, but the need for informal and formal rules to order them is universal, to make successful human life possible. Suppose while you are attending some social gathering, you develop an intestinal cramp and really want to release a bit of flatulence to relieve the pressure, probably you won't. Why not? After all, you'd feel so much comfortable if you did. You won't because there are rules of etiquette and social norms that reject such intentionally boorish, rude behavior for which you might be ridiculed, criticized, or socially excluded. Customs and morality are similar sets of rules that order our lives. All these systems of rules have their own enforcement mechanisms, again ranging from social exclusion to criticism and condemnation.

Law is yet another human invention of a system of rules to regulate our interpersonal life, generally, and to moderate conflict in particular. What is distinctive about law, however, is that the creation and enforcement of legal rules is accomplished by the state, including its near monopoly on lawful force, even when a legal dispute is between two private parties. If the parties can not resolve their disagreement privately, they go to law to adjudicate the conflict and enforce the outcome if necessary. Thus, all of us are acting in the shadow of the law which gives us reason to behave one way or another. No blind instinct necessitates adherence to the rules, and indeed we often violate them. But the rules always give us explicit and implicit reasons for action as when we habitually and unthinkingly follow them.

With this simplified understanding of what law in mind, let us turn to what is distinctive about criminal law. Let us begin with a simple, but realistic example that is not for the faint-hearted. Imagine an aggressive 21 year-old man who enjoys driving at very high speeds on the highway, as behaving dangerously thrills him. One day he is driving at 75 miles per hour in the middle of the day on a semi-urban undivided roadway that has one lane in each direction, a 45 mile per hour speed limit, and intermittent traffic lights. He sees that a traffic light up ahead is about to turn red. His blood alcohol is just above the legal limit. Instead of slowing down and stopping as he should,

the man decides to run the light for the fun of it and speeds up to more than 90 miles an hour to make the light. Alas! The light turns red just as he reaches the intersection and a crossing vehicle properly enters it. Our driver crashes into the hapless other vehicle, killing the driver and paralyzing the passenger, who is irreversibly quadriplegic. The physical evidence and eye witnesses leave no doubt about the driver's exceptionally dangerous behavior, and a breathalyzer test confirms that his blood alcohol content was above the legal limit. How does united state law respond to such an unnecessarily sad tragedy? First, the families of the victims could sue the driver for civil damages to compensate them for the harm done by his negligent behavior. This is a province of tort law, the legal rules that deal with certain types of civil harms including personal injury. Of course, money can never replace a human life or fix irreversible disability. But the point of civil damages is to try to make the victims as whole as possible given the inevitable limitations of money as a remedy.

But the driver's behavior also manifests massive moral indifference to the rights and interests of others. It was a gross violation of the duty we all owe each other to avoid unnecessary harms. Compelling the driver to pay money damages seems an insufficient response. His behavior seems to call for a public response, on behalf of society, for societal blame and punishment. This is the province of the criminal law.

Crimes are distinct from civil wrongs because crimes morally wrong all members of society and are prosecuted by the state rather than by private parties. Reflecting this distinction, criminal cases are titled not Smith v. Jones, but rather they are the titled The People v. Jones, or the State v. Jones, or the United States v. Jones in federal criminal cases. Crimes are wrongs against "we the people", as well as the individual victims themselves. Criminal law and tort law are both methods of regulating our lives together, and they share some common goals. Each involves some degree of blame, and each includes sanctions, but only criminal law is based fundamentally on moral values about what we all owe each other, and then imposes state blame and punishment for the gross failures of obligation that occur all too often.

State blame and punishment are the most severe impositions of state power on individuals because they involve official public blame, stigma, and the infliction of punishment; i.e., the infliction of public pain, because the offender deserves it. Because criminal blame and punishment are such severe inflictions, there is a different level of burden of proof in criminal and civil law. In civil law, the party bringing the suit must prove the wrongful injury by a standard known as the preponderance of the evidence, which is interpreted to mean more likely than not. In other words, if the evidence slightly favors the plaintiff, the party who is seeking compensation, then the plaintiff wins and the defendant must pay damages. In criminal law, by contrast, the state must prove that the defendant's behavior was criminal beyond a reasonable doubt (note, this does not mean beyond any doubt!). We impose such a high degree of burden on the prosecution, that they require a very high degree of certainty, because the consequences are so potentially grave to the defendant. We favor the error of acquitting the guilty to the error of convicting the innocent. The differing levels of burden of proof thus reflect how much more is at stake in a criminal prosecution than in a private civil lawsuit.

Let's now draw an important distinction between two ways of characterizing criminal law. The first is procedural; i.e. those rules and practices that guide the investigation and adjudication of criminal guilt. These rules, such as the right to remain silent, and the right to be provided with an attorney, are familiar to most people. They're extremely important and help protect citizens from unjustified state interventions in their lives, but they are not the main subject of this lecture. Rather, we'll be talking about what is known as the substantive criminal law, i.e. those rules that define what behavior is criminal and deserves state blame and punishment. These rules are

codified by the state and federal legislatures and then interpreted and applied by the courts. In the United States, U.K., Canada, and other countries originally influenced by English law, we have what is known as a common law legal system. Judicial interpretation is far more important to the development of the law in common law countries than in so-called continental, i.e. civil, legal systems, and our process is considerably more adversarial.

Despite these procedural differences, the definitions of crimes and defenses in common law and continental penal codes are, on the whole, remarkably similar. Most criminal cases in the United States are disposed of by plea agreements, so-called plea bargains, by which the defendant agrees to plead guilty, thus saving the government the time, trouble, and expense of trials. In exchange, the prosecution usually agrees to a lesser charge or recommends a less severe sentence than might have been imposed if the defendant were convicted at trial. Virtually all judges routinely accept such prosecutorial recommendations. In our system, about 98% of federal criminal cases, and about 94% of state cases, are resolved in this way, and thus trials are a rarity compared to peer nations. In the United States, the rules of substantive criminal law are simply the backdrop in the shadow of which the prosecution and defense bargain. Now, let's talk about justifying state blame and punishment.

I have said that criminal law's special province is the infliction of state blame, punishment, and stigma on wrongdoers. Such infliction is intentional and thus raises the immediate question of how the state can justify such harsh treatment. After all, the intentional infliction of pain morally requires justification, if anything does. What goals justify such state action?

The most fundamental answers are that the criminal law aims to do justice by giving wrongdoers what they deserve, and it seeks to control crime in two ways: by deterring would be wrongdoers from committing crimes, and by imprisoning criminals who would be dangerous if they were at large in the community. Let us consider both of these goals in a bit more detail. The technical term for the justification for inflicting blame and punishment because the defender deserves it is called retribution, which is also known as "just deserts". Retribution is a theory of justice that aims to give people what they deserve. It should not be confused with imposing revenge, which is a common psychological desire when people have been wronged but that is not a justification of punishment.

According to the retributive theory of justice, it is simply right in itself to give people what they deserve. Retribution is therefore no different from similar theories of justice in property law, in which people are thought to deserve fair compensation for the fruits of their labor, or in contract law, in which people deserve compensation if others break their promises.

In general, in the United States, we believe that no one should be blamed and punished criminally unless they deserved it. It would thus be unfair and unjustified to convict people known to be innocent, even if doing so increased crime control. We also believe that people should not be punished more than they deserve. Thus, deserving is a necessary condition before the state can impose blame and punishment, and it sets a limit beyond which punishment would be unjust. Interestingly, there is substantial experimental and other empirical evidence to suggest that most people are strongly disposed to blame and punish those who deserve such treatment, even if the imposition of punishment is costly and seems to produce no other good consequence.

Crime control is a justification that aims directly to produce the good consequence of cost-effectively reducing crime. Although crime can be controlled by many means other than threatening or the actual imposition of punishment, such imposition may be especially effective because that imposition is so painful. The goal is not to prevent all crime, as such a system would be too harsh and intrusive on liberty. Criminal law is therefore a balancing act to control behavior consistent with other values we endorse, such as the right to liberty, to pursue our projects without undue state

interference, and the right to be free of blame and punishment unless they are genuinely deserved.

Although retributive and crime control goals can be complementary, sometimes they can conflict. For example, we might believe that a criminal defendant's mental abnormality makes the defendant less blameworthy because the abnormality interferes with his capacity to use his reason. Thus, perhaps, the defendant deserves a somewhat lesser sentence than other defendants who committed the same crime but had no mitigating condition. On the other hand, the same abnormality might also make the defendant particularly dangerous, and thus a candidate for even longer than usual sentence. Balancing such goals can be a daunting task, as we shall see when we discuss sentencing later.

5.2 Constitutional Law, Part II

Let us turn to how society defines criminal behavior. It is often said that the entire body of criminal law can be described by two principles: the harm principle and the fault principle.

The harm principle tries to pick out those behaviors that produce such substantial and unjustified harms, or such risk of harm, that the criminal law is the appropriate response. Some harms, such as the use of force, theft, and fraud, are the so-called core of the criminal law. Familiar examples are homicide, rape, arson, and stealing another's property. They involve substantial harm to others, and their prohibition is uncontroversial and found in all mature systems of criminal law.

In the last century, however, and increasingly in recent decades, criminal law is used to address a wide variety of potentially problematic activities that are nonetheless not obviously sufficiently clear violations of the duties we owe each other to warrant societal blame and punishment. For example, do you think that a person should be convicted of a crime and sentenced to prison for passing oneself off as a war hero by wearing medals that the person did not earn? It's insensitive and immoral behavior, but should it be regulated with criminal law and potential imprisonment? Congress thought so and passed the Stolen Valor Act of 2013, which the President signed into law. Should prostitution be a crime? Or should it be dealt with by public health measures and other forms of non-criminal regulation?

Such expansive use of the criminal law is controversial because it is not clear that criminal law regulation is morally appropriate and necessary. And employing the criminal law when it is not appropriate and not necessary tends to undermine the moral message that the criminal law distinctively is meant to convey.

A current example of the issue of the appropriate use of the criminal law is the extensive law enforcement approach to branding the use of recreational drugs as abusable, other than the drugs of alcohol and nicotine, of course. There's substantial debate about whether criminal law regulation as the primary means to prevent drug use is a wise and cost-effective policy. More generally, criminal law as a regulatory tool has become so expansive that is unclear that the harm principle is now used to limit the proper reach of the criminal law.

It is often said that our Federal system provides 51 laboratories, the 50 States and the Federal Penal Code, for trying to produce the best policies. This permits substantial experimentation and responsiveness to differing values and attitudes in different jurisdictions, rather than a one-size-fits-all approach. Moreover, in our legal order, the Constitution places almost no limits on the ability of a jurisdiction to criminalize an activity.

Thus, the various states and the federal government have essentially no restrictions on the type of conduct within their jurisdiction that they can prohibit using the criminal law. To return to the example of the Stolen Valor Act raised shortly ago, the Supreme Court found an earlier version

of the act that prohibited lying about military heroics unconstitutional, because it violated the First Amendment's protection of free speech. Otherwise, it would have been perfectly acceptable to criminalize such unsavory, but not terribly harmful behavior. Another unusual example is a case in which the Supreme Court held that it was unconstitutional to blame and punish a person simply for the status of being a drug addict. Not for use, not for possession, but simply for the status of being a drug addict. Because statuses are not actions, they are not behavior, and thus they are beyond the reach of the criminal law. But such instances are indeed unusual.

Now let us turn to the fault principle. This is the principle that guides who deserves criminal blame and punishment for the behavior that we wish to prevent using the criminal law.

Examples of such behaviors that criminal law aims to prevent are killing, non-consensual sexual contacts, burning of buildings, takings of another property, and the like. All these harms can be caused without fault if a person was acting as carefully as one could expect under the circumstances, but caused an accident nonetheless. Accidents can happen without fault. Indeed, the only way to prevent all accidents would be to completely cease all interpersonal human interaction. When innocently-caused harms occur, such cases are occasions for regret, but hardly for criminal blame and punishment.

Indeed if the harm-doer, and note that I say harm-doer and not wrongdoer, was sufficiently careful, the victims of the accident would not even be entitled to tort damages because the harm doer did not violate the reasonable standard of care that is the touchstone of tort liability. So if causing a harmful result by one's behavior is not a sufficient condition for blame and punishment, what is the essence of the fault principle?

We can best start to explore this question with a quote from former Supreme Court Justice Oliver Wendell Holmes. Justice Holmes wrote that even a dog knows the difference between being stumbled over and being kicked. In essence, the mental state with which the person acted is the root of the fault principle. An intended harm, a violent kick of an enemy is vastly more blameworthy than an accidental kick that is equally painful to the victim. Mental states are the royal road to moral fall.

The mental state with which a person engages in potentially harmful behavior is the best indication of the person's attitudes towards the rights and interests of fellow people. If someone is being as careful as humanly possible, then the person has manifested complete respect for the rights and interests of others. If the person has intentionally caused the harm without any justification, then the person has demonstrated that the rights and interests of the victim do not matter. Such indifference is the essence of moral fault and blameworthiness.

The mental states that make conduct criminal violations are knows as the mens rea. This is an old Latin term that literally means a guilty mind. But this is misleading. A more precise meaning would be the mental state of the accused, one that is part of the definition that makes a specific behavior a crime. The combination of acting in prohibited ways, coupled with a mental state indicating culpability, that are the pre-conditions for fault.

The criminal law is littered with mental state terms that are part of the criteria for crime. Often such terms are confusing, but in the last half century, a law reform organization based in Philadelphia, the American Law Institute, has published a model penal code that identifies blameworthy mental states with some care. Although it is only a model code, and it is not binding on any jurisdiction, it has had enormous influence on the reform and evolution of criminal law since it was published in the early 1960's. It identifies four culpable Mental States: Purpose, Knowledge, Recklessness, and Negligence.

Purpose has its ordinary language meaning. That is, to do something on purpose, where the

result is your conscious goal. So if I kill purposely, this means that I meant to kill the victim, and I did it on purpose.

Knowledge means simply that you are aware of some fact, or are practically certain that it is true. Suppose, for example, I want to blow up a plane to destroy the cargo so that I can collect insurance proceeds. The crew, of course, dies in the explosion. Was it my true purpose to kill them? Not necessarily, I may even have foolishly hoped that a miracle would occur, and that they wouldn't die. Nevertheless, I knew it was practically certain that the crew would die, and I would be guilty of knowing homicide.

To define the other culpable mental state terms, Recklessness and Negligence, let us return to the example of our speeding driver. The driver certainly did not have the goal that someone should die, and he was not practically certain that someone would be killed as a result of his enormously dangerous driving. But he created an immense amount of risk of death that was completely unjustified under the circumstances.

Recklessness means that the person is actually aware of a risk he is creating. It is actually in his mind, but he decides to run that risk despite recognizing the danger. The driver would thus be guilty of reckless homicide if he were actually aware of the risk of death or serious bodily injury, but he decided to run the light anyhow for no reason without any social justification.

Negligence is defined as being unaware of a risk a person has created, but under conditions in which a reasonable law-abiding citizen should have been aware of the risk. That person has failed to pay the kind of attention we expect of each other when creating unjustified risks. Even if our driver were somehow not aware of the risk of death or serious bodily harm he was creating by his dangerous driving, he certainly should have been aware.

In criminal law, the amount of risk that must be created for criminal liability is greater than in tort law, reflecting the criminal law's concern with sufficient culpability to justify, state blame, and punishment.

Remember that I said that the mental state accompanying behavior is an indication of the person's attitudes towards the rights and interests of others who might be affected by the behavior. The more indifferent someone is, the more blameworthy. And they are almost certainly more dangerous if they are more indifferent. The four mental states I have defined, Purpose, Knowledge, Recklessness, Negligence, represent an imperfect, but good hierarchy of different levels of blameworthiness. To continue the homicide example, killing purposely or knowingly is more indifferent and generally more dangerous than killing by the creation of risk with awareness of the risk, which is in turn more blameworthy than killing without awareness of risk, but when one should have been aware of the risk. And the severity of punishments that may be imposed reflect such different levels of blameworthiness, even when a result like death is the same.

There is one major exception to the fault principle in the United States criminal law, the so-called crimes of strict liability. These permit criminal blame and punishment, simply for engaging in the prohibited conduct even if one's behavior was blameless.

For example, shipping certain goods in interstate commerce without a proper label may be a crime. Imagine a midsize business that is a wholesaler and distributer of pharmaceuticals. The firm packages and labels the drugs before shipping them. Suppose one batch is not properly labeled, all though the firm management had instituted fine training and quality control for the labeling process. There is no perfect process. Innocent accidents happen, and the business and its officers are blameless. Depending on the circumstances, the officers and perhaps the business itself are nonetheless criminally liable, and they may be blamed and punished.

Such crimes largely address public health and safety issues, and carry light punishments and

stigma, but not always. Some strict liability crimes carry heavy penalties. Such crimes, and there are many in contemporary criminal codes, are extremely controversial because they potentially blame and punish people engaging in legitimate activities in blameless fashion. Given the immense importance of fault in criminal law, there is a question of whether it is fair to use the criminal law to regulate such behavior, especially since other forms of regulations such as civil fines might be equally effective.

5.3 Constitutional Law, Part III

Let's begin this part with the discussion of the structure of criminal guilt; i.e. how the state establishes criminal liability. The structure of criminal guilt is two-fold: the prosecution's prima facie case and the defense's affirmative defenses.

The definitional criteria for culpability for criminal offenses are what lawyers call the elements of the crime. They are typically defined by statute, although courts may later interpret the meaning of these criteria. These elements are known as the prima facie case – what the prosecution needs to prove for a crime.

The Constitution requires that the prosecution must prove the definitional elements of an offense beyond a reasonable doubt. If the prosecution cannot prove one of the elements of the charged crime, the defendant will be acquitted of that crime, although the defendant may be guilty of some other crime for which the prosecution can prove all elements.

If the prosecution can prove the prima facie case, i.e. all the definitional elements of the crime beyond a reasonable doubt, the defendant will be guilty unless, and it is a very big unless, the defendant can establish what is known as an affirmative defense.

The United States Constitution permits placing the burden of proof for affirmative defenses on the defendant if a jurisdiction wants to do this, and many do for some affirmative defenses. In some, criminal guilt requires both proof beyond reasonable doubt of the prima facie case and the failure to establish an affirmative defense.

Let us now use a concrete example based on a real case, Clark v. Arizona, that reached the United States Supreme Court. Eric Clark was riding in his pickup truck in Flagstaff, Arizona, when he was stopped on a routine traffic stop by officer Jeffrey Moritz who was in full uniform and driving his police cruiser. The stop quickly turned deadly as Clark shot and killed Moritz. Clark was charged with the murder of a police officer.

In Arizona, the crime was defined as follows: intentionally, or knowingly, killing a law enforcement officer, who also had to be a person, which we'll get to in a moment, in the line of duty. Note that this particular form of homicide focuses on the identity of the victim. It carries enhanced penalties because we believe that killing an official member of the government, who serves to protect all of us, is more serious than the already serious killing of a civilian. Thus, such defendants are more culpable if all of these elements are proven, and we want to deter such conduct with higher penalties, especially to protect police officers.

Thus, the prosecution's case was to prove that Clark killed Moritz purposely or knowingly, and that Clark knew that Moritz was a human being and a police officer acting in the line of duty.

But even if the prosecution were able to prove this prima facie case, suppose Clark killed because someone threatened to kill him if he didn't kill Moritz, or suppose Clark suffered from a severe mental illness, and delusionally believed that Moritz was about to kill him, i.e. Clark. In either case, maybe Clark shouldn't be found guilty. Even if the prosecution can prove that he intentionally killed a police officer, knowing he was a police officer in the line of duty, there may be

counterweights to this act.

Each crime includes a conduct element, a prohibited type of intentional behavior. In the Clark case, the conduct is any type of intentional killing conduct. So, it wouldn't matter if Clark intentionally shot Moritz, stabbed him, bludgeoned him, strangled him, or pushed him off a cliff. This requirement that the defendant intentionally engaged in prohibited conduct is known as the act requirement.

In our actual case, there is simply no reason to believe that Clark shooting at Moritz wasn't an intentional action. So the prosecution will have little trouble proving the act requirement.

The act is usually self-evident, so mental states are the primary fault criteria.

Guilt under the homicide statute in Clark requires that when Clark intentionally shot at Moritz, he did so with the purpose of killing Clark or knowing that a gunshot was practically certain to kill him. This looks like another easy win for the prosecution, but Clark undisputedly suffered from paranoid schizophrenia. There was evidence he had delusional beliefs that space aliens were persecuting him. Clark claimed that he genuinely believed that Moritz was a space alien. If we believe him, then he did not purposely or knowingly kill a human being. His purpose or knowledge concerns space aliens, and killing a space alien with any mental state is not a crime, at least not yet. Clark also had to know that a particular so-called "circumstance element" existed, namely that Moritz was an officer acting in the line of duty. But even though Moritz was in uniform and in a police cruiser, if Clark genuinely believed he was a space alien impersonating a police officer, then Clark really didn't know Moritz was an officer acting in the line of duty. Indeed, if he really had this belief, he wouldn't be guilty of reckless homicide, because he was not aware that he was risking the life of a person by shooting at a supposed space alien. At most, he would have been guilty of negligent homicide because he made an unreasonable mistake about the nature of his victim. A reasonable person would have been aware, as Clark arguably was not because he was acting under the influence of a delusion, that Moritz was a person and police officer, and not a space alien.

There are other elements the prosecution must prove to establish guilt for criminal homicide. And there are many other ways than introducing mental disorder evidence that a defendant can try to cast reasonable doubt on the elements of the prosecution's prima facie case, but I'm sure you get the general picture. In any event, this case was tried before a judge. Clark waived his right to a jury presumably because he thought a judge, who on average is more highly educated than a juror, would better understand and sympathize with expert psychiatric or psychological testimony. Let us now therefore turn to understanding the affirmative defenses.

In essence, the elements of the prima facie case do not require proving why a defendant acted as he or she did. It is simple prima facie wrong, for example, to kill another human being intentionally. If you do that, you are prima facie guilty of murder. But we all understand that people sometimes do things that at first appear wrong, but then, when we come to understand why the person did them, we may think that it were not wrong after all. Or, even if we think that it were wrong, we may think that the person was not blameworthy because there was something amiss about the defendant, or the situation.

There are two classes of affirmative defenses: justifications and excuses.

Justifications exist when conduct that is ordinarily wrongful, such as the intentional killing of a human being, is in fact right or at least permissible under the specific circumstances. To succeed with a justification, the defendant must have had a reasonable belief that he had an objectively good reason in these circumstances to act in ways that are ordinarily wrong. By an objectively good reason, I mean a reason that we as a society think is a good reason. Not simply a reason an individual thinks is acceptable from his own idiosyncratic point of view.

Justifications do not require that the person formed a correct belief about the need to act in ways that would otherwise be wrongful. It is sufficient if their belief is objectively reasonable, even if it weren't true. That is all we can expect of fallible creature such as ourselves.

Self-defense is a perfect example of a justification. We as a society believe that people are justified in using intentional force to prevent immediate wrongful aggression against them. Suppose I wrongfully threatened to kill someone with immediate deadly force. My innocent victim would be justified in protecting his own life with deadly force because the intentional killing of a wrongful aggressor, when there really is no alternative, is preferable to an innocent life being taken by a wrongdoer.

Other examples of justification include defense of others and defense of property. Notice that there is nothing wrong with the defendant in these cases. The defendant was a responsible person, and was simply doing the right or permissible thing in the circumstances of the case.

5.4 Constitutional Law, Part IV

Let us begin with the affirmative defense of excuse. In cases of excuse, defendants have done wrong, but they are not held accountable because we think there is some reason that they are not responsible for what they did.

In cases of justification, the defendant is a responsible person who has done the right thing or the permissible thing. In cases of excuse, a non-responsible person has done the wrong thing. Examples of excuses are infancy, insanity, and duress.

I believe that the criminal law quite precisely agrees with the ordinary morality criteria for responsibility and excuse. Recall our discussion of the types of creatures we are, where we are the types of creatures who can rationally be guided by reason. Now think about your implicit standards for believing that someone is the type of person who would be blameworthy if they did wrong. You expect such people to have the capacity to be reasonably rational and to have acted without compulsion. If they have this rational capacity and were not compelled, then you would consider them responsible. In contrast, if the person does not have the capacity to be rational, or if they were compelled to act, you would be inclined to excuse and forgive them.

The criminal law's excuse defense mirrors these everyday criteria. We excuse young children who intentionally do wrong, because their capacity for rationality is not fully developed. We excuse some people with mental disorder, because the disorder undermines their capacity to act rationally even if they are prima facie guilty. Suppose someone threatens to kill you unless you kill someone else. If you yield to the threat and kill the innocent third person, we might excuse your intentional killing, because we would conclude that the threat produced such a hard compelling choice that we couldn't expect you not to kill and thus you are not responsible for the intentional killing.

A particularly hard question about excuses is raised when a wrongdoer's capacity for rationality was seemingly fine and no one was threatening him, but he claims that he couldn't control himself or couldn't help himself when he committed the crime. Cases of addiction or child molestation are examples. But exploring this topic of self control for excuses is for an advanced lecture.

I have not previously mentioned free will so far. Free will is not a criterion for any criminal law doctrine. And our whole system of criminal blame and punishment does not depend on a presumption of so-called metaphysical free will in the strong sense, that is, the ability of people to act uncaused by anything but ourselves. When we excuse, it is actually because the defendant lacks rational capacity or is compelled to act, and not because the person lacks free will.

Assume now that the prosecution is able to prove its case beyond a reasonable doubt and that no

affirmative defense is established. The defendant will then be found guilty of the crime charged and deserves to be punished. At this stage, we are ready for the last part of our discussion, sentencing: the imposition of the proper punishment.

Most experienced criminal defense attorneys will tell you that their clients care far more about whether they will go to prison, and for how long, rather than about whether they are convicted. Yes, a conviction imposes blame and stigma, but for most people, going to prison, which is the primary punishment in the United States, is profoundly painful and something to be avoided. Thus, the possible punishments, and the process by which they are imposed, are of the utmost importance to the state and to the individual.

The goals of sentencing are generally the same goals that justify criminal blame and punishment: giving offenders their just desserts and preventing crime. But sentencing schemes are seldom precisely clear on how these goals should be weighed and balanced in general, or how they should be applied in individual cases.

Recent decades have seen greater emphasis on retribution and less indeterminate sentences. But the pendulum may be swinging toward more evidence-based crime control that focuses on the offender's risk of future criminal behavior.

The punishments that may be imposed for crimes are set by the legislature, or by an administrative agency that the legislature authorizes to do this. The Supreme Court has repeatedly held that the 8th Amendment's prohibition of cruel and unusual punishments sets almost no constraints on the terms of years legislatures may authorize.

Indeed, the Supreme Court has held some exceedingly severe sentencing schemes, such as California's original "three strikes and you're out" law, which permitted a sentence of 25 years to life for a defendant convicted of a third felony, even if the third felony were relatively minor and the prior two felonies were not very serious. This enormous disparity across and within jurisdictions concerning the proper sentences for various crimes is once again, the federal laboratory at work.

Though juries decide whether the defendant is legally innocent or guilty, with the primary exception of capital sentencing, it is judges who impose sentences. Generally, the legislature provides for a range of sentences for each crime, but is often unclear what sentences demand for the goals of retribution or crime control.

Judges, therefore, have wide discretion to decide what sentences to impose within the statutorily-authorized range. They are typically aided in this endeavor by non-binding pre-sentence reports prepared by probation officers or other court personnel that address the defendant's background, the circumstances of the crime, and other sentencing considerations. In some jurisdictions, judicial discretion is constrained by legislatively-mandated guidelines, or by required mandatory minimum sentences that must be imposed. Despite attempts to reign in unjustified discretion, inequality in sentencing for similar crimes committed by similar defendants remains a disturbing phenomenon.

There has been a great deal of fervor concerning sentencing in recent decades, reflecting the recognition of how important it is to individual lives and to the society as a whole. Everyone hopes that the attention paid and the thought given will produce a more just and effective sentencing system. But whether that result will be achieved is an open question.

Let me conclude this section on sentencing by pointing out another way in which the United States is distinctive.

Imprisonment and fines are a common feature across a wide range of nations, but what sets sentences apart in the United States, compared to other developed nations, is the much greater length of prison terms that we impose for most crimes. In fact, capital punishment, which among western developed nations, is only imposed in the United States (and capital punishment is valid

both morally for just desserts, societal healing, and for crime-control reasons, but it is a topic for another time). Let me therefore return to the example of imprisonment to illustrate my point about the length of sentences. Please compare Bernie Madoff, whose massive fraud harmed and impoverished a large number of innocent people, to Anders Breivik, a young Norwegian ultranationalist who killed eight people in Oslo bombings to create a diversion, invaded a summer youth camp for members of a political party he despised, and systematically slaughtered 69 people at the camp.

Madoff, who was 71 years at the old at the time of sentencing, received 150 years in prison for his Ponzi scheme. Breivik, who is 32, received 21 years for his mass murders of 77 people. It can reasonably be argued that life-taking is the worse of the two crimes, and yet our law permitted a vastly greater sentence for Madoff than Norwegian law provided for Breivik's multiple murders. Of course, Madoff was much older and likely to effectively serve less time, but that is beside the point. If he had been Breivik's age, the sentence disparity would be even clearer.

It goes beyond the scope of this lecture to explain why our sentences are so comparatively severe. And I'm here taking no position on whether such severity is justified for the vast majority of crimes. It is simply a fact that sentences in the United States tend to be comparatively severe.

Let me say a few words in conclusion about the future of criminal law. As we all know from reading the newspapers and other media, there have been major advances from the various sciences in our understanding of the causes of human behavior. Hardly a day goes by without a revelation from psychology, genetics, neuroscience, and other disciplines that study human behavior.

Our criminal law is based on our ordinary understanding of ourselves as persons. As we learn more and more about ourselves, will we come to see ourselves as the non-responsible victims of causal forces over which we have no control? If so, this would justify abandoning our practices of blame and punishment that take people seriously as moral agents. Many think that this development is possible, and even desirable. In contrast, I think that this is highly unlikely for many reasons, and I believe that our view of ourselves as creatures who act for, and can be guided by, reason, which is the basis of criminal law and ordinary morality, is here to stay. And it's a good thing too. Our current concept of personhood is at the core of concepts like liberty, dignity, respect, and concern for people. These concepts contribute to the richness of our lives. I believe it would be a human disaster to abandon these concepts, and that there is no scientific or moral justification for doing so.

6 Civil Procedure

This 4 part overview of Civil Procedure is taught by Prof. Tobias Wolff, who teaches civil procedure at the University of Pennsylvania Law School.

6.1 Civil Procedure, Part I

Welcome to Civil Procedure! The best way to organize our thoughts are with some definitions. What is civil procedure?

Broadly speaking civil procedure has two components, civil and procedure. Civil in this sense describes the workings of our judicial system that have to do with the resolution of disputes between people, or sometimes between people and government, that are not criminal in nature. Civil disputes have to do with disputes over ownership of property, injuries for which you think you're entitled to be compensated, contracts that you want to get enforced, and so forth. That is a civil dispute. Procedure describes the mechanisms by which we use our court system to resolve disputes. And so the field of civil procedure, broadly speaking, is a field that relates the use and mechanisms of our court systems to resolve civil disputes between people and the ways in which our court system operates in the resolution of those disputes.

Now, the field of civil procedure details the power of courts that is bound in procedure and the ways in which people approach the resolution of their disputes. I'd like to frame my discussion about civil procedure with a quotation from a man by the name of Karl Llewellyn. Llewelyn was a legal scholar, writing in the first part of the 20th century. And in 1929, he wrote a series of essays called The Bramble Bush that were designed for incoming law students and the fields of study that they were about to be undertaking. When he was talking about the field of procedure, he said the following:

"You must learn to read your substantive courses through the spectacles of the procedure. Because what substantive law says means nothing, except in terms of what procedure says you can make real."

Now, Karl Llewellyn was writing at a time when the issue of procedure, and procedural reform, was really quite urgent. The procedures in our civil court systems in the United States have not always functioned particularly well. And the early part of the 20th century was a time when procedures were extraordinarily varied around the country and even varied within our federal court system. There were a lot of very active and elevated conversations around the country about procedural form and what that might look like. At the time, procedure was in danger of actively frustrating the ability of litigants to prevail on their claims or to bring their claims forward in an effective and meaningful fashion. In particular, Llewellyn lived and taught in New York at the time, and New York had a really messed up set of procedures in their state courts.

In this period of time, the federal courts looked to what state courts would do in deciding what procedures they would use in many of their cases. Each state used different procedures and had many different policies surrounding the resolution of civil disputes. As a consequence, a lot of federal procedures were a mess as well. And so conversations about procedural reform in the first 30 or 35 years of the 20th century were both conversations about what a sensible procedure system might look like and whether it would make sense to have a single uniform set of procedures in the federal courts.

Largely as a consequence of the negative history and negative experiences that lawyers and judges had with the existing procedural system, in 1934, Congress passed this very important

statute, the Rules Enabling Act of 1934. This was the very first time that Congress had provided for a single, uniform set of civil procedures to resolve civil disputes in our federal courts. And several years following the enactment of this statute, rule makers carried into effect the very first set of general purpose, uniform procedural rules for the federal court, what are often described as the Federal Rules of Civil Procedure.

So, because federal courts are a very important place where civil disputes get litigated, and the way that our federal courts resolve civil disputes winds up providing a model and guidance on how states adjudicate civil disputes as well, it's important to understand the federal system of civil procedure. And in particular, it's important to understand three basic principles, which are going to be the focus of this discussion.

The first basic principle involves a term called transsubstantivity. It's what you might think of as a philosophical principle that underlies the federal rules of civil procedure, and that has really served to shape, to a significant extent, the way that we think about how a procedural system ought to operate within the American justice system.

The second basic principle is the relationship between "procedure" and "substance". For a lot of people, particularly before you get to law school, if you hear a term like civil procedure, you think, oh that's going to be the really dry, boring stuff. And that's not remotely true at all. And this boundary between what we label procedure and what we label substance is a really important issue, and figuring out what it means to distinguish between procedure and substance actually winds up being one of the key issues in the administration of a civil justice system. It's also sort of a practical concern, this distinction between procedure and substance, and what that distinction is meant to capture.

The third issue that I'm going to discuss has to do with some efforts that are increasingly important in the 21st century for litigants, and in particular for powerful defendants like corporate defendants, to try to bargain their way out of the civil procedure system, using a mechanism called arbitration enacted under the auspices of a very powerful federal statute called the Federal Arbitration Act.

6.2 Civil Procedure, Part II

So let's start our conversation about this first issue of transsubstantivity. As I mentioned, when the federal rules of civil procedure were brought into existence, procedure had been a mess, and one of the goals of the enactment of the Rules Enabling Act of 1934 was to clean up that mess. It did this by creating a set of mechanisms by which people could bring their civil cases into court that would be relatively uniform and relatively predictable, and the principle of transsubstantivity was one of the tools by which that goal was sought to be carried into effect.

Transsubstantivity has two components: vertical transsubstantivity and horizontal transsubstantivity. These are big fancy terms, but they're really meant to capture some very simple ideas. First of all, this idea of vertical transsubstantivity is basically an idea that says that all similar procedures will operate in the same basic way. That is to say, the same procedures will apply whether a lawsuit is a big complicated lawsuit or a small, relatively simple lawsuit. And we have one set of procedures, a very fully realized one, with all the bells and whistles, that apply regardless of whether you bring a big, expensive, complicated case into federal court or a relatively simple and relatively low-stakes case into federal court.

Now why might this matter? Well, it matters because this "bells and whistles" version of the federal rules of civil procedure can sometimes be moderately expensive. And, more recently, it has

gotten some attention for the completeness of it. The fact that it makes so many tools available for discovery, i.e. for learning information from the other side and getting that side to turn information over to you, and for motion practice, i.e. for filing formal motions with the court in which you ask the court for various different kinds of relief at various stages of the litigation process, when utilized to their fullest extent, can be a relatively expensive way of resolving disputes.

While there are a lot of benefits, there are some costs as well. There's at least the possibility that smaller cases might get priced out of the federal courts in various ways. And so one conversation about transsubstantivity has to do with the affordability of litigation. That is to say, whether people will have access to justice due to this unintended consequence. This is a useful issue to start with because it aligns us on the relationship between a procedural system and the viability, and cost, of enforcing a claim.

Circling back, horizontal transsubstantivity is a description of the way that procedure operates in different types of cases. That is to say, different cases that are governed by different substantive legal principles. And one of the core concepts is that procedures should not vary depending upon the type of claim that you're seeking to prosecute. These different types of law all use the federal rules of civil procedure if they're brought in the federal courts, and it's the same set of federal rules for all of these different types of claims.

Now, that may sound like a fairly sensible and straightforward proposition, and indeed, in a lot of ways, this idea of horizontal transsubstantivity has in fact been a very important unifying feature of the civil procedure system in the federal courts. But there are times when it can also cause problems, or at least cause some confusion. There's a recent case that I want to talk about that helps to illustrate some of the problems and confusion that this idea of transsubstantivity can introduce, called Bell Atlantic v. Twombly (2007).

Bell Atlantic v. Twombly was an anti-trust case. And it was a case specifically that deals with pleadings standards. Now, pleadings standards is a description of the very, very first stage of a lawsuit where you initiate the lawsuit by filing a complaint with the court. And when you're a plaintiff, when you're somebody who thinks you've been injured and you want to start a lawsuit, you draft this document called a complaint. And because you're right at the onset of a lawsuit, you don't have any evidence, necessarily, or any testimony or documents from the other side. All you can put in a complaint is allegations, right? Something that says, I allege that the following things happened. A complaint is basically a promise for what it is that you think you'll be able to prove. That is, what it is that you're offering to prove if you're given an opportunity to have a lawsuit and develop evidence. It contains allegations that are supposed to show why you would be entitled to relief from the court, if you're able to prove the things that you say happened to you. So, there's a question of what you have to put into a complaint in order to get into court, right? What is the threshold requirement for initiating the very powerful processes of a lawsuit is a matter of great concern, and we refer to that question as the standard of pleading that you have to satisfy.

So, Bell Atlantic v. Twombly was a case that involved pleading standards. It involved a dispute over whether a complaint that had been filed by an anti-trust plaintiff was an adequate complaint. That is, whether it met the standard for getting this anti-trust plaintiff into federal court. So, in the Bell Atlantic v. Twombly case, the Supreme Court wound up deciding that the complaint that the plaintiff had filed in that case was inadequate, that it failed to satisfy the pleading standard required to allow the plaintiff to initiate the litigation process to have a day in court. And specifically, what the court wound up deciding was that a very specific issue of anti-trust law, which was what it is that you have to demonstrate to establish a conspiracy in anti-trust cases, that aspect of the complaint was insufficient and the plaintiff had not alleged enough facts to make it, in the court's

words, plausible that there was a conspiracy to violate the anti-trust laws.

Now, this was an issue in the field of anti-trust, and so it had a particular substantive context. Anti-trust policy is very concerned about fostering competition and policing abuses of market power. And so the doctrines around conspiracy in the anti-trust laws seek to strike a very careful balance between the desire to foster competition and to prevent certain kinds of abuses of market power. And what the court had to say in the Bell Atlantic v. Twombly case, about why the complaint in that case was inadequate, was geared, to a very significant extent, to these particular substantive policy judgements that our anti-trust laws make about balancing the fostering of vigorous competition with preventing abuses of market power. And after Bell Atlantic was decided, there was a question about whether this case establishes a heightened pleading standard across the board for all kinds of lawsuits, no matter what the substantive context, or if it were specific to anti-trust cases?

In a series of two cases following the Supreme Court's Bell Atlantic v. Twombly decision, the Supreme Court answered that question by invoking this principle of transsubstantivity, and saying that, in fact, what Bell Atlantic represented was a ratcheting up of the pleading standard across the board. They considered this a procedural issue, and what we say about procedure in one context applies in all the other contexts as well. The ramification wound up shutting several litigants, and potentially shutting others, out of court because of what it viewed as the implausible nature of their allegations at the very outset of the lawsuit. And this is a very consequential procedural holding because the pleading standards determine not only whether you're going to be able to get into court in the first place, but also if your complaint gets dismissed because you have failed to satisfy the pleading standards, then you can't rehabilitate your complaint in a sufficient fashion. You get only one shot to file a complaint on a given claim in the civil court system.

And so this principle of transsubstantivity winds up producing this very consequential result. Now, there are both good and bad aspects to this principle of transsubstantivity. The virtue of this principle is that we want our procedure system to be predictable and uniform, where proceedings learnings can apply across the board. The danger is that the line between procedure and substance is not always quite so sharp. And if we have a procedural holding in one particular type of case that really seems powerfully tied to the substantive law in that case, then is it always so clear that this principle of transsubstantivity should apply to all kinds of other cases as well?

The idea of transsubstantivity, therefore, depends upon a fairly robust understanding of the distinction between substance and procedure. And Bell Atlantic v. Twombly is one case that illustrates that, perhaps sometimes, that assumption that there is this sharp distinction between procedure and substance is not always a good assumption. And that applying transsubstantivity in such a doctrinaire fashion can sometimes produce negative consequences.

6.3 Civil Procedure, Part III

The second issue that we will discuss is the distinction between substantive questions and procedural questions. Now, the federal statue that brings into existence the Federal Rules of Civil Procedure, the statue called the Rules Enabling Act of 1934, contains in the very text of the statute an apparent requirement that we distinguish between substance and procedure. The statute specifies that these procedural rules are never supposed to abridge, enlarge, or modify substantive rights.

And broadly speaking, that's a distinction that would seem to make a fair amount of sense. Substantive questions are the questions that we might think of as having greater social policy implications, being the types of questions that legislators and other types of politically accountable figures ought to be responsible for carrying into effect. Procedural questions are the types of

questions that are generally involved in the administration of a civil justice system. And drawing a distinction between the types of questions that legislature should address and the types of questions that rule-makers should address seems quite sensible. And that is, at base, what this substance procedure distinction is meant to capture.

But it's not always quite so easy to draw that distinction. Or at least, to draw it in a way that makes a lot of sense. As one example, take the pleading standard case that I mentioned in the last part. This is a case in which a procedural issue speaks in a very direct fashion to whether people are going to be able to get into court at all. That would seem to have some pretty significant, maybe even substantive implications to it. And so figuring out when it is that we can draw a distinction between substance and procedure in a satisfying way is a continuing issue that gets addressed by scholars and by courts in the administration of our civil justice system.

So, the example that I want to discuss to illustrate this problem more fully is the example of class actions. Class actions are one of the most powerful procedural mechanisms in the modern civil justice system. In the federal system, they are governed by a rule that gets discussed a lot, Federal Rule 23, in our civil procedure system. The modern version of Federal Rule 23 was brought into being just about 50 years ago in 1966, and it authorizes a representative lawsuit, a class action, in which one or several individuals come into court with their lawyers and allege that they've been injured in some following way, a contract has been violated, or our financial interests have be affected. We've been injured in some fashion, and not only have we been injured, a whole lot of other people who are similarly situated have been injured in the same way as well.

And when litigants come into court, invoke Rule 23, and seek to initiate a class action, what they say is, we don't want to just litigate our claims. We want to litigate the claims of everybody who's been hurt in the ways that we've been hurt. This is a remarkable proposition if you think about it. Right? A couple of litigants come in with their lawyers, and often it's the lawyers who really play a much more powerful role in guiding the course of these proceedings, and they say, we want to litigate a set of claims on behalf of a whole bunch of people whom we've never met, whom we have no relationship with, but whom we think we would be adequate representatives for, to litigate their claims that are just like our claims. And the circumstances under which a class action is permissible, the circumstances under which a court will allow a lawsuit to proceed as a class action, is an issue of major importance in the civil justice system of the United States today.

If a defendant, let's say for example, a corporate defendant, faces the claims of one or even a small handful of injured individuals, then their exposure is limited. The overall amount they might have to pay in response to these lawsuits is liable to be relatively modest. But if one or a couple of these individuals can now come into court and litigate everybody else's claims on behalf of an entire class of people, suddenly the corporation exposure and the corporation's potential damages can be enormously magnified, and the resulting lawsuit becomes a very high stakes one.

Class actions serve very important functions, in that they can enable claims that nobody would otherwise be able to afford to litigate to get adjudicated by the court. For example, say we have 100,000 people, each one of whom has been injured to the tune of $50, let's say because of an improper billing practice from their cable company or from their cellphone company, no one person is going to be able to litigate a $50 claim in all likelihood. It's just not worth the time and money for a whole lawsuit for the majority of those people. But, if it's possible for a couple of people to come into court, represented by lawyers who are going to bring those claims on behalf of everybody, then suddenly 100,000 people with $50 claims becomes a $5,000,000 lawsuit, and that's a lawsuit that's worth litigating. So class actions can have the effect of allowing claims to get enforced that wouldn't otherwise be enforced at all.

But the flip side is that class actions have the potential to create a lot of pressure, maybe even improper pressure, on defendants to settle lawsuits in order to avoid what might be crippling exposure. And there are all kinds of other reasons why class action lawsuits have to be monitored very carefully, because they can be misused or even abused in various ways.

Building off this concept of putting limits on class action lawsuits, when the lawmakers in New York State created their class action system, they took a look at their laws and realized that they had some statutes in New York where they had penalty provisions and statutory damages that might be problematic. Certain kinds of remedies are available to winners of these lawsuits on the assumption that they should get paid, not necessarily based upon how much they've actually been injured, but rather a fixed amount that might be a larger amount than the actual injury that they've suffered in order to create a mechanism by which people, individual people, can actually afford to bring these lawsuits or in order to create disincentives for certain kinds of defendants to engage in bad behavior.

And we think these are great. We think these make a lot of sense in our laws. But if you can have a class action in a case involving statutory or penalty damages, then suddenly you're going to be magnifying the effects of these penalties totally out of proportion with what they were intended to do when they were first enacted. Or at least there's a danger that that could happen. And so New York created a separate provision of law that said no class action would be allowed in these cases unless the actual statute itself authorizes class actions. In other words, we're going to say that if we've created statutory or penalty damages, certain types of damages that are really geared towards individual enforcement and could be misused or, at least create bad consequences if they're the subject of a class action, then you can't have a class action for that kind of substantive law dispute unless we specifically say in the statute itself that you can have a class action.

So that's how New York geared its class action system in the state courts. Now, in a lawsuit that recently came before the Supreme Court in a case called Shady Grove v. Allstate Insurance, a question arose: can you get around the New York law by bringing the class action in a federal court instead? In many ways, the court systems in our country, i.e. the federal courts and the state courts, all operate in parallel with each other. And there are many types of lawsuits, not all, but many types of lawsuits, that could be brought either in the federal courts or in the state courts, and this was potentially one of them.

And so the plaintiffs thought they could invoke Rule 23, which doesn't have any of these limitations that New York's provisions have. Thus, the question that was presented to Supreme Court of the United States was, is that possible? Is it possible to bring a lawsuit in federal court based on a New York claim, where you wouldn't be able to have a class action in the courts of New York, but you can have a class action in federal court, simply by pointing to this provision, Rule 23? Ultimately, the court said yes. And the court said, in fact, that Rule 23, because it was just a matter of procedure, controls the issue of class action in the federal courts for all purposes and trumps, or supersedes, any contrary law in the state of New York. And in particular, in response to the argument from the defendant that there are serious substantive implications this run-around, they declared that procedural questions are governed by the Federal Rules of Civil Procedure alone, and any consequences that it might impose upon the policies of New York to allow a class action in this kind of case are merely incidental consequences. They don't change the character of this question as a procedural question, because there isn't a distinction between defining a class and a class being eligible for treatment as a class.

Now this is a very controversial opinion. And it's an opinion that really highlights what could be at stake when you draw this distinction between procedure and substance in such sharp and rigid

terms. Class actions are one of the biggest and most important things going on in our procedural system today. And in the New York case in particular, the result of this decision by the Court was to take what was essentially a $500 lawsuit by an individual and turn it into a $5 million lawsuit on behalf of an entire class. How can that not have some kind of substantive implications? Good question. But if it does have substantive implications, then does that mean that class actions in the federal court are always problematic, or always somehow invalid, because, after all, the Federal Rules of Civil Procedure are only supposed to deal with procedure questions and are not supposed to deal with questions of substance?

If class actions have substantive implications in every case, then maybe class actions are invalid across the board under the Rules Enabling Act of 1934. This was the vexing question that the Court was presented with in this Shady Grove v. Allstate Insurance case. And in that case, they wound up adopting a relatively formalistic and fairly rigid way of defining this distinction between procedure and substance. And they allowed a class action to happen in the federal courts that couldn't have happened in the courts of New York and under the laws under New York. Following this Shady Grove decision, the law today is that you can have a class action in the federal courts in a type of claim where you can't have a class action in the State Courts of New York. And the reason for that somewhat surprising result is this sharp distinction that the Court has felt the need to draw between questions of substance and questions of procedure.

So, there are two lessons I want to focus on. The first is that this is a distinction that we can't avoid grappling with. The Rules Enabling Act of 1934, the statute that carries into effect the Federal Rules of Civil Procedure, in its very text draws this distinction between procedure and substance. But it is a very difficult distinction to administer in particular cases, and the lines can be blurry.

The second lesson goes back to this first principle of transsubstantivity: the idea that the rules are supposed to operate irrespective of the underlying substantive law. Transsubstantivity invites us to give more formalistic and more rigid answers to this question of procedure versus substance, because if you think about it, one alternative in the Shady Grove case would have been to say that the type of statute involved in the New York case is one that needs to be treated differently in a federal class action than other types of statutes might be treated in different types of lawsuits. That might have produced a sensible result, albeit one in conflict with transsubstantivity.

So with this transsubstantivity principle, the procedure is not supposed to vary depending upon the underlying substance of the legal dispute before the court, and thus administering this distinction between substance and procedure is necessary and unavoidable, but also very difficult. And operates in some tension with this important, but sometimes excessively applied, principle of transsubstantivity, which says the procedure is supposed to operate in the same way, no matter what the underlying law. If procedure is supposed to operate in the same way, no matter what the underlying law, that encourages more formalistic or rigid answers to this substance/procedure distinction.

6.4 Civil Procedure, Part IV

Arbitration is a mechanism by which litigants can choose to have their disputes resolved not in our court systems but before a private decision-maker. Arbitrators are men and women who are paid professionals, whose job it is to resolve disputes that would otherwise be heard in the court system, but whom the litigants decide to hire to resolve their dispute instead.

Now why might a litigant want to have a case heard before an arbitrator instead of before a court?

Broadly speaking, arbitrators are sometimes less formal. There is the possibility that arbitration might be less expensive than a lawsuit. Arbitration can produce quicker results sometimes, and it carries the promise, at least, of being more final because the opportunities to appeal an arbitration decision are fewer. And so litigants will often get a dispute that will be completely over at a sooner point in the process from an arbitrator than would be true from a civil court system.

In the United States, there's a federal statute, the Federal Arbitration Act, which was enacted in 1925, which grants a favored status to arbitration. In particular, this federal statute says that, if people sign a contract in which they agree to arbitration instead of litigation through the courts, then that contract has to be enforceable. Courts are not allowed to set aside that contract simply because they're hostile towards the idea of arbitration, or that they don't like the idea of arbitration.

In recent years, the practice of arbitration has wound up being a major focus of attention among courts and commentators for a very specific reason: the capacity of arbitration can wind up not just being an alternative venue, or an alternative mechanism, for disputes to be resolved, but also this capacity for arbitration can displace some of the more powerful features of our procedure system. And indeed, in recent years, the Supreme Court has decided a series of cases that have given defendants, and in particular the corporate defendants who usually draft such contracts, a lot of powerful tools for both shielding themselves from certain types of civil lawsuits and for shielding themselves certain types of powerful civil procedure tools that might be available in the federal courts.

This is actually one of the major issues that is getting discussed in the field of civil procedure and dispute resolution today. It's worth taking a moment to spell out exactly what is at stake here. A lot of the attention on arbitration in the last several years has focused on class actions and the ways in which arbitration can be used to prevent plaintiffs from bringing class actions in certain types of cases. Class actions, that powerful tool that we discussed in the previous section, are this mechanism by which lots and lots of claims that might not be affordable to bring on an individual basis can be collected together and brought on a representative basis, all at once, in front of a court.

So let's imagine that we have a series of potential claimants, a class of potential claimants, all of whom have signed a similar contract. It could be a contract with a credit card company, or it could be a contract with a cell phone company. And they think that they have a potential claim. Let's say that the company, in drafting its contract, has included an arbitration clause which says that if you have a dispute with this company, then you agree that you're going to resolve that dispute through arbitration rather than by bringing a lawsuit. So, let's then imagine that somebody believes that they've been injured, and they believe that the entire class of people had been injured. The company has engaged in an improper billing practice, and not only that, but also it's engaged in that improper practice with respect to everybody too.

So this is a classic case where the plaintiff might come into court and say that he would like to represent not just himself but also the entire class of people who have been harmed. However, if the company has put an arbitration clause in its contract, then the company can respond by saying that the plaintiff is not allowed to bring that case in a court. As required by the contract, the plaintiff would have to bring that court before an arbitrator.

A situation like this would present the obvious question: can the case be heard as a class, nonetheless? Is there such a thing as class arbitration? And what are the circumstances under which there might be a class proceeding in front of an arbitrator, instead of a class proceeding in front of a court?

In a series of decisions over roughly the last ten years, the Supreme Court has addressed these questions, and it has addressed these questions in a way that severely limits the ability of plaintiffs

to bring class action proceedings. And in particular, it gives defendants and the people who draft contracts, usually corporate actors who provide services and perhaps even employ a lot of people, a lot of tools to shield themselves from certain types of class or mass adjudication.

In particular, let's talk about two cases that the Supreme Court has decided that have addressed these questions directly. One of them is called AT&T Mobility v. Concepcion, decided in 2011, and the other is called American Express v. Italian Colors Restaurant, decided in 2013. Both of these were cases in which the corporate defendant had drafted a contract. In the case of AT&T Mobility, it was a contract for cell phone services that was drafted for the company's customers, and in the case of American Express, it was a merchant agreement that American Express entered into with certain merchants, like restaurants, that specified the terms in which those restaurants could accept American Express cards by way of payment.

And in both of these contracts, the companies included an arbitration clause that said that this lawsuit had to be litigated, if at all, as an arbitration rather than as a lawsuit. And, both of these contracts were also designed to explicitly prevent class actions by stating that there could be no class-wide arbitration. Both of these lawsuits went up to the Supreme Court on the question of whether these arbitration clauses could be enforced, and in both cases, the argument was not just a sort of abstract question about the enforceability of the arbitration clause, but in reality, they were questions specifically about what the practical impact of the arbitration clause would be on the ability of people to assert their claims.

So in AT&T versus Concepcion, the question was whether, in the absence of a class action, there would be any real enforcement under state law for what the plaintiffs asserted was an improper billing practice on the part of AT&T Mobility. And in the Italian Colors, the question was whether there would be any affordable mechanism at all for these individual merchants to assert their anti-trust claims that American Express was misusing its market power in some way by defining these terms with merchants in their payment relationships. And there were very good arguments to the effect, in both of these cases, that if the arbitration clause were to be enforced on its terms, that the practical consequence would be that very few claims would be brought in the AT&T case, or there might be no claims at all brought in the Italian Colors case, simply because it would not be affordable for individuals to assert these claims on their own.

And in both cases, the Supreme Court held that under this very powerful statute, (or more accurately, the statute that has been interpreted in very powerful ways), this Federal Arbitration Act, definitively stated that the arbitration clauses had to be enforced and that the corporate defendants could draft these specific contracts which are called contracts of adhesion. That is to say, these are the terms on which we're willing to do business with you. We're not going to negotiate these contract terms. And in your daily life, you've probably signed half a dozen contracts of adhesion in the past couple of weeks if you've made reservations online, or if you've signed up for a gym membership, etc. All of these everyday activities that we engage in that involve clicking online or checking a box for a contract have many terms in them that we would never think about trying to negotiate, and that indeed, might not be subject to any negotiation. That's often described as a contract of adhesion.

Are there any limits on the ability of a corporate defendant to succeed, i.e. to enforce those arbitration clauses, even if what it means is that the plaintiff is going to be deprived of any practical opportunity to enforce their claims? And in both cases, the Supreme Court said that there are no limits for corporate defendants.

In the Concepcion case, which was a state law case, the court focused a lot on the ways in which federal law trumps state law, meaning the Federal Arbitration Act overriding any state law, even

if cases “fall through the cracks”. Those cases were not a basis for getting around the mandate.

In the Italian Colors case, there were two federal statutes potentially squaring off against each other: the Anti-Trust Statute and the Federal Arbitration Act. And so the plaintiffs in the Italian Colors case said that, well, our case is different, and there has to be some kind of accommodation between these two competing federal statutes. The Supreme Court wasn’t buying it, and it said it viewed the Federal Arbitration Act as a mandate that required this arbitration clause to be enforced. In fact, it held that the mere fact that a plaintiff has a claim under a statute like the Anti-Trust Statute doesn’t guarantee that the plaintiff will have an affordable procedural path towards the vindication of that claim.

Thus, even if the arbitration clause is structured in such a way that, as a practical matter, it becomes impossible for a plaintiff to pursue his claim, the mere fact that the claim becomes unaffordable doesn’t mean that the other competing federal statute has somehow been improperly treated or improperly served.

So I think there are two important lessons for us. First, procedure really matters, and the mechanisms by which plaintiffs seek to enforce their claims are sometimes just as important as the definitions of their substantive rights under the applicable law. This is a fact that the people who draft contracts and the people who make major financial planning understand very well. Focusing on how procedure operates is often just as important for corporate defendants, and indeed for plaintiffs advocates, as focusing on the definition of people’s substantive rights.

The second lesson is the importance of remembering our history. We started this conversation with this famous quote from Karl Llewellyn that it is important to read the substantive law courses in law school through the spectacles of procedure. Why? Because substantive law means nothing except in terms of what procedure says that you can make real. In 2013, we had the Supreme Court saying something that sounds almost the polar opposite. The Supreme Court said that, yes, you may well have substantive rights, but having a substantive right doesn’t entitle you to an affordable procedural path for actually vindicating and enforcing that right. In saying that, the Supreme Court seems, in some ways, to have forgotten, or perhaps to even have rejected, the lessons that gave rise to the federal rules of civil procedure in the first place. The lessons that said that substantive rights without effective procedural pathways are rendered meaningless.

And so in deciding how to administer questions of transsubstantivity, how to draw distinctions between substance and procedure, and when it should be permissible for powerful actors to opt out of the procedural system to shield themselves from all kinds of liability, I think it’s very important for us to continue viewing the substantive law through the spectacles of the procedure. The observation that Karl Llewellyn made, way back in 1929, has proven to be just as true today as it was then.