

INTRODUCTION

1. Basic Remedial Tools

a. Four basic classifications of remedies

i. Coercive (equitable)

1. Injunctions, specific performance of K
2. Purpose- if you want to stop D from doing something harmful/potentially harmful OR you want something started (courts order is telling someone to do something)
3. Looks to the future
4. Specific- must that the person is specifically entitled to that remedy
 - a. I.e. reunification of families
 - b. More extraordinary- court must order someone to do/not to do something

ii. Damages (legal)

1. Looks backward- compensate P for harms done by D
2. Compensatory, reliance, punitive
3. Substitutionary- substitutes for the right you've lost
 - a. Damages for personal injury is substituting money
 - b. Substitutionary is the more common remedy

iii. Restitution (legal or equitable)

1. Specific or substitutionary
 - a. Specific- return of a specific item
 - b. Substitutionary- damages measured by what D unjustly gained, not what P lost

iv. Declaratory (neither legal nor equitable because did not exist when courts were split)

1. Often linked with request for coercive remedy

b. **Problem:** Waste Lagoon Example

- i. Facts: Pollard's own a farm and grown corn on the farm (productive farm). Krystal refining lagoon was adjacent to Pollard's farm. Pollards were experiencing crop loss and found out that the chemical from refining lagoon was causing harm to Pollard's crops. Only expensive additional testing could determine the permanency of the damage

1. Legal Damages

- a. Look to legal damages first
- b. Yes- here, clearly have instance of past damage to crops
 - i. Must prove to reasonable certainty

2. Equitable Relief

- a. If P shows that legal damages inadequate, look to equitable relief
- b. Injunction against pollution to remedy for future harm

- i. Legal damages inadequate bc “future damages” are highly speculative
- 2. Remedy Characterization- Scope of Legal and Equitable Remedies
 - a. Right to a jury trial in civil cases guaranteed by the 7th A. and state constitutions
 - i. Legal classification - jury right
 - ii. Equitable - no jury
 - b. 1st issue- Classification of claim as legal or equitable
 - i. Judge classifies claim before jury is impaneled
 - ii. If one or more parties want a jury, will get one for legal claims
 - iii. State (varies)
 - 1. Main purpose for bringing cause of action (jist of the action):
 - a. Jurisdictional variation as to weight placed on following factors:
 - i. Historical origin of relief/remedy (sought in the prayer of complaint)
 - 1. Did it come from court of equity or court of law?
 - 2. South Carolina- **Verenes v. Alvanos**
 - a. CoA was breach of fiduciary duty, which is legal, but remedy sought was disgorgement, which is equitable. Thus, court said main purpose was equitable, TF no jury
 - 3. **C&K** Dissent- thought remedy should be determinative
 - ii. Nature of the issues
 - 1. Whether issues that have to be resolved to prove the cause of action (elements) were historically decided by jury or judge
 - 2. CA - **C&K Engineering**
 - a. Breach of K (legal) CoA seeking money damages (legal). Breach of K brought on promissory estoppel theory (equitable). TF, court held jist of action is promissory estoppel (look to legal theory behind CoA); TF, no jury right. But may use an advisory jury to determine damages amount (not bound by their findings)
 - iii. Historical origin of cause of action
 - 2. Ex. Shareholder derivative suit originated in courts of equity but remedy sought is money damages

- a. States that focus on remedy will say it is legal and, therefore, jury trial right
 - b. States that focus on “nature of issues” will say it is equitable, therefore, no jury trial right
 - iv. Federal (pro jury)
 - 1. Remedy is main consideration
 - a. Historical setting for the creation of the remedy
 - b. Federal courts resolve things in favor of finding legal remedy in order to preserve jury right
- c. 2nd issue- What to do with mixed cases - both legal and equitable remedies/ claims are present or **D counterclaims with other type of thing**
 - i. State- jurisdictional split
 - 1. Majority- Equitable clean-up doctrine
 - a. If equity claims/ remedies predominate, judge decides everything
 - i. No jury even on legal claims/ issues/ remedies
 - b. However, if predominantly legal, jury for legal with judge for equitable issues
 - 2. Minority- jury first, judge second
 - a. Jury first determines legal issues/claims/remedies
 - b. Judge bound by jury’s determinations, then decides the equitable issues
 - 3. Judge first, jury second (includes CA)
 - a. Judge goes first and resolves factual issues that go to equitable remedies (i.e. entitlement to equitable remedies), then the jury decides legal issues (entitlement to damages for past harms)
 - i. Jury bound by the judge’s findings
 - ii. Technically, a jury can be impaneled, a judge can look at the equitable issues and decide that there’s no legal issues, and then completely dismiss the jury
 - ii. Federal- jury first, judge second
 - 1. **Dairy Queen v. Wood**- In breach of K case, asked for injunction and accounting (both equitable remedies) BUT request for jury trial should have been granted bc there were factual issues as to whether there had been a breach of contract
 - a. Through constitutional law, jury first, judge second is the only way to protect the 7th A. jury trial right
 - i. States are interpreting their state constitutions and are not bound by the 7th A.
- d. What if right arose by statute in legislature after law and equity merger? (TF no history of law or equity)

- i. Analogize - look at the type of remedy sought. Ex. Monetary damages looks legal, TF jury
- ii. Supreme Court held that 7th A. applies to statutory rights if analogous to a legal claim
 - 1. This applies if statute is silent on jury trial right

INJUNCTIONS

1. Standard of review- abuse of discretion
2. Preventative (Permanent) Injunctions. Party must show:
 - a. Actual success on the merits of the underlying cause of action
 - b. Inadequate legal remedy
 - i. Unique character of what was lost
 1. I.e. constitutional issues (separation of children at border), real property
 - ii. Ongoing/continuing harm that would trigger need for multiplicity of lawsuits
 1. Focuses on preventive benefit/function of injunction
 2. **Wheelock**- continuing trespass, and P showed that D would not follow demand to vacate and is likely to repeat invasions bc he promised to remove rocks multiple times but never did
 3. **Muehlman**- continuing/repeated conduct over 4 months and no stopping point in sight bc no reason for D doing this
 - iii. Damages would be speculative
 1. I.e. lost profits from business are hard to measure
 2. **Wheelock**- Giant rocks- P doesn't have anywhere to put them- would have to research where they would go, and how much would it cost, among other things
 3. **Muehlman**- impacts health, sleep, etc- cannot measure harm going forward
 - iv. **Thurston v. Baldi**
 1. Facts: Baldi operated drive-in movie theater, and Thurston operates a marina on adjacent land. Baldi sold some of his land to Thurston so he could use it for additional parking, boat storage facilities, etc. Baldi granted easement to Thurston so the vehicles could cross Baldi's land to build stuff. Thurston started hauling really heavy and large trucks across the easement and the trucks couldn't stay on the easement and damaged the land. Ruined the driveway for drive-in theater. Baldi sought remedy of injunction. Court granted it- ordered Thurston to repave and repair Baldi's land, and ordered him not to use more than 5 trucks per day
 2. Sup. Ct. reversed as to repaving order bc that could be remedied by money damages and no facts to show money damages were inadequate

- v. **Wheelock v. Noonan**- D drops a pile of rocks on P's land. He did trespass since it wasn't his land. P sought injunction requiring D to remove his rocks. Trial court granted injunction on grounds that it was an ongoing continuing trespass (rocks were still there day after day).
 - vi. **Problem:** The Borrowed Lot- Wheelco parked on Landry's lot daily, which was a trespass. Landry offered him a rental fee for the lot, but Wheelco rejected and kept parking there. Is an injunction appropriate?
 - 1. Yes, permanent injunction- would stop the trespass entirely; no, TRO- must show why you need immediate relief. Landry has no immediate plans to use the lot so no emergency requiring TRO
 - 2. **RULE:** Getting an injunction for continuing trespass to prevent harm in the future doesn't preclude you from getting legal damages for damage already occurred by the trespass
- c. Irreparable harm
- i. Harm must be great/serious, and not trivial
 - ii. **K-Mart v. Oriental Plaza**
 - 1. Facts: Kmart was tenant of oriental plaza and negotiated a lease provision in which nothing would block prominence of kmart's display. Plaza builds parking structure contrary to what the lease negotiation said, and structure blocked kmart's display. Kmart sued for breach of lease (K), and Kmart sought injunction to tear down the structure which district court granted.
 - 2. Legal remedy inadequate bc goodwill lost through loss of uniformity of appearance among K-Mart stores nationally
 - a. Damages speculative bc not just matter of lost sales
 - iii. **Problem:** Wandering Golf Balls
 - 1. Golf balls occasionally going into the yard
 - 2. Unless harm was serious, court will not issue injunction
 - 3. Cannot say a particular type of case always gets or never gets injunction because each case turns on individual facts/subjective values of P seeking remedy
 - iv. **Muehlman v. Keilman**
 - 1. Facts: Ds trucks were causing noise and fumes to the people living next door, disturbing them. They were doing it maliciously at all times during the day and night for 4 months, right outside of Ps bedroom window. Ps sought both injunction and damages
 - 2. Serious, not trivial harm
- d. Balance of hardships favors grant of injunction
- i. Hardships to P if injunction does not issue outweighs harm to D if injunction does issue
 - ii. Court will look to practicality of enforcement
 - 1. Is injunction clear, enforceable, easy to comply with?

- iii. **Muehlman**- no evidence that D would be harmed at all by the injunction bc there was no reason for them doing this
- iv. **KMart**- much more harm to D- tore down structure that was already built- BUT injunction favored P bc D willfully violated the lease and willfully built the structure- fault of D
 - 1. Had D not willfully violated the lease, it might have been different because tearing down the structure is very harmful to D (expensive)
- v. **Triplett v. Beuckman**
 - 1. Facts: Island surrounded by lake, and there was a bridge between the land and the island. Wooden easement to the bridge, in bad repair, which provided the only above water access to the island. The party that bought the island replaced the bridge with a causeway that blocked lake. Ps claimed it interfered with their recreational use of the lake bc liked going around the lake in a circle.
 - 2. Court held injunction should have issued and D should be ordered to replace causeway w bridge in order to preserve P's right to use the bridge for particular recreational purpose
 - 3. D: lower court already balanced the hardships in reaching their decision to deny the injunction, so it doesn't make sense for this court to balance it again
- vi. **Galella v. Onassis**- In first amendment case, injunction must be narrowly tailored and no broader than necessary
 - 1. Facts: Galella was following around Jackie Onassis everyday for 10 years, taking photos of her and her kids. Jackie sued to enjoin him from following her around and doing what she regarded as harassment. Her suit was joined by the US govt bc secret service had to increase their protection of her bc of Galella
 - 2. Can't ban him from taking pictures permanently bc would be hard to enforce and too broad BUT if he does take her photograph, Jackie will keep coming back to court
 - a. Terms must be CLEAR so Galella's substantial compliance won't be questioned
 - b. **RULE:** Can't hold D responsible for violating a vague order
 - 3. Proposed injunction- can't come w/in 50 ft of her/100 ft of children
 - a. Court held overbroad when you balance the interests- too great an impact on Galella and not enough interest on Jackie's side to warrant injunction
 - i. Broader than necessary to protect Jackie's rights
 - ii. Modified to 25 ft

- vii. **RULE:** there is not any situation where an injunction should be granted or denied as a categorical matter/always issue absent exceptional circumstances
 1. Same factors must be satisfied w/in context of facts of each case
 2. **Ebay v. MercExchange**
 - a. Facts: eBay operated a website that allows private sellers to list goods they wish to sell by auction or at fixed price. Merc had licensed this business method patent to other companies and attempted to do so with eBay. Merc and eBay did not come to an agreement, and Merc sued eBay for patent infringement. A jury determined that the patent was valid, that eBay was infringing on the patent, and that Merc should be awarded damages. The trial court refused to issue a permanent injunction
 - b. C: injunctions are often granted against patent infringement in the vast majority- thus, while there shouldn't be categories, precedent is not irrelevant
 - c. C: true, but precedent not controlling
- e. Public interest does not disfavor grant of injunction
 - i. Not present in some cases- but can always say something about this- i.e. public interest won't be offended by this
 - ii. **Harrison v. Indiana Auto Shredders**
 1. Facts: Ps sought to enjoy operation of automobile recycling plant that was in their neighborhood. Ps claim that plant's activities constituted a nuisance (unreasonable interference). Court said that Indiana was doing a benefit to the community by recycling old cars even though the recycling was causing some pollution. In balancing the interests, took that into account- some of what the plant was doing was good
 2. Court found that damages would be sufficient
 - iii. Can still get an injunction even if you're in compliance with zoning regulations
 - iv. If there's no likelihood that the harm will continue, unlikely that they'll grant injunction
 - v. **Boomer v. Atlantic Cement Co.**
 1. Facts: whether court can enjoin operation of cement plant bc the plant's pollution causes nuisance
 2. If close down plant, putting people out of work- would be a radical remedy that would not only impact D, but will impact family members of employees, community getting tax money from the plant, restaurants where the plant employees eat, etc.
 3. Solution: bc economic benefit of keeping factory open is greater than harm suffered by Boomer, should award an injunction that

will be lifted once Atlantic pays permanent damages to Boomer. This way, Atlantic may keep its business open, and Boomer will be compensated for the harm he may suffer

vi. **Problem:** The Encroachment

1. Facts: two plots of land next to each other. Stone builds a house, and part of it is accidentally on Blanzzy's land. Stone offers him reasonable fee, and Blanzzy counters 10x higher (unreasonable). Blanzzy sues to enjoin the encroachment.
2. Damages could be an inadequate remedy bc land is unique and FMV of the portion of the encroachment could be insufficient if he wanted to build something on that portion of the land
 - a. Fact that he was willing to take money undercuts the inadequacy of damages issue
3. May come out totally different if he intentionally encroached
 - a. Unclean hands defense- can't get any equitable remedy if you come into the court w unclean hands
 - i. Acted in a bad faith way with respect to the underlying claim for which seeking to have injunction granted

vii. **RULE:** When a statute itself contains a statement of public interest supported by the statute, a court is not empowered to say "that's not the public interest"

1. **US v. Oakland Cannabis Buyers' Cooperative**- CA enacted compassionate use act which allowed cannabis to be used for medical purposes. However, this was illegal under federal law, and under supremacy clause, federal law takes precedent. Fed sought injunction. Lower court denied injunction under medical necessity defense bc it showed a public interest in medical care which overrode the federal law
 - a. SCOTUS agreed generally with the principle of wide discretion to fashion equitable remedy, BUT said that the power of the court to determine the public interest in the context of the injunction defense is constrained by legislative supremacy
 - b. Federal statute said it's against the public interest to use medical marijuana- thus, the remedy is in congress changing that law, not in the court deciding what the public interest is in contrast to a statute

viii. **RULE:** some courts will deny/condition injunction if the party moves towards the nuisance (**Dell E. Webb**)

3. Interlocutory Injunctions

- a. Preliminary (only available before trial) and extraordinary form of relief
- b. Diff b/w TRO and prelim injunction:

- i. Have the same requirements, but TRO is often brought ex-parte and a PI requires a full hearing on the merits
 - ii. Not a final order- given/denied before the facts are fully known
 - iii. TRO is granted usually very one-sided or based on no info
 - 1. Possible that a TRO would be granted but then a PI not granted bc the PI hearing provides more info for judge
 - 2. Also the facts often change between those two points in time
 - iv. TRO designed to preserve status quo until Prelim injunction, and prelim injunction designed to preserve status quo until ruling on permanent injunction THEN perm is to protect P's rights into the future
 - 1. If Prelim injunction is denied, TRO dissolves; same w/ prelim and perm injunction
- c. **Ride the Ducks of Philadelphia v. Duck Boat Tours**
- i. Facts: Superducks said it was going to use Duck's boat ramp for its own duckboats. SD attempted to negotiate deal to use ramp, and they didn't get permission, but started using it anyways. Ducks thought that SD was taking away its business by using its ramp. One day before the day they said they were gonna start using it, Ducks sought TRO. District court immediately granted. TRO lasted few days, then PI motion was granted rapidly after.
 - 1. Don't have to seek a TRO to seek a PI- can seek them all at the same time. SD filed appeal for PI (TRO not appealable)
- d. Substantive Requirements (standard is preponderance):
- i. *Substantial likelihood* that movant will ultimately prevail on the merits
 - 1. Less than actual likelihood
 - 2. **Ride the Ducks**- Ducks has strong likelihood of success on the merits for its trespass claim
 - ii. Showing that the movant will suffer irreparable injury unless the injunction issues
 - 1. Inadequate legal remedies included in this prong
 - 2. Serious/not trivial harm
 - 3. Harm can't be remote or speculative
 - 4. **Ride the Ducks**- SD's threatened use will likely result in Ducks losing customers and income
 - 5. **Tom Doherty Associates v. Saban**- TDA has exclusive rights to Saban's character, power rangers. Saban licensed the characters to others, so TDA sued. TDA claimed that if prelim injunction did not issue, there would be loss of future "goodwill" which damages could not remedy- lose the ability to be publisher of children's books generally/go out of business (not trivial)
 - a. Goodwill lost- viability of P's business threatened, or P may suffer substantial losses of sales beyond the loss of power rangers character sales

- b. Lost opportunity to become est. publisher of children's books that can attract other authors/owners of characters
- iii. Balance of hardships/equities favors grant
 - 1. When you look to hardship to nonmoving party if TRO is granted, look at it in the sense of reserving status quo until hearing for prelim injunction- not permanent
 - 2. **Ride the Ducks**- Although SD might suffer harm from being unable to use its purchased duck boats, this must be discounted by the fact that SD brought this harm upon itself
 - 3. **Cassim v. Bowen**- Cassim, a Medicare-participating physician, sued Secretary of Health and Human Services, seeking prelim injunction barring HHS from suspending Cassim from Medicare and publishing notice of Cassim's suspension in a local newspaper without first granting him full evidentiary hearing. HHS argued that it suspended Cassim bc he allegedly performed unnecessary surgery on elderly patients, endangering their health.
 - a. While Cassim faces serious harms, including possible irreparable damage to his reputation even if he is eventually vindicated, the harms that his patients might suffer from unnecessary surgery are even greater.
- iv. Public interest doesn't disfavor grant
 - 1. The effects if any that the grant or denial of the preliminary injunction would have on nonparties
 - 2. **Ride the Ducks**- public has right to see that contract/property rights are respected
 - a. Prof says this is a stretch, but it's fine bc the test really is that the relief doesn't DISFAVOR public interest
 - 3. **Cassim**- non-party interests of elderly patients
- e. **Gonzalez v. O Centro Espirita**
 - i. Facts: Religious groups uses hoasca drug for their religious sacrament. Govt threatens prosecution bc drug is illegal. O Centro files suit for permanent injunction. Pending trial on the merits, O Centro seeks Prelim injunction so that it could practice its faith. Balancing hardships showed that it was much greater hardship to O Centro bc if injunction was not issued, they would be arrested, whereas only hardship to govt is that they can't arrest them in the "meantime" before the trial on the merits. Court granted preliminary injunction. SCOTUS granted certiorari
 - 1. RFRA act makes clear that burden to demonstrating exception to RFRA rests on govt. Govt argued that here, because P is seeking injunction (movant), it's their burden to show to show that the exception is likely not to apply.
 - ii. SCOTUS said NO- on the merits, the burden to showing exception is on the Govt- can't shift the burden of ultimately proving the case

1. Normally speaking, burden of proof of underlying merits on the claim is on the movant, but HERE, D has burden of proof on first element- showing that it's unlikely that P will prevail on the merits
 - iii. Court held evidence was basically equal, but bc the govt had burden and didn't meet burden, favors O Centro
 - iv. NOTE: Purely legal rulings are reviewed de novo on appeal, even if the ultimate decision by the court (whether or not to grant injunction) is a review of abuse of discretion
 1. If there are parts that are purely legal, reviewed de novo- no deference
- f. Sliding Scale Test
- i. **Cottrel**- developed new sliding scale test bc old one was condemned by SCOTUS in **Winter**
 - ii. If you can't succeed on all of the 4 elements completely, then the sliding scale test helps P who can prove that the balance tips sharply/ overwhelmingly in its favor as to one of the sliding elements
 - iii. Test:
 1. 1- "substantial q's are raised as to the merits" (not frivolous- plausible claim) OR very strong likelihood of success
 - a. Slides against 3
 - b. Can be weak, but must still support some preliminary relief
 - c. I.e. if there is no precedent as to an issue/claim
 - d. **Turnell**- Centimark had strong likelihood of success bc Turnell ignored non-compete K
 2. 2- Must prove irreparable harm- same as traditional
 - a. **Turnell**- working for competitor and taking business from Centimark is harm that can't be quantified
 - b. **Landmark Problem**- Urgent- threatening to tear it down the next day; Serious- it's not trivial bc it's a landmark
 3. 3- balance of hardships must tip SHARPLY in P's favor OR weak
 - a. Slides against 1
 - b. **Turnell**- harm greater to Turnell bc individual losing clients; Centimark will be harmed too, but not as much bc big corp
 - c. **Landmark Problem**- City- if tore it down, the maintenance they had been paying to maintain building would be lost
 4. 4- public interest doesn't disfavor injunction- same as traditional
 - a. **Landmark Problem**- railroad co- property owner's rights- don't want to pay the maintenance fee, should be able to tear it down
 - i. City- Saving landmark can't be against public interest
 - iv. **Turnell v. Centimark**

1. Facts: Centimark is big roofing company and Turnell had non-compete K w it. Fired for financial misdealings, which he denied. Took job with competitor, and Centimark sued to enjoin him from working for competitor, citing the non-compete K. Trial court granted prelim injunction and modified the non-compete to make it more narrow.
 - a. High 1, low 3- still granted
- v. **Problem: The Threatened Landmark** (p. 247- sim to essay q)
 1. Facts: beautiful building is threatened to be torn down by a railroad company. 4 days before scheduled demolition, people in the town found out about this plan. Tried to make ordinances forbidding it, but lawyer said those won't work, and railroad company said they would proceed anyways. Town council went to courthouse and sought injunction
- vi. **Winter v. Natural Resources Defense Fund**
 1. Facts: NRDC filed suit against Secretary of the Navy alleging that the Navy's use of mid-frequency active sonar during its training programs harmed marine life in violation of several federal laws. Argued that the Navy should have prepared an environmental impact statement prior to commencing the training.
 - a. When the court invokes national security, very deferential towards government
 - i. Almost impervious to appeal bc SCOTUS won't question the executive's call for national security
 - b. Said 1 and 3 balance against each other
 - c. Public interest in allowing the navy to continue using sonar technology highly outweighs the harm to marine mammals
 - d. Dissent- only to modify, not take out navy's exercise completely, and not harming marine mammals is highly in the public interest
 - i. Public interest is not something we can answer as determinative factor in the abstract
- vii. EXAM NOTE: first lay out traditional test- if concluded that maybe number 1 isn't satisfied, move to sliding scale test- say the test, but don't have to analyze 2 and 4 again bc already analyzed it in the traditional test
- g. Procedural Requirements- FRCP 65
 - i. TROs (b)- ex parte has a lot of conditions
 1. Specific/actual facts in affidavit that show the elements of TRO- can't just be conclusions
 - a. Must assert urgency- need it before we even have an adversarial hearing
 - i. **Problem: Software Scofflaws**

1. Adobe and Microsoft sued Sun Jewelry for abuse of copyright act. Asked for emergency TRO and didn't notify Sun
 2. Not necessarily immediately urgent bc it's a small amount of infringement; thus, court shouldn't grant emergency TRO w/out notice (ex parte)
2. Certify in writing efforts to give notice and reasons why notice shouldn't be required
 - a. Reasons to grant w/out notice:
 - i. Identity of party is unknown or can't be located
 - ii. P would face irreparable harm so immediate that it would be improper to wait until D was notified
 - iii. Narrow band of cases where notice to D would undermine P's action
 - b. **Carol v. Princess Anne**- Town feared that a white supremacist rally planned for the next night would be violent, so they sought an ex parte TRO. Court granted it, and white supremacists appealed
 - i. Appeals court said it was improper bc they failed to give notice to white supremacists- could have easily given notice
 1. Prior restraint on free speech heavily disfavored
 - ii. Failure to even attempt to give notice, given the stakes of 1st am, produces a very serious error
 - c. Assuming that someone is going to destroy evidence isn't enough- destroying evidence is highly sanctionable, so can't assume a lawyer/party will do that
 - d. Ex parte TROs should not be granted lightly
 3. NOTE: courts have applied a lot of this to TROs WITH notice
 4. If issued w/out notice, motion for PI must be set immediately- takes precedent over all other matters
 5. If TRO granted, on 2 days notice or shorter if set by court (before hearing for PI), opposing party can move to dissolve TRO
 - a. Safeguards to protect due process
 - ii. TROs and PIs are linked in the rules, and linked when you ask for them
 1. When seeking TRO, **must** ask for PI and most likely perm
 2. BUT don't NEED to seek TRO if you seek prelim injunction
 - a. Only in extreme emergency do you need to ask for TRO
 3. Don't need to seek TRO or PI to get perm injunction
 - iii. Preliminary Injunction REQUIRES notice and hearing

1. Maybe the perm injunction and prelim gets resolved at the same time (rarely, but sometimes), but can't consolidate so early that they can't seek legal remedy and don't have right to jury trial
 - a. i.e. if seeking legal remedy, can't consolidate
 2. **Fengler v. Numismatic**- Court issued ex parte TRO against Ds, and a week after it had been issued, court issued a PI. On appeal, the court said that there were facts in dispute, but the lower court improperly issued it nonetheless without an evidentiary hearing
 - a. Hearing doesn't have to be full blown- just opportunity for both sides to be heard
 - b. Appeals court needs to have an adequate record from which to affirm or reverse
 - i. Not in the position to have a hearing/gather facts- thus, it would be a remand to the trial court for adequate findings of fact/conclusions of law
- iv. **RULE:** A court treats an improperly extended TRO as a preliminary injunction; can be appealed
1. **Sims v. Greene**- dispute within church of who's controlling the church. Original controller sought TRO to enjoin second controller from taking over. Court misapplied FRCP 65 by extending TRO beyond the FRCP specified time period without showing cause or consent
 - a. OG TRO lasts max 14 days; cause must be shown for first extension; after first extension, can only be extended again by stipulation from adverse party
 - b. Court reversed it, saying its invalid because it was extended improperly
- v. Bond Requirement- moving party seeking TRO/PI must put up some money to compensate D if preliminary form of relief is granted wrongfully and D is injured by it
1. Damages compensatory in this context
 2. The amount of the bond sets the cap on the amount of damages that a party can seek against the improper injunction
 - a. BUT D still has to prove the amount it was damaged by injunction
 3. If you're wealthy, i.e. corp, don't have to put up bond, can just put up the full amount of money as a security
 4. **RULE:** P must present evidence that the required bond amount would amount to undue hardship
 - a. **Save our Sonoran**- P is public interest organization. Court set bond for \$50k. Both sides appealed the amount.

- i. Court said there's no requirement that the court charge only nominal bond, although it would have been okay if they did
 - 1. On appeal, it's really hard to overrule this bc abuse of discretion standard
 - 2. SOS did not show undue hardship
- b. Many courts have said that with public interest org or indigent person, amount of bond will be nominal (i.e. \$10)
 - i. Don't want to prevent access to courts

5. Coyne-Delany Co. v. Capital Development Board- At the time CD obtained TRO whose substance was based on a statute, court ordered 5k bond, and D asked for 50k bc the TRO was halting its construction project. At PI stage shortly after, trial court declined to increase amount of bond despite Ds objections bc still looked like likelihood of success for P was very high based on precedent of statute of the time. Court of app reversed PI on the basis of the original statute being overturned- new precedent- there actually wasn't success on the merits for P at all. D then sought damages on the bond BUT bond was only 5k. D then went in and claimed 56k in damages during pendency of TRO and PI. Lower court denied any damages on the basis that P had requested TRO/PI in good faith.

- a. Appeals court reversed this bc they said it doesn't matter- damages available on bond despite good/bad faith
- b. BUT could only obtain damages in amount of the bond
 - i. Important that D go in and try to increase bond as it looks like the damages are being racked up over time- show facts
 - ii. Judge can change amount of bond at any time during process

h. Problem: Fending Off the Fence

- i. Facts: neighbor was going to take down your tree tomorrow, and you are sure it's on your property line. Can you seek TRO today?
 - 1. Can't get ex parte TRO bc you know where he lives and what he does so you can easily give notice
 - a. BUT if giving notice in itself puts client at risk or if location is unknown or if notice would undermine P's actions, then it would be OK
 - i. I.e. the very giving of the notice will cause irreparable harm
 - ii. Not the case HERE
- ii. Success: yes- on your property
- iii. Irreparable harm:

1. No adequate legal remedy bc the tree is 100 yrs old and can't be replaced
2. Serious harm- entire tree will be torn down
3. Immediate
- iv. Balancing of hardships:
 1. Nonmoving party will not be able to do what he wants w his fence for ONE WEEK, not forever
- i. Pre-Appeal Injunctive Relief
 - i. Two Types:
 1. Where appeal is from a grant of preliminary or permanent injunction = stay of pending appeal
 2. Where appeal is from a denial of preliminary or permanent injunction = an injunction pending appeal
 - ii. Federal- must ask for it- no automatic stay or automatic injunction
 - iii. Some states do allow an automatic stay of an injunction simply on the filing of a notice of appeal
 1. CA Approach: give automatic stays of mandatory injunctions, but NOT of prohibitory injunctions
 - a. Mandatory injunction: Mandates/orders someone to do something (affirmative)
 - i. An automatic stay- upon the filing of a notice of appeal
 - b. Prohibitory injunction: Prohibits an act, it is not ordering an affirmative act
 - i. EX) Onassis- photographer ordered not to take photos
 - ii. NO automatic stay of prohibitory injunctions
 - iv. Party first asks the trial court
 1. If the trial court denies it--you ask the court of appeal to issue a stay/injunction upon appeal
 - v. The court in judging is using the same substantive factors, and can use sliding scale, BUT as to likelihood of success on the merits of the appeal
 1. Under the other factors its same as traditional test
 - a. Trial judge is now looking at the balance of hardships specifically on the time frame between the entry of the injunction and the appeal
 2. What would the injunction upon appeal REALLY mean?
 - a. Judge doesn't think you're entitled to an injunction, BUT a party might be entitled to a full hearing on the appeal--in order to preserve status quo a judge might allow the period of time to adjudicate the case
 - vi. Ex- A party could be denied a preliminary injunction, granted an injunction on appeal, and then denied the permanent injunction

vii. **Cavel International v. Madigan**

1. Facts: Cavel was selling horse meat for human consumption. IL passed law banning slaughter of horses for human consumption, and Cavel sued, arguing that burdened foreign commerce. Trial court found for D. Cavel sought injunction against enforcement of law pending appeal. Trial court denied the injunction. 7th circuit reverses and says that the trial court should have applied the sliding scale test- this is specifically on the motion for an injunction pending the appeal. Cavel wants the pre-appeal injunctive relief bc they want to continue their business
2. Court held that balance of hardships is very strong in favor of Cavel, and thus slides against the low showing of success on merits
 - a. If the likelihood of success on the merits is ZERO on ANY test there is no winning
 - b. Here, the argument for unconstitutionality is NOT negligible, thus OK (very low standard)

4. Contempt

a. Indirect criminal Contempt

- i. Violating a court order not in front of a judge, but somewhere else
- ii. A person willfully violates a court order, like an injunction
- iii. If the Court's purpose is to punish
- iv. Vindicates the court's authority
- v. **RULE:** Party has to appeal--cannot collaterally attack the validity of an injunction by disobeying it

1. **Walker v. City of Birmingham**- City claimed they were fearful of marches and protesting. AL officials get an ex parte TRO restraining the leaders and preventing the Easter weekend protesters. Protestors announced that they were going to march anyway. Court held MLK and protestors in criminal contempt for violating the ex parte TRO.

- a. Court said that criminal contempt convictions had to stand because at the time MLK and the other leaders violated the injunction, the injunction was in effect
 - i. Not a case where order had only a frivolous pretense to validity, nor where order was transparently invalid
 1. This is very narrow- doesn't involve attack on merits or constitutionality of underlying order
- b. Need to wait for PI hearing and argue there that the PI should not issue and the TRO should be vacated

i. Saying that you never received notice or no jx or not a party to it is always a defense and doesn't fall under this rule

2. **RULE:** District court has the right to preserve the status quo while it figures out whether there was jx- can't just violate the TRO if you think there's no jx

a. EVEN IF jx is found to NOT exist, will still found in criminal contempt if you violated the TRO

b. **United States v. United Mine Workers-** US wanted to prevent strike against coal mining companies. District court issued TRO against UMW without notice the same day it was requested. After being served with the order that same day, strike leader called a strike in violation of the TRO. 3 days later, US asked court to find them in contempt. At the show cause hearing, Ds argued that the court had no jx to issue TRO bc of underlying labor law (Norris La Guardia Act). Trial court extended TRO, and held full argument on Q of whether trial court has jx to issue TRO under labor law; after trial, court held they DID have jx, then a trial on the contempt issue was held

i. Ds waived right to jury trial, and pleaded not guilty. Trial court found Ds guilty beyond reasonable doubt and leader was fined 10k and union fined 3.5 mil. Court issued PI that same day, in terms similar to those of TRO. Next day, Ds filed appeal from judgments of contempt; day after that, US called for cert.

ii. Court rejected the notion that the TRO/PI were granted out of jx bc of labor law.

b. Criminal direct Contempt

i. Crime "like any other"

ii. Purpose = punishment for contemptuous behavior

iii. Protects the court's order

iv. **Ex parte Daniels**

1. Facts: scuffle initiated by D with court officers in the back of the courtroom, and then there was general disruption in court. Judge held D in direct criminal contempt

2. Upheld- conduct did take place in front of the court's presence

a. This is required

b. Judge DID witness what he considered a disturbance and felt compelled to interrupt court business and intervene, and then call a recess

3. D- didn't take place in front of judge bc he only heard/saw some of it

v. **Matter of Contempt of Greenberg**

1. Judge held attorney in direct contempt for outburst during court hearing, and judge's repeated warnings to sit down.
2. Reversed bc judge failed to adhere to federal rules of crim procedure- did not certify that he saw/heard the conduct
3. Judge did not see or hear at least some of the behavior- role and purpose of this extraordinary power is to preserve integrity of judicial process
 - a. Judge is witness and juror- thus must be used sparingly and only in exceptional circumstances
4. **RULE:** Overzealous representation by counsel is generally not the circumstance in which the judge can use direct contempt power
 - a. Only when conduct threatens judicial process

c. Civil Compensatory Contempt

- i. Function is to compensate a party for harm caused by the contempt-typically violation of a court order
 1. I.e. harm to a party because of the other party's violation of an injunction
- ii. **Federal Trade Comm'n v. Trudeau**
 1. Facts: T violated a FTC consent order by running infomercial for weight loss cure. T said this wasn't civil, bc not compensatory and not coercive, so it should be criminal and thus he should get jury trial. Court found that it was compensatory civil and then remanded it for a clarification of how the damages were calculated and to clarify that the money was intended to reimburse consumers
 2. On remand, court clarified that the money was meant to go to consumers to reimburse them for the money they spent on this fraudulent diet book
 - a. If it was criminal, the money would've been paid to govt, which it wasn't
 - i. **THUS** no jury trial
 3. T then objected to calculation of damages- said compensatory damages shouldn't be calculated by what consumers lost, but by what he gained, which would be much less bc he would be able to subtract the cost of his production/expenses, and he would only have to pay his profits
 - a. Court found that measuring it by what the "bad guy" has gained is not damages, its restitution
- iii. **RULE:** In general, compensatory damages must be proved with reasonable certainty:

1. Means you have to causally link the damages you are claiming to the wrongful act (here, it was the conduct that violated the court order)
- iv. Can include attorney's fees attributable to bringing the contempt action
- d. Civil Coercive Contempt
 - i. To coerce compliance with a court order in the future (forward looking)
 - ii. Court can coerce a party to comply with jail
 1. Once a party swears under oath that they are going to comply, then the contempt charges usually go away
 - iii. **RULE:** Even though DPC doesn't require that counsel be provided even where civil coercive contempt will result in imprisonment, alternative procedural safeguards are necessary to prevent violation of DPC:
 1. Notice to the D that his ability to pay was a crucial issue in proceedings, use of form seeking financial info to D, opportunity for D to address financial Q at hearing, express finding by the judge of D's ability to pay
 - a. IF he didn't have a lawyer, judge should give him right to these substitute procedural protections
 - b. IF he did have a lawyer, lawyer would know all these things
 2. If he's not given other procedural protections, he should have counsel
 3. **Turner v. Rogers**- Failed to pay child support, and was found in contempt. Court ordered him jailed until he could pay. Imprisonment was coercive on its face bc he could have gotten out of jail if he paid/agreed to pay and showed he could pay. Court also limited to 12 months in jail. He served the full 12 months. Was not represented by counsel, even though he wanted to be.
 - a. Trial court didn't make any express finding that he had the ability to pay before putting him in jail
 - i. This is a problem bc he had no opportunity to purge- doesn't even know if he CAN pay
 - ii. If truly coercive contempt, should be able to avoid the sanction by complying (purging); if not purgeable, not coercive- becomes criminal
 - b. SCOTUS- Need to look at the contempnor's due process on the face of the contempt order
 - i. Factually, the father's comments to the trial judge were that he was a drug addict, but now he's not, and he would like to pay but couldn't YET
 - c. NOTE: Can't read this case generally- combo of the indigency and the inability to pay that led the court to make this decision

- d. NOTE: Person can be indefinitely jailed if they have the ability to purge, but don't do so; if they don't have any money at all/don't have ability to purge, civil coercion should end
 - i. If they didn't have any money to begin with, shouldn't be jailed at all
 - ii. If they run out of money in jail, should be released
- iv. **RULE:** In circumstances where coercive civil contempt results in imposition of a serious fine, then criminal safeguards must be afforded- **if civil compensatory contempt in a fine is criminal then same rule applies- i.e. if there's no evidence that the fine is compensatory/evidence that the amount is much higher than req. compensation shows, looks like fine**
 - 1. **United Mine Workers v. Bagwell-** labor dispute between mine workers and coal companies. Coal company sought injunction against unlawful strike- strike was allegedly blocking access to facilities, throwing objects at employees, physically threatening, damaging company trucks, picketing with more than permitted # of people. Injunction issued, union violated it, and fined 642k. Judge announced prospective penalties that would be imposed if further violations continued- 100k for any violent attack, 20k for non-violent violation. There were ultimately 400 violations, and cumulative fines were more than 64 mil of which 12 mil went to companies, and 52 mil ordered paid to the state.
 - a. 52 mil looked like a fine- criminal
 - b. Companies and UMW settled the underlying case, and they moved to dismiss based on that settlement
 - i. Court vacated 12 mil designated to companies, but didn't vacate the amount payable to the state bc said it was payable to the public (which is technically reason for criminal contempt)
 - c. SCOTUS said that fines here were criminal, and thus jury trial req
 - i. Purpose- when contempts involve out of court contempt, disobedience to complex injunctions, and require elaborate fact finding= must use criminal procedures
 - ii. BUT maybe the issue isn't labeling it differently, maybe just give the person further rights as a matter of due process
 - 1. But exactly when that occurs is up to the lower courts to decide

- d. Ginsburg Concurrence: should be classified as criminal, rather than civil- but says classification is more of a proxy for procedural requirements
 - i. Just bc conditional doesn't mean coercive- all criminal contempts are conditional if you announce them in advance
 - ii. Just because a fine is coercive, doesn't mean its civil bc criminal fines are coercive in a way
 - 1. Deter future misconduct
 - 2. Dignity of the law
 - iii. The fact that court wouldn't vacate order, even though the underlying matter had settled and underlying injunction TF was vacated, showed that court was treating it as a criminal fine

e. 3 above types of contempt NOT mutually exclusive

- i. **Example:** Order not to trespass
 - 1. It is possible for the prosecutor to seek criminal contempt for violation of the trespass order willfully
 - 2. Court could also impose civil coercive contempt into not trespassing anymore--to encourage not to trespass again
 - 3. Court could also impose civil compensatory contempt if there was damage to the other party who the violator trespassed

	Direct Criminal	Criminal Indirect	Civil Compensatory	Civil Coercive
Sanction	Jail or fixed fine (paid to government) or both	Jail or fixed fine (paid to government) or both	Compensatory damages (paid to aggrieved party upon proper proof)	Jail or per diem fines (paid to government) or both. Conditional: may be "purged."
Jury Trial	No	Yes, if sanction is "serious" (over 6 months in prison; as to fine, no clear holding- Some lower cts look to statutes involving petty crimes that say if \$500 or more; other courts look to implication of SCOTUS case where large labor union was held in criminal contempt and fine was 10K and union claimed that it should've received jury trial and didn't, and court said it was on case by case basis	No	No

		and didn't think 10k against labor union w 13k members is serious) -look to circumstances- who individual is, wealth of individual, etc.		
Right to Counsel	No	Yes	No	No (but see Turner)
Willfulness required?	Yes	Yes	No	No
Proof Level	Beyond a reasonable doubt	Beyond a reasonable doubt	Clear and convincing-	Clear and convincing (but see Bagwell)
Procedures Used	Summary- no notice or hearing bc happens quickly in front of the judge	Criminal procedure	Civil procedure	Civil procedure (but see Turner) -If someone is being sent to jail, may be a violation of due process, esp if being used against indigent person
Nature of Proceeding	Imposed immediately by judge who witnesses the misconduct ("summary proceeding") –and used only in "exceptional cases"	Separate criminal trial brought by prosecutor	Hearing as part of administration of injunction—same judge who issued injunction presides	Same as civil compensatory
Effect of Underlying Order being Vacated	Not applicable; no underlying order	No effect; contempt sanction remains valid (crime in and of itself)	Contempt vacated- you get your money back	Same as Civil Comp. (probably; note Bagwell)

Appealable?	Immediately	Immediately	With underlying order	With underlying order
Collateral Bar Rule?	Not applicable; no underlying order	Yes (Walker)	Not applicable- Bc civil contempt is appealed along with the merits of the underlying injunction, an attack on the merits of the	Not applicable- see civ compens

			injunction is not "collateral," but rather "direct." A litigant seeking to hold violator in civil contempt must prove that the injunction was valid/enforceable, and violated, which tends to show that any attack on the underlying order is not "collateral" to that proceeding.	
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- f. First look to purpose of contempt:
 - i. Whether to punish, compensate, coerce, etc.
- g. Crim indirect, civil compensatory, and civil coercive can all happen in same case
 - i. Crim indirect not brought by aggrieved party- brought by prosecutors
 - 1. Covers past violation
 - ii. Civil compensatory brought by aggrieved party
 - 1. Covers past violation
 - iii. Civil coercive- can be brought by aggrieved party if it looks like the person won't comply with court order
 - 1. Forward looking
- h. Criminal direct stands on its own- has to do with conduct that takes place in front of the judge, and nothing to do w court orders
- i. **RULE:** Appeals court will look to what the contempt charge is in reality, not what the judge has named it
 - i. **In re Stewart**
 - 1. Facts: Juror is upset that he had been demoted by employer for serving on the case. Juror told supervisor that judge prohibited adverse job action as a result of serving on the jury. Employer said it's not a demotion, just a transfer. The Judge sends marshals out to arrest the employer, bring him before the judge, and holds him in contempt. Judge called this civil contempt. Employer appealed
 - 2. Court of appeal said that if this is any kind of contempt, it's criminal, bc judge's goal was to punish the person for something they did. Civil contempt is either to compensate or to coerce compliance with a court order, and here, there is no court order
 - 3. Court also said that judge didn't follow rule for holding someone in criminal indirect contempt
 - a. Not indirect bc there is NO court order; even if there had been, there is a const right to counsel where they are able

to defend themselves and say that they didn't meet the requirements for crim indirect contempt

- j. **RULE:** Substantial compliance only found when all reasonable steps have been taken to ensure compliance
 - i. Party can offer mitigating factors as to noncompliance, but court must find these factors to be established (not case here)
 - ii. **US v. Darwin Construction Co.**
 - 1. Facts: Court ordered Darwin to either comply with a summons by the IRS demanding that he provide certain documents, or face penalties of 5k per day for noncompliance. On June 24, Darwin furnished some of the documents. On June 27, an IRS agent informed Darwin that the production was incomplete, and Darwin furnished the missing documents. Evidence showed that Darwin had either known the documents were missing or taken no special steps to find out/ensure compliance before the June 23 hearing. Court found Darwin to be in civil contempt for the 6 days of noncompliance. Darwin filed a motion to set aside/reduce the fine based on substantial compliance with the June 23 order and good faith. Darwin argued that it had made all reasonable efforts to produce the documents after the June 23 order. Darwin further argued that because the items produced 6 days late were misfiled and buried behind dozens of other boxes, the items were impossible to produce on time.
 - 2. Looks like and is civil coercive contempt bc party had ability to not pay a dime of it by simply producing the records
 - 3. Defenses to substantial compliance- if it would have been impossible to comply; **had no notice of injunction; not a person bound to it (not directed at you); that you didn't violate it**
 - a. Here, Darwin did not take all reasonable steps to ensure complete production until the IRS agent informed him that certain docs were missing.
 - b. Argued that the documents were misfiled/difficult to find
 - i. BUT did not argue that the missing documents were outside of its possession or control.
 - 4. Good faith-
 - a. Rejected because Darwin had opportunities to prepare for production prior to June 23, and because the evidence clarifies that Darwin either knew documents were missing or made no effort to find out prior to June 23
- k. Appealability of Contempt Sanction
 - i. Appealable as soon as it becomes a final order
 - 1. Criminal contempt- final as soon as they are issued

- a. Bc it's a stand alone crime- validity of the sanction doesn't depend on any outcome of any underlying case
- 2. Civil contempt- final order when underlying case becomes final and appealable
 - a. Inextricable part of the entire case involving the injunction

DAMAGES

1. Intro to Compensatory Damages
 - a. Must be proved to a reasonable certainty (not precise, but not speculative)
 - i. Can't win any damages at all unless P can prove (generally by preponderance of evidence) that the action by the D were reasonably certain to cause the harm
 - ii. Capable of measurement based on known reliable factors
 1. K damages easier to prove- generally in K
 2. Tort damages harder bc no way to predict what the damages will be
 - b. Judgement for damages not directed at the person, directed at the person's assets
 - i. If you don't pay a judgement, your assets get attached; separate enforcement action
 - c. **Sunnyland Farms, Inc. v. Central New Mexico Coop, Inc.**
 - i. Facts: Tomato farm sued local electricity company after the farm was severely damaged by a fire. Co had cut off the electricity to the farm w out giving P the notice that it was required to give. Sunnyland employees had negligently caused the fire, but then couldn't put out the fire w out the electricity to the water pumps. Farm agreed it was contributorily negligent
 - ii. Court said D not liable in a K action bc not reasonably foreseeable
 - iii. In terms of tort negligence damages (didn't give notice), a business's damages for lost profits must be reasonably certain
 1. Here, trial court did not err in awarding damages in tort for lost profits
 2. Relied on expert testimony to show that the lost profits were reasonably certain
 - iv. Two tests for lost profits:
 1. Before and After theory
 - a. Requires comparison of profits before/after the tort/breach
 - b. If you're a brand new business and don't have a "before" then other courts allow recovery based on—
 2. Yardstick
 - a. Looking at similar businesses and what they are making
2. Contract Damages
 - a. Elements of breach of K
 - i. Contract

- ii. P's performance, or excuse for nonperformance
- iii. D's breach
- iv. Damage to P resulting from the breach
 - 1. By definition, if you prove breach of K, you are proving that one of the interests have been broken (expectancy, reliance, etc.)
- b. General damages- those where we can say the breach of this K suffices to give notice to the breaching party of the nature of the resulting harm
 - i. Assumed to be reasonably foreseeable at time of K formation- based on the very K, anyone would suffer this if it was breached, regardless of special circumstances
- c. Special/consequential- P has to prove that the damages were/should have been reasonably w/in contemplation of the breaching party at the time of contracting
 - i. Not implied by law- require case by case evaluation
 - ii. Special to this particular P- goes beyond general types of damages that would occur to any plaintiff if this K was breached
 - iii. **Sunnyland**- too attenuated/P didn't prove that utility company should have known that the farm had no other way of putting out the fire/ that it was reasonably foreseeable
 - 1. Although company should have known that some damage might occur w/out electricity, no reason to know that there would be fire/that they didn't have backup generators for water pump
 - iv. **Langley**- breaching party had actual knowledge that they had no backup generator so that the fish wouldn't die (slam dunk), even though actual knowledge isn't necessarily required
 - v. **Hadley v. Baxendale**- P ran a mill and the mill shaft was broken, so couldn't operate the mill. P hired D, a delivery company, to deliver shaft to a repair shop and then bring it back. D failed to deliver it in a timely way, and the delay in delivery then caused a stoppage of P's business.
 - 1. General damages- cost of the delivery service
 - 2. P claimed special damages as lost profits for what he lost from having to shut down his biz
 - a. P must show that at the time it contracted with the delivery company, it should have been contemplated by the breaching party at the time they agreed to deliver this that if they screwed this up, P would lose profits/couldn't operate his business
 - 3. Court said this wasn't reasonably foreseeable
 - a. Damages were "too remote" from this breach of K
 - b. How would the delivery company know that P only had one shaft and without it they couldn't run their business at all?
- d. Expectancy
 - i. Gives P the benefit of the bargain

- ii. Designed to put the P in the position he would've been in had the K been performed
 - 1. What nonbreaching party expected to get when signing the K
 - 2. Won't be seeking expectancy damages when you weren't going to get any profit on the deal or even if the profit would be unclear/speculative
 - a. i.e. bidding against other people to get a job- when you bid low and basically lose money
 - iii. Both general and consequential
 - 1. Consequential recoverable if meets **Hadley** test
 - iv. Will generally allow reimbursement of money spent (even though this is technically defined as reliance damages)
 - 1. Categories aren't rigid constructs- can overlap
 - v. Construction contract:
 - 1. Party harmed can either recovery:
 - a. Diminution in market value (what they bid for v. what they got) OR
 - i. NOTE: will consider aesthetic value personal to P in determining FMV for value differential
 - b. The costs of finishing project/repair/replace
 - i. Caveat- cost of repair not unlimited- can't grossly disproportionate to the diminution value
 - 2. Can add loss of use (i.e. FMV of rental value)
 - 3. **Eastlake Construction v. Hess**
- e. Reliance
 - i. Reimbursement of out of pocket expenses expended in reliance on the K
 - ii. **Puts P back into position P would have been in had the K not been entered into at all**
 - iii. Usually special damages bc its things spent in reliance on K- but depends on what's written in K bc whatever is written in K is general
 - iv. Alternative to expectancy damages- usually can't recover both
 - 1. To allow both would be considered a "windfall"
 - a. Fine as long as damages aren't duplicative
 - v. BUT there are some cases in which what we would call reliance damages would go under the expectancy damages cases- does this just show how they overlap?
 - 1. P's reliance takes the form of acts central to his enforcement of the K, and D breaks/repudiates the K before complete performance has taken place
 - a. Ex- Building contractor finished half the structure when property owner terminates the K- contractor claims damages spent/made in performance/expecting to perform, AND the lost profits

2. Reliance interest in K prevented him from creating contracts with other persons
 - a. Ex- Physician by making one appt deprives himself of making a similar appt with another patient- complete correspondence b/w the reliance and the expectation interests
3. Breach of K results in direct harm to P
 - a. Ex- Farmer buys cow warranted to be free from disease, cow is diseased, and contaminates purchaser's entire herd
- vi. **RULE:** Rest 1- Where you obtain reliance damages, any amount that you would have lost on the deal has to be subtracted from those damages (not included in Rest §2)
 1. Burden on D to show it would be a losing K
 - a. D must prove the AMOUNT that was lost to a reasonable certainty- not just that there was a loss
 - b. Rule seems sound in theory, but D can almost never prove amount that would have been lost
 2. **Gruber v. S-M News Company**
 - a. Facts: K by which Ps would produce xmas cards and D would make efforts sell the cards, and pay Ps 84c for every set sold. D didn't try to sell the cards, Ps got stuck w the cards, and sued for breach of K. Ps able to sell the sets 4 yrs later for 6c profit on each set. P didn't prove that the sets of cards would have been sold EVEN if D had used its best efforts
 - b. Difference b/w value of D's performance as promised and received was too speculative- D couldn't prove how much P would've lost on K, thus lost profits weren't subtracted
 - c. Damages = Reliance damages minus the amount that P sold the cards for later = net total of \$17,854
 - i. Compared to the expectancy interest, which would give P the profit he could have made on any deal (P didn't get this here)- can't get expectancy on losing contract
 - d. This losing K argument- Court in **Gruber** says New York law is not clear on the loss of K rule; court concludes for the sake of argument that the rule exists
- f. **RULE:** A non-breaching party has to take reasonable steps to minimize/mitigate the losses/damages caused by the breach
 - i. Where the non-breaching party has taken steps to mitigate, the non-breaching party can recover the costs of mitigation
 - ii. D has to prove that the non-breaching party did not mitigate- if so, can subtract amount that was not mitigated

- g. Restitution (see section below)
- 3. Tort Damages
 - a. Two main goals:
 - i. Specific deterrence- deter this specific defendant from doing this again; General deterrence- trying to deter other similarly situated individuals from doing this again (Make the world safer)
 - ii. Compensation
 - b. Must be:
 - i. Reasonably certain- bc of the fact that effect of the injury in tort can often continue into the future, damages are quite uncertain
 - 1. Courts relax reasonable certainty requirement- hard to prove w precision but not speculative bc we allow it
 - 2. Not speculative if there's some methodology to the measure
 - ii. Reasonably foreseeable
 - 1. Type of harm and type of plaintiff, not extent of harm
 - a. i.e. if you hit a car, you expect there to be damages- the extent of the harm (i.e. whether you hurt 1 person or 6) doesn't have to be foreseeable
 - i. Still liable for full extent of harm as a tortfeasor
 - 2. **New Hampshire Fish and Game Dept v. Bacon**- Hiker hikes by himself, despite physical disabilities and bad weather, and is injured seriously on the hike. State rescue team has to come rescue him. State has a statute that says that if a person is injured through their own negligence and that causes a need for search and rescue mission by the state, state can go after the hiker and recoup their loss from the mission. Must be a causal link between the person that was injured and the costs that were incurred by the state. State must prove: 1) hiker was negligent, 2) search and rescue damages were caused by that negligence. Hiker said that his injury wasn't "foreseeable."
 - a. Court said damages were foreseeable bc Bacon's injury was foreseeable- poor health and was not physically equipped to go on the difficult hike he chose, esp bc of the weather forecast on the day of the hike.
 - b. Reasonable damages- state's recovery is not limited by the fact that some of the 15 employees were already on duty at the time of the mission- mission pulled these employees off of other assigned duties they would have carried out absent Bacon's negligence
- c. Damaged, but repairable
 - i. P can elect between 2 measures of damages:
 - 1. Diminution in value caused by the tort (pre-tort value minus post-tort "damaged" value)

2. Reasonable cost of repair, IF those repairs are economically feasible
 - a. Often a higher measure of damages (don't necessarily need to use money to repair it)
 - b. Loose "cap" on this measure (jx split):
 - i. Where repairs exceed (or are disproportionate to) the pre-tort value
 1. Value can reflect personal value to you, or can be FMV
 - a. There may be no market for a chattel (exchange, can tell how much its worth, can buy similar items on the market)/ FMV might not meet goal of compensation
 - b. Value to owner- **how is the owner using it?**- can be translated to \$
 - i. Much more subjective
 - c. When chattel has unique capabilities, they must be considered in determining value
 - i. **Barge**- didn't mind it getting damaged bc he could just use it again since it was already damaged- unique capability/makes it more valuable- also was being used as a pontoon, etc.
 - d. Goal of deterrence might not be achieved by FMV bc people will think they can go around hitting dented things that don't have value and not be held liable
 2. i.e. car repairs would follow this limit
 - ii. Value differential cap- can't get costs of repair that would grossly exceed diminution in value (pre-tort value minus post-tort value) caused by the tort
 1. Where this true, limited to diminution in value method
 - ii. PLUS:
 1. Loss of use during period of repair
 2. Depreciation (diff in value even after the item is repair)
 - a. This may not exist
 - iii. **Hewlett v. Barge Bertie**

1. Facts: D dented P's barge. P was seeking cost of repair. Barge was not destroyed, but it was in pretty bad shape. It was already in bad shape (but still useable) when D dented it. Trial court said that the market value of the barge was zero; TF, damages for repair were inappropriate.
 - a. Reasonable cost of repair would be capped at either JX split cap
 2. Appeal court said this was incorrect reasoning:
 - a. **Burden of proof is on the D to prove what the cap is on reasonable repair costs**, which he didn't do
 - b. P should recover the cost of repair of damage caused by D- restored to its prior condition
 - i. See above re: value to P- fact that it's declared a constructive total loss is irrelevant- still has value to P
 - c. Dissent: this measure unjustly enriched the plaintiff
 - i. P was unlikely to actual repair the barge, so just giving him all this money
- d. Destroyed (not repairable)
- i. Formula:
 1. FMV at the time of the tort (General default rule)
 - a. But value may be different than FMV (see above)
 2. PLUS loss of use
 - a. I.e. rental fee to get something else in its place
 - ii. Destroyed chattels
 1. **Lane v. Oil Delivery**
 - a. Facts: House burned down with everything in it. There were 30 pgs listing everything in the house- estimated value/cost of item. Didn't state how they arrived at the value of each item.
 - b. Court said that the market value is the market value at the time of the loss, not when it was purchased
 - i. BUT, when it's household items and clothing, the secondhand market value doesn't adequately represent P's loss
 1. They need to replace the items, and the value of their used items are essentially zero, so not enough to replace them
 2. THUS, court can award replacement value IF plaintiff asks for it
 - ii. If court awards full replacement value, will allow various factors to affect the measure

1. Depreciation, age, wear and tear, condition,
cost of replacement, and cost of repair

- c. When dealing with value to the owner, court will accept plaintiff's own testimony as rational value of the measure
 - i. Just must be reasonably certain measure/criteria

2. **Carbasha v. Musulin**

- a. Facts: Dog dies bc of negligence of D. Law regards pet as chattel. Trial court says P limited in recovery to FMV of dog at the time of the loss. On appeal, P argues that she is entitled to recover true and special value of the dog as measured by the sentimental value of the dog or her emotional distress as the result of the death of the dog
- b. Court holds to common law (pets are chattel) and says you can't recover for sentimental value of the pet or emotional distress of pet- just like you can't for emotional loss of pen
 - i. Reasoning:
 - 1. Too hard to measure- imprecise and inconsistent
 - 2. Will vary from P to P and judge to judge
- c. Dissent:
 - i. Majority seems to be thinking that it can't change the common law- BUT fully empowered to do so
 - ii. Huge number of Americans own pets, and huge amount of money is spent on taking care of pets- people don't do the same with their chairs/tables
 - iii. Common law rule is out of step with current societal attitudes about pets and should be changed

3. NOTE: Objectively sentimental value

- a. Other people would have sentiment behind the thing as well, and if you prove this, then you may be able to recover more than FMV
 - i. This can be where aesthetic value comes in
 - ii. I.e. hand painted portrait of gma
- b. Idiosyncratic sentimental value (i.e. can't call it this) is not recoverable

iii. Example:

- 1. Facts: While P was beaten by 2 police officers and incident to false arrest and beating, he lost a manuscript that he wrote and that only he had a copy of. Sued for loss of manuscript
- 2. FMV- hard to prove- unpublished author, hadn't gotten money from anyone, no one had seen it, etc.
- 3. P could put on proof of cost of time and materials to reconstruct the manuscript

- a. BUT P couldn't introduce this proof, and lawyer instead just pulled out amount of 50k out of his ass
 - 4. Instead of remanding for proof of cost of time and materials, court just reduced his award to 25k
- e. **NOTE:** Where D has prevented P from proving something in a certain way, i.e. damages to a reasonable certainty, that's taken into account (equitable estoppel)
- f. Harm to Real Property
 - i. Distinguish b/w permanent injury and one that can be repaired
 - 1. Permanent injury means permanently affected by the tort
 - a. Land itself is rarely "destroyed" unless its submerged under water
 - 2. Repairable- "temporary" condition
 - ii. Reparable/restorable (temporary)
 - 1. P can choose between:
 - a. Value differential (pre-tort value minus post-tort "damaged" value)
 - b. OR
 - c. Reasonable repair/restoration costs
 - i. JX split on cap like other damages
 - ii. NO CAP IF:
 - 1. Reasons Personal
 - a. i.e. aesthetic value may fall under this- esp when living in the property, aesthetics matter to you
 - i. i.e. damage to your view (falls under residential as well)- allows you to get more than the FMV
 - b. **Roman Catholic**- church should be able to recover full restoration costs bc church had reasons personal to restoring it:
 - i. If they didn't restore it, they would be violating the K
 - ii. Low-income housing was a part of their mission
 - 2. Residential property
 - a. May be same as reasons personal
 - 2. PLUS loss of use of land during repair/restoration
 - 3. PLUS depreciation in value after repair ("stigma" damages- depressed market value bc of lingering concerns of land's condition)
 - 4. **Miller v. Cudahay**

- a. Facts: Farmland polluted by salt- damaging the use of the land to grow crops. Aquifer that contained high concentrations of salt leaked onto farmland bc of negligence of D in running the plant.
- b. Court determined that it is repairable- can restore the land to its previous condition
- c. Sought value differential bc didn't want cap- harm- lost crop profits for the period of time it'll take to repair the land
 - i. Here, the value of the land was largely based on the use of the land, even if value exceeds potential recovery for permanent damages
- d. Temporary damage SOL rule

5. **Roman Catholic Church v. LA Gas Service Co.**

- a. Facts: Church purchased apartment building from govt at reduced price- K for sale said they must use it as low-income rental housing for 15 yrs. If condition is not met, property would revert to the govt. Defect in some of the gas company's equipment, which caused fire that caused fire in the building. Church sued gas company for negligence, and sought cost of repair. Lower court held that repair costs exceeded FMV at time of tort, thus capped
- b. Court thought that neither of the caps capture what should be done/injustice in this case, bc the goal is compensation and to bring the land back to the condition it would have been in pre-tort
 - i. There should be more flexible approach bc there is flexible standard for measuring damages for real property, esp when P is seeking restoration costs

iii. Permanent

- 1. Loss or diminution in value (typically FMV- can also reflect loss of use or loss of rental value of land)
 - a. Default: FMV pre-tort minus FMV post-tort
- 2. PLUS other consequential damages so long as it's not duplicative of above, IF proved

4. Personal Injury Damages

- a. Negligence elements:
 - i. Duty
 - ii. Breach
 - iii. Actual harm
 - iv. Factual cause
 - v. Proximate cause
- b. Intentional torts (no actual harm required):

- i. Battery
 - ii. Assault
 - iii. False Imprisonment
 - 1. Must be aware of confinement, or actually harmed by confinement
 - a. If aware, damages are to compensate me for the particular invasion of my mental space
 - i. Thus, don't have to prove particularly how I was damaged mentally- damages presumed
- c. Components of personal injury damages:
 - i. Medical expenses (past and future component)
 - 1. Past- suffered from time of injury up until time of judgement
 - 2. Future- damages for medical expenses projected into future- requires expert testimony
 - a. Educated guess work using expert testimony
 - 3. **Frankel**- medical expenses that carry on for the rest of life- 8 mil
 - a. Lump sum expenses bc if it's payment plan, court won't be able to monitor that
 - 4. Medical monitoring- some courts will give lump sum and more common is periodic medical monitoring
 - a. CA- does not allow medical monitoring damages in toxic torts situations
 - 5. Misdiagnosis- some courts allow- expert testimony that shows the negligent misdiagnosis caused you to lose a particular percentage of chance of recovery
 - 6. CA: Can't sue for fear of getting cancer unless there's expert testimony that it's more than 50% chance you'll get cancer
 - ii. Lost income or wages (past) and lost earning capacity (future)
 - 1. Still be proven to reasonable certainty (i.e. not speculative)
 - a. **Athridge**- P's expert came in and concluded that but for the injuries, P had 16% of obtaining only high school degree, 60% of obtaining college degree, 24% chance of obtaining graduate degree. Each of P's siblings was enrolled in professional degree program, and P had expressed interest in attending law school
 - i. Up to trier of fact to decide if this was more likely than not
 - ii. Upheld 1.4 mil in lost earning capacity
 - 2. What you would've made in your life if you hadn't been injured v. what you can now make since injury
 - a. Take \$ amount that would've been earned, and subtract from that the \$ amount you will earn with the injury
 - b. Calculate it up until how old people typically stay in that career (i.e. athletes, models, etc.)

3. Simply must show that you've lost economic opportunities from employment going forward because of the injury-don't necessarily have to show that you can never work again
 - a. **Wilburn**- P produced evidence that his employer would probably never promote him to barge captain bc of his injuries, and even if employer had, he couldn't accept it bc of his injuries
 4. Don't have to show that there's job offer you can't take; just that it's a very real possibility you could've had another opportunity
 5. **RULE:** First ask if you're entitled to this category of damages; if yes, then see how much you're entitled to
 - a. **Wilburn**- didn't show amount of lost earning capacity
 - i. Difference between yearly salary of tanker man and barge captain is only 6k a year
 1. This gross loss of earnings is only 162k- so far off from 1mil, that 1mil is excessive
 6. **Frankel**- court concluded that she would've earned 5k a year when she graduated.
 - a. Progress in school, family background, paintings all came into evidence
 - b. Use 65 years for measure of her life
 7. **Wilburn v. Maritrans GP, Inc.**
 - a. Facts: P was worker on inland barrage- position was tanker man. Badly injured when he was swept off the deck of tugboat he was working on by huge wave. Sued employer under federal statute called Jones Act- sim to worker's comp, but have to prove fault on part of employer. Here, it was unseaworthiness of the ship (unsafe bc of negligence of the owner of the ship). Sued for physical injuries, lost earning capacity, and P&S. Jury in Jones Act cases if requested. Jury awarded 1mil for lost earning capacity. D moved for judgement notwithstanding verdict, and court agreed- set aside judgement. Held that P failed to show a narrowing of economic opportunities as a matter of law. Court reversed, ordered new hearing on damages
 8. **Athridge**
 - a. Facts: 15 yr old high-school student struck by car, severely injured, brain damage. As a result, he would be limited to low wage jobs with high risk of unemployment.
- iii. Pain and suffering (past and future)
1. These are considered general damages- what anyone will be expected to suffer
 - a. Thus, often very large (roughly 3x others added up)

2. **Frankel**- appreciated pain even in semi-coma
 - a. Must undergo physical therapy for the rest of her life, has prostheses, frequently falls
 - b. Suffers and will continue to suffer mentally
 - c. Has sudden outbursts- can't explain outbursts and apologizes for them
 - d. Lost ability to engage in activities that caused her enjoyment in life
 - i. Motherhood, horseback riding, marriage
 - e. Gave her 650k for this- lump sum to cover both past and future
 3. Some states cap the award, some don't
 4. One of the uses is to pay attorney's fees
 5. Measure is very imprecise- makes it difficult for P lawyers in terms of what could they possibly say to jury to provide an amount
 - a. **Debus v. Grand Union**
 - i. Facts: P was injured while shopping at D's store and boxes fell on P. P's lawyer suggested that the jury think of P's pain and suffering in terms of how much per day that each day was worth (per diem argument). D said that it sounds imprecise
 - ii. Court here allowed this bc said that P's counsel ultimately left it up to the jury's discretion to determine an amount
 - iii. BUT many states refused to allow P to make per diem arguments bc never supported by evidence
 1. Pain isn't the same every day
 - iv. Any other special harm (but not including attorney's fees)
 1. **Healy v. White**
 - a. Facts: 7 yr old child injured in car accident- sustained minor brain damage that aggravated his learning disability. Father sought damages for future medical expenses and also the expense of tutors bc father as a parent was responsible for education of the child legally.
 - b. Court gave 350k to child, and 650k to father in amount that contains future educational expenses
 - c. Computation is a jury question (where available and requested)- court in reviewing jury verdict must be deferential to the verdict
 2. I.e. wheelchair bound, and have to fit house to accommodate you
- d. **Frankel v. US**
 - i. Facts: Fed govt immune from tort suits except when immunity is waived under federal tort claims act. Conditions for waiver- when you sue fed

employee for tort caused when on the job, employees cannot be sued at all, and you sue the USA instead. Here, automobile collision w driver of dept of the army. P sustained serious, irreversible personal injuries. She had completed 2 years of 4-year art degree, and was intending to be a commercial artist- was well on track

1. Testimony came in about what she was expected to do

e. Collateral source rule- source collateral to tortfeasor

i. I.e. insurance- when P has insurance that pays for the medical expenses, D doesn't get to credit that amount- must still pay full amount of the judgement even if insurance payment has been made

1. If they would allow D to subtract insurance, it would provide windfall for D, which we don't want to allow

a. Don't want to give benefit to D- prevents deterrence

f. Additur and Remittitur

i. Power that the trial court has to lower or add damages to the jury verdict (usually at the request of P or D)- jury must have been way off

ii. Remittitur: Lower the damages

iii. Additur: Jury left out a whole group of damages usually

1. Court wouldn't typically raise an existing category of damages

5. Punitive Damages

a. Not available for breach of K- almost only available in tort

i. Law doesn't dissuade people to breach K- not considered a wrong in it of itself

b. Purpose is to punish and exemplary

i. Make an example out of P

c. Only allowed for particularly egregious conduct

i. Usually never available in negligence cases

ii. Malice, willful- D must have the purpose to harm

1. CA- requires clear and convincing evidence of oppression, fraud, or malice

a. Oppression- intended to cause injury, or despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights

2. Looking for a bad state of mind- i.e. for battery, when the physical harm is foreseeable, then you have a worse state of mind

a. **Silverman**- not the case here

iii. **RULE:** Not available in every intentional tort case

1. **Silverman v. King**

a. Facts: P is dealer at a casino. Suffered an injury when an excited gambler enthusiastically hugs him and lifts him off the ground, and P suffers serious injuries (eggshell skull case). Intentional tort- battery.

- b. Not available here bc harm wasn't malicious or predictably dangerous, even though it was intentional
 - i. For battery, purposefulness to do the conduct that caused the harm is enough for intent
- d. Not available if neither compensatory nor nominal damages available
- e. Amount- decided by a jury. Factors to consider:
 - i. Nature and degree of reprehensibility of D's conduct
 - 1. i.e. has D profited from the reprehensible conduct? Will ratchet the amount up
 - ii. Seriousness of the harm resulting from the misconduct
 - iii. D's awareness that such harm would result
 - iv. Duration of the misconduct, D's conduct upon discovery of the misconduct, and any efforts to conceal the misconduct
 - v. Profitability of D's misconduct
 - vi. D's net wealth
 - 1. For a wealthier person, it would take more money to punish
 - 2. The relevance of this has been a troublesome issue for courts
 - vii. Relationship b/w actual harm and amount of punitive damages
 - 1. Don't want the amount of punitive damages to vastly exceed compensatory damages/the amount of proven harm
 - viii. Total deterrent effect of other damages and punishment imposed upon the D
 - 1. Goal is to punish someone, and if they're already being punished in other ways, may lower the amount slightly
 - ix. BOILED DOWN:
 - 1. Reprehensibility of the conduct takes in a number of these factors, and is thus a very important factor
 - 2. D's net wealth as well- goes to serving purpose of punitive damages
 - 3. Relationship between harm (compensatory damages/the amount of proven harm) and amount of punitive damages
- f. Vicarious Liability
 - i. Majority rule: only available if-
 - 1. Principal engaged/consented to authorized conduct, or
 - 2. Deliberately retained unfit servant, or
 - 3. Agent engaging in the conduct was employed in managerial capacity and acted w/in scope of his/her employment
 - ii. Minority rule: If an employee committed some egregiously horrible act that authorizes punitive damages w/in scope of employment, employer should be liable
- g. Limits (state law + US courts)

- i. Bifurcation: trial on liability and compensatory damages takes place w/out any mention of punitive damages, then if there is liability, go into second phase of trial where you do separate trial just on punitive damages
 - 1. Good for state like CA that requires higher standard of proof for punitive damages
 - 2. Usually requires legislation, but a lot of courts just do it on request
- ii. Cap/ceiling on amount of punitive damages
 - 1. States differ
 - 2. Tort reform
 - 3. Ratio cap
 - a. Amount of compensatory damages compared to amount of punitive damages
 - i. i.e. 1 mil in comp, and maximum ratio allowed is 4:1, then the max punitive damages is 4 mil
 - b. SCOTUS has said that 9:1 is highest you can go w/out being unconst

RESTITUTION

- 1. Purpose- to avoid unjust enrichment
 - a. 1- D has been enriched
 - b. 2- At P's expense
 - c. 3- D's retention if the "enrichment" would be "unjust"
- 2. Secondary goal- deterrence, punishment (maybe)
 - a. Author says not designed to punish- punishment merely externality
- 3. **RULE:** Measured by D's unjust gain, not harm to P
 - a. May award higher amount than compensatory damages
- 4. Quasi K (legal)
 - a. Developed from writ of assumpsit
 - i. Suit in assumpsit gets way higher amount of damages than just regular compensatory damages- P can get benefit of the chattel conferred to D
 - 1. **Berg**- the rental value and the value of the grader itself
 - b. K is implied in law, not in fact
 - i. Law implies a K when services are extended under circumstances where it would be unjust for the recipient not to pay for them
 - ii. Focused on ensuring justice, not on whether there was meeting of the minds
 - 1. Not action for breach of implied in fact K
 - c. Type of quasi K- quantum meruit- measuring by what the D got by not paying- how much D benefitted by the work
 - i. i.e. if D hires P as a lawyer on contingency, then decides he doesn't want lawyer to take 40%, D can fire lawyer and negotiate the settlement himself, but then lawyer can claim quantum meruit
 - ii. Factors for formulation of requirements for recovery under QM:

1. Claimant furnished valuable services or materials to the person sought to be charged
2. The services and materials were accepted, used and enjoyed by the person sought to be charged
3. The party who provided the services or materials did so with the reasonable expectation of receiving comp (not always used)
4. The party who accepted the services had reasonable notice that comp for the benefits would be expected (not always used)
 - a. i.e. someone who repaints your house number on your curb without you knowing and comes to you and says I want \$10- won't get comp
5. Retention of the benefit without payment of reasonable comp would constitute unjust enrichment
 - a. Main one

d. Matter of Estate of Zent

- i. Facts: Johnson and Zent had relationship until Zent's death in 1988. Johnson filed a claim against Zent's estate for compensation for services that she had rendered to Zent prior to his passing. Zent suffered from strokes and Alzheimer's disease, so J became his "houseservant and nursemaid." J testified that Zent was physically incapacitated for the last three years of his life and mentally incapacitated for the last year. Johnson's testimony was corroborated by Zent's treating physician.
 1. Her argument is that his estate has been unjustly enriched by her giving her services to deceased without any payment
 2. Estate would've had to hire someone to do it had she not done it- estate had higher amount of \$ bc they didn't have to hire anyone
 - ii. Court said it was not a gift, and is a setup for application of quasi-K
- e. Type of quasi K- suit in assumpsit (waiver of tort)

i. Cross v. Berg Lumber

1. Facts: Berg sued Cross for the tortious conversion of a road grader (piece of heavy machinery) and for replevin. Cross had initially borrowed the grader with Berg's permission in order to repair damage done to Cross's property by one of Berg's contractors, but then kept the grader without permission despite Berg's demands for its return. Trial court ordered Cross to return the grader to Berg and pay incidental damages in the amount of \$83,400, which included restoration of the grader to its prior condition, costs of attempted recovery of the grader, and loss of use. Loss of use was calculated based on the monthly rental value
2. Court affirmed the rental fee for 27 months, calling it loss of use
 - a. Said the measure of \$67,500 isn't compensatory, but can be justified on restitutionary theory

- i. If sued for conversion, should sue for the FMV of the grader, which was under \$20k
 - b. Want measure based on D's unjust gain, which here, was the monthly rental value of the time he kept it from Berg
 - i. Irrelevant that Cross didn't actually use it or that Berg didn't even need it during that time
- 3. Prof says this looks punitive, even though author says it's not
 - a. Thinks that if there weren't intentional actions here, the higher 67k amount wouldn't have been awarded
- 4. Even though court says its incidental damages, it's really just restitution
- 5. Enrichment was the holding of the machine w/out paying rental fees for it
 - a. Cross didn't gain the use of the machine- didn't use it, or rent it out and keep the proceeds, etc.
 - b. It's hypothetical- possession of the grader presented an opportunity for Cross to use it for profit, even though he didn't
 - i. Took away any option that Berg may have had to use it
 - c. Negative unjust enrichment- no tangible benefit to wrongdoer

ii. **Olwell v. Nye**

- 1. Facts: P sold his 1/2 interest in egg packing company to D. P had on his premises a machine that washed eggs. D didn't want it, and parties agreed that machine could just stay in storage on premises. WW2 later broke out, and there was suddenly a labor shortage, and can't hire people to wash eggs. D decided egg washing machine could be useful after all, and put it into operation w/out P's knowledge/permission. Discovered D's use later (wrongful act- concealment), and P said it's fine I'll sell it to you for 1/2 the amount he bought it for. D offered a ridiculously low amount, so P sued for conversion, trespass to chattels, and asked for fair rental value of equipment (\$25/month). Trial court found that D saved \$10/week by using the machine, and that that was the proper measure. Shouldn't be based on what P lost, but what D unjustly gained. Machine had been used for 156 weeks, at \$10/week, so \$1,560.
- 2. **RULE:** enrichment can include a savings to someone, as opposed to money that they've gotten in
 - a. Benefit- any form of advantage
 - i. Here, advantage was savings in labor cost that D obtained through his wrongful use of machine

5. Constructive Trust (equitable)

a. Person who would otherwise unjustly be enriched must transfer property to the intended party

i. Remedy will ONLY be an alternative if P can identify some THING that D is holding that should be transferred to P

1. Must attach to something- could be just money, but real property is most common

a. **So long as P can trace the wrongfully taken thing into that new thing (thing you're trying to place the trust on), then you can get a constructive trust on it**

b. Requirements:

i. D must convey title to P

ii. P is the constructive beneficiary

c. **County of Cook v. Barrett**

i. Facts: P (county) sought and obtained constructive trust in an accounting of funds received as bribes by D. D received the bribes because he was a county clerk at the time (breach of fiduciary duty case- not embezzlement)

ii. Why would the county seek restitution as opposed to damages?

1. D is profiting, and it's clear that whatever loss the county suffered is LESS than the gain

a. Proving the losses is more difficult

2. D is unjust in holding the funds EVEN THOUGH the County did not lose that amount

iii. Does the conveyance of funds constitute a windfall to the county? In some respects, YES

1. County gets \$180k which is FAR more than their losses

2. It would be unjust to allow D to retain this money, D was bribed and employed by P- he never would have been in the position to receive these bribes absent P

d. **HYPO:** What if the Clerk had used the bribe money to purchase a condo?

i. Could the P get a constructive trust over the condo, which would force the transfer of title in the condominium to the County?

1. YES- IF the entire amount was used to buy the condo (i.e. bribe money was 100k and bought condo for 100k- if condo was 500k, would have to get equitable lien on 100k part of condo)

ii. When would the P want to go after the condo?

1. If D is insolvent

2. The P can get the entire condo, even if the value of the condo has increased because D used the money to purchase the condo

e. This is a good remedy where a P cannot prove damages the same amount as the unjust gain; OR where the D has used the ill gotten gain to purchase other items that are worth more (P wants title to those items); OR where D's money is tied up in those things purchased with the ill gotten money

- f. P is entitled to any items or any products of that item
- 6. Equitable Lien
 - a. Where there is identifiable property that does NOT completely belong to the P in justice (only has interest in part)
 - i. Useful when interest isn't severable
 - b. Elements:
 - i. Court orders the imposition of the lien of an item
 - 1. Security interest on item enforced through a forced sale if not paid
 - ii. Gives P partial ownership of property
 - c. How to measure the EL:
 - i. Court will come up with an amount that serves the purpose of the remedy: make D give up "unjust" gains, which will vary depending on the facts
 - ii. **Robinson**- could be:
 - 1. Value of the labor/materials supplied
 - 2. Increased value of the property (similar to % theory)
 - 3. Personal value to the owner of the benefits received
 - 4. 1/2 of the reasonable value of the improvements
 - iii. P has the choice to argue for either measurement:
 - 1. Amount P gave
 - 2. % of the property that the original contribution purchased/added to, and then reassessed
 - a. Where property has decreased in value, courts will generally pick the higher amount
 - iv. EL is often restricted in amount, and amount may be adjusted in the interest of justice
 - d. **Middlebrooks v. Lonas**
 - i. Facts: P loaned her parents 25k. They used it to build a home on their land and mortgage their house, then refused to give it back. Daughter sued seeking equitable lien over the home built.
 - 1. Substantive Reason: Fraud- Parents fraudulently obtained \$ from daughter
 - ii. This remedy more accurate than legal bc since they mortgaged home, if she just becomes creditor at law, it would be subordinate to a mortgagee's claim
 - iii. This land doesn't belong to the daughter, thus constructive trust would be too much
 - 1. EL is imposed and the EL may be satisfied/discharged by a D EITHER by
 - a. Paying the EL off
 - b. P can foreclose on the property and force sale to get the \$
 - e. **Robinson v. Robinson**

- i. Facts: Married couple built home on property owned by Husband's parents. Parents were acting as if the land belonged to the son/wife. Couple divorced. Wife filed for (essentially) an EL on the house
 - ii. Would the parents be unjust in keeping the house?
 - 1. Yes, bc she made improvements with their permission
 - 2. Unless they gave wife \$\$ in exchange for the work on her improvements (labor)
 - iii. Court gave EL for 1/2 of the improvements her and husband made to the land
- 7. NOTE: CT and EL require a physical item for these remedies to attach to
 - a. Where D does not have funds to pay a money judgment, instead the money is tied up in something that belongs in justice in whole or in part to the P so the P cannot get cash, but they can get a thing (parcel of land, chattel, etc.)
 - b. These are ONLY available in very limited situations
 - c. Alternative to money damages
- 8. NOTE: although CT and EL are both equitable remedies, a lot of modern courts seem to not require a showing of inadequacy of legal remedy for CT or EL

NOMINAL DAMAGES AND DECLARATORY RELIEF

- 1. Nominal Damages
 - a. Main goal- declare P is right and D is wrong
 - b. May be a way for getting attorney's fees in civil rights case (nominal damages supports the grant of atty fees) or vehicle for obtaining punitive damages
 - i. Very tiny amount
 - ii. Atty fees exception to American rule: fee shifting statutes
 - 1. If you bring a claim under one of those statutes, and you win, the loser must pay your atty fees
 - 2. BUT SCOTUS has held that if you seek a lot, and only get a little, not technically prevailing party so doesn't support award of atty fees (if you seek high compens and only get nominal)
 - 3. If seeking only nominal, and you get it, this supports award
 - c. Maxim- there can be no right without a remedy
 - d. Limitations:
 - i. Not available, and would be improper if awarded, in a negligence case
 - 1. MUST prove actual/compensatory damages in a negligence case
 - a. Part of the CoA
 - e. **Okeke v. Ewool**
 - i. Facts: P wrongfully evicted, and sued over it. Failed to prove compensatory damages
 - ii. Court said this is fine bc it was a trespass action, which is intentional tort and not negligence action. In intentional tort, in NY, P is entitled to at least nominal damages if you prove the tort (bc harm is an element of the tort).
 - iii. Granted nominal damages
- 2. Declaratory Judgments

- a. Def- a declaration of rights
 - i. Gets its power bc it has res judicata effects (if D continues to do something where court has declared it unlawful, can use DJ in subsequent litigation/part of same lit)
 - b. Can be used in tandem with other remedies, including injunctive relief
 - c. Purely statutory remedy
 - d. Requirements:
 - i. Actual, concrete dispute between the parties
 - 1. I.e. case cannot be a hypothetical- can't go to court seeking DJ and say "thinking about doing this- what would happen?"
 - 2. **Public Service Commission of Utah v. Wycoff**
 - a. Facts: PSC of Utah sued Wycoff in state court and sought to enjoin them from engaging in distribution of movie films/newsreels without getting permission/approval from them. Instead of responding in state court, Wycoff went to federal court and sued commission seeking declaratory judgment that would prohibit PSC from interfering with its distribution. PSC moved to dismiss, fed court granted, appealed, reversed, and SCOTUS granted cert
 - b. Q- whether declaratory judgement granted in fed court should've been granted
 - c. SCOTUS held that trial court correctly dismissed DJ
 - d. Must be concrete dispute and must be ripe
 - i. This case is not- hasn't matured to a point to see what/if any concrete controversy will develop
 - ii. THUS DJ won't help resolve anything bc no real controversy
 - ii. Must serve useful purpose in resolving that dispute
 - 1. I.e. in insurance dispute, court can use DJ to say that a certain thing is covered by the policy
- e. Discretionary remedy- not entitled to it
- f. When federalism concerns appear, DJ should not be used to interfere with OR impede an administrative proceeding or a state ct proceeding (where DJ is federal)
 - i. **PSC of Utah**- federal court would've abused its discretion in granting DJ if it had effect of interfering w/impeding administrative proceeding, esp when its in state court
- g. Federal declaratory judgement act doesn't confer jurisdiction- must have federal jurisdiction otherwise
- h. Steps:
 - i. 1- jurisdiction
 - ii. 2- actual case/controversy

- iii. 3- serves useful purpose in resolving concrete dispute AND doesn't violate federalism issue