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PROHIBITION AND PREEMPTION

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Like many of you, I have a neighbor with an excitable car alarm. It goes off if someone drives by at just the right speed, if the humidity is right, or if a large insect lands on the hood. Worse, it seems most sensitive at night. (Perhaps that's just when he parks in front of my house.) I'd like to do something about it, to preempt it before it preempts another night of sleep. One possibility, which is beyond my competence, is repairing it myself. Another, which I have so far resisted, is to get out my tool box and remove the offending device. Private law has a kinder and gentler solution: I can get an injunction. Rather than trying to sue my neighbor for minuscule damages each time he wakes me, and waste a huge amount of both of our time in the process, I can enlist the state's support, and have it act preemptively to prevent him from waking me.

Injunctions seem like a good idea. I'm quite sure they are a good idea. So good, in fact, that an obvious question comes to mind: Why do we allow so few of them? If my neighbor accidentally drives his car up into my yard, destroying my garden, I am entitled to damages. Likewise, if he is fixing his roof, and carelessly drops shingles onto me. Or if his pet racoon bites me. Now I am not happy about being awakened by his car alarm, but, frankly, it sure beats having my garden torn up or getting hit in the head with falling shingles. Why can't I have an injunction to prevent those things before they happen, rather than damages after they do? After all, the harms are more serious than the nuisance of the car alarm. And I presumably have a right to be free of his conduct in each case. What's the difference?

In this article I will reflect on these examples, and others like them, in the hope of offering a general account of the grounds on which the state may act preemptively to prevent one person from harming another. I will use private-law injunctions as a model for analyzing preemptive prohibition more generally. Injunctions limit the invasion of liberty, while also protecting security where necessary.

My focus will be on cases in which the preemptive response is supposed to protect one particular person from the harm posed by another particular

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person. Examples of one-on-one injunctions, like the one that finally quieted my neighbor, fit this pattern. But I shall argue that laws against speeding also fit this general pattern, as do laws restricting the use of firearms and keeping of wild animals. In these cases, the law has the structure of a multi-person reciprocal injunction that protects people from each other.

Injunctions are interesting because they provide a juridical rather than a directly coercive solution to issues of security between private citizens. They do so by providing a prohibition for the benefit of one person in relation to another. By looking at this structure of prohibition, we learn something important about the structure of prohibition more generally. Prohibitions, both injunctive and criminal, are justified because they protect people from each other. They do so by guiding conduct; although they are backed by sanctions, they are best understood as specifying the limits of acceptable behavior, rather than as part of an economy of threats. Most of my examples will use injunctions to make sense of important features of criminal prohibitions. But I will also sometimes work in the opposite direction, and seek to illuminate injunctions in light of criminal prohibitions. The point of working in both directions is to explain the structure of prohibitions, rather than to reduce the criminal law to a series of injunctions, or injunctions to one-on-one criminal statutes.

American law has developed broader uses for injunctive relief, including injunctions to protect civil rights. Whether such injunctions can be modelled on private law injunctions is a nice question, which I will not attempt to answer. I will also say nothing about the role of preemptive state action in its role as coordinator and protector of public goods. Schemes designed to ensure that all contribute to securing and protecting goods that all people enjoy, such as clean air, may require preemptive enforcement to keep them stable because the harm done by any particular person is likely to be *de minimis*. Some cases include elements of both injunctions and public goods. Traffic laws, for example, protect people from each other and also make sure that some do not unfairly exploit the precautions taken by others. In cases of this sort, though, both the element of coordination and danger of free riders are parasitic upon the dangers the activity poses directly.

I do believe, however, that large portions of the preemptive criminal law *can* be modelled on private law injunctions.[1] They serve to protect one person's rights against the conduct of another. But they do so in a particular way. The particular way in which they do so tells us something important about the rights that are at stake. It also tells us something about the role of the state in all of this. I will say something about why we should expect such injunctions to be less finely tuned toward preventing the harm in

1. I do not mean to deny that the existence of criminal law in some area may preclude injunctive relief. The point of the model is that both criminal law and injunctions serve to protect private parties from each other.

question than if they were private one-on-one injunctions. I will argue that this account explains why the breach of a criminal statute is negligence per se for purposes of tort law. I will also argue that the criminal sanctions appropriate to such cases can be modelled on judicial sanctions for contempt of court. Finally, I will contrast this structure of coercion with cases in which the use of force is more direct, cases which are better modelled by the dispreferred alternative of a self-help "alarmectomy." The direct use of force—with or without official sanction—is troubling in a way that injunctive protection is not.

Injunctions may seem an unpromising model for the criminal law. The point can be put in terms of a challenge: Given that the tool of criminal law is available, why do we need injunctions at all, rather than simply prohibiting such behavior as should be enjoined? The answer is that looking at injunctions explains important features of the law of crimes *mala prohibita*. First, it shows why the private law of damages is inadequate as a response to certain types of behavior. Second, it shows how the criminal law can sometimes be an appropriate response in cases in which people neither intend nor cause harm to others. Prominent views in criminal law theory make intending or causing harm essential to criminal culpability. As a result, they frequently treat crimes *mala prohibita* as puzzling utilitarian appendages to a body of deontological criminal law, a sign of the readiness to sacrifice the one for the sake of the many. Looking at injunctions lets us see the criminal law as both more principled and more unified. Put somewhat differently, by looking at the structure of injunctions and the penalties for their violation, we can identify the mental element in some such crimes.[2]

I will also use these examples as an opportunity to kick up some dust, in the hope that you will later be grateful to me for clearing it away. Much of said dust consists in a puzzle, which many people have found gripping, but I believe to be spurious. I'll call it "the Ford puzzle" after the American president who gave it its classic statement. President Ford is reported to have spoken out against gun control on the grounds that it punishes the wrong people. The claim is not quite the same as that captured in the National Rifle Association slogan "Guns don't kill people; people do."[3] The NRA claim rests on a false dichotomy, since the possibilities are not mutually exclusive. People with guns kill or, rather, people kill with guns. President Ford's claim is more interesting, because it rests on what appears to be a fundamental principle of punishment: Do not punish someone until he or she has done something wrong. Most prominent forms of preemptive action by the state look like they have just that structure: the restraint of some person's freedom before that person has done anything wrong. Although the Ford

2. I suspect that crimes *mala in se* (or "true crimes" as they are sometimes called) can also be understood in terms of a generalized version of the same strategy. I must leave defense of that claim to another occasion.

3. Or, as a cartoon shortly after a schoolyard massacre put it: "Guns don't kill people: children do."

puzzle received its classic statement in debates about gun control, it is far more general. The puzzle is: How can it be legitimate to limit the liberty of those who have done no wrong? The answer, in brief, is that it almost never is. The familiar forms of preemptive state action—everything from speed limits through gun control to some restrictions on freedom of expression—are better understood as having a different structure, one of protecting people from each other. Don't worry—I won't try to defend all such forms of preemptive action. My interest is philosophical and analytical so I will try to limit my use of examples to cases where prior restraint is easier to justify by the apparatus I offer. Those examples, I hope, will illustrate what is at stake in justifying restraint.

I. MY NEIGHBOR'S CAR ALARM

Why am I entitled to an injunction against my neighbor's car alarm, but not against his carelessness? Both have the potential to violate my rights: The alarm violates my right to quiet enjoyment of my property, and the carelessness violates the security of my person. Why should I have to put up with rights violations, or even their possibility? Two familiar ways of distinguishing the cases come to mind. The first of these says that carelessness happens in the midst of other activities, whereas keeping a noisy alarm is something that can be prevented once and for all. Thus, courts are in a position to supervise one but not the other. The second way says that the harm done by the car alarm is irreparable, so that damages are not a suitable remedy. Each of these ways of drawing the line is on to something. But both are incomplete, because each picks up on inessential features of certain familiar examples. Think of driving at one hundred miles per hour. It too is something that is done in the midst of doing something else, namely driving, getting to the beach, or whatever else. But, putting to one side for a moment the question of whether it should be forbidden, it certainly is something that *can* be forbidden. And it is not always harmful (though neither is my neighbor's car alarm: a thunderstorm may keep me awake anyway, or an illness keep me asleep). Although the harm done by a car alarm may be hard to quantify and repair, a lot turns on the details. If I need to sleep with my windows closed, my air-conditioning bill goes up, and perhaps the sleepless nights in turn render me unfit for employment. Many other enjoinable nuisances create harms that are readily measurable. Replace the noise of the alarm with a pungent smell, my house may become uninhabitable. Conversely, money damages may do comparatively little to repair my injury from falling roof shingles.

An injunction against my neighbor's car alarm protects me from a minor nuisance. Let me now tell you about another (imagined) neighbor. This neighbor likes shooting at tin cans, and lines them up on our common fence. (The actual neighbor has nothing to do with guns. Even the murder-

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ers in the mystery novels he writes seldom use them.) He is a *very* good shot, let us suppose, so that it is not likely a stray bullet would hit anyone in my yard. Nonetheless, I do not want to risk it. I should not have to choose between running the risk of injury or staying out of my yard. Nor should I have to work out a schedule with my neighbor. I should be able to just sit and enjoy my yard, even though that will limit his ability to enjoy his.

In this example, the neighbor's activity is potentially dangerous. I am not entitled to an injunction just because of the objective magnitude of its danger, though. There are two further elements that go into figuring out if an injunction is merited. The first of these is a factor in setting standards of care in negligence as well as in determining which activities to forbid. I will first explain its role in the law of negligence, and then go on to look at its role in justifying injunctive relief. It is the significance of the potential injurer's liberty interest. Driving, for example, is fairly dangerous no matter how carefully it is done, just because of the sheer momentum involved. And it is quite dangerous when it is done at standard urban, let alone highway, speeds. We suppose the risks it poses to be acceptable because of the importance we attach to the liberty interests in mobility.

II. LIBERTY AND SECURITY

In deciding how careful a person must be, both the liberty interests of potential injurers and the security interests of those who might be injured must be taken into account. Virtually all activities carry some risk of injury to others. What is needed is some fair way of dividing that risk between those who risk injury, and those whose activities might injure others. Putting all the risk on injurers would burden liberty too much, for it would require that people act at their peril. Putting all of the risk on potential victims would leave each person's security wholly hostage to the choices of others. Instead, some balance between the two must be struck. (I should say that this distinction between liberty and security is, in an important sense, merely heuristic. Physical injury and property damage both injure a person's liberty, by preventing the person from pursuing ends in ways that the individual otherwise would. Liberty is always on both sides of the balance. Talk about security is just a way to highlight the different ways in which liberty can burdened.)

I have argued elsewhere that the common law's use of the reasonable person tests is an attractive way of striking the appropriate balance between liberty and security. The reasonable person is neither the typical person nor the rational person who adopts the best means in pursuit of his or her ends.[4] Instead, the reasonable person is the one who exercises appropriate restraint in light of the interests of others. The basic strategy is to use the

4. I defend this approach in detail in EQUALITY, RESPONSIBILITY, AND THE LAW (1999). My interpretation of reasonableness follows John Rawls, POLITICAL LIBERALISM 54 (1993).

reasonable person as a construct to strike a balance between different interests. To do so we need to decide how much weight to attach to which interests. Decisions about such matters invariably import substantive judgments about what is important to a person's ability to lead a self-directing life. Such matters will occasionally be controversial, though most such interests—freedom of action and association on the one hand, and bodily security and security of possession on the other—will not. Still, the point of the reasonable person standard is to balance such interests in a way that is fair to all concerned. Rather than aggregating them across actual persons, so that one person's loss is made up for by another's gain, we construct a representative reasonable person, who has interests in both liberty and security. A standard of reasonable care protects people equally from each other, allowing each equal liberty to pursue his or her ends, and equal security against the unwanted effects of others pursuing their ends.

The reasonable person standard enjoys a certain sort of objectivity, insofar as it protects people from each other. That objectivity means that its content may disappoint some. Those who would prefer to let their roof shingles fall where they may, and happily risk the shingles of others, may be disappointed to have their behavior declared unreasonable. But it is not up to them to set the terms of their interactions with others unilaterally. They might try to set up contractual arrangements with like-minded people whereby risks are divided differently. But without something like a reasonableness test to determine where which risks already lie, there is nothing for them to contract around.

The same standard of reasonableness underlies the remedy of compensatory damages. Those who fail to behave reasonably take unacceptable risks with the safety of others. Having taken those risks, they must bear their costs: The risks to others are treated as the risk-imposer's problem. If they fail to materialize, so be it. No harm is done, no loss needs to be made up, and no further sanction is required. To return to an earlier example, my neighbor who is careless with his roof shingles may just be lucky. They may fall harmlessly to the ground, or even sit safely on his roof, despite his lack of care. If they injure someone, though, the injury is his to deal with. So he must pay damages. The reasonable person standard thus provides a standard of conduct that sets limits on how people should behave toward each other. It also provides a rationale for the standard remedy for failure to take reasonable care, namely compensatory damages.

The attractiveness of the reasonable person standard raises a new question: Why would we want anything more? As we have seen, there are clearly occasions on which a person would want more, indeed is entitled to more than compensatory damages if injured. My neighbor who shoots at cans on the fence provides one such example. Why not just let him shoot and pay damages if he misses? One reason is that his activity is just too dangerous. Another is that his liberty interest in shooting at cans just is not very important. Put in terms of the reasonable person standard, the liberty

interest is clearly outweighed by my security interest. This answer is incomplete, though, because in other cases the unreasonableness of his behavior is supposed to explain why he needs to pay damages if he injures me. It does not yet get to the issue of whether his conduct should be prohibited altogether. Other examples make this point still more vivid. Most jurisdictions impose strict liability for certain dangerous activities, such as blasting, or keeping wild animals. No amount of care is sufficient to avoid liability for the injuries that are risked by those activities. Why allow them at all? Why forbid other activities?

Injunctions prohibit injurious behavior. By contrast, negligence law only takes an interest in a defendant's conduct if injury results. The fact that I am clumsy does not matter, provided I am lucky enough never to injure anyone else. The same point applies to strict liability torts, where no showing of fault is required. If I use explosives without injuring anyone, the law takes no interest in my behavior. Nonetheless, I cannot escape responsibility for any injuries I do cause by showing that I was careful. Injunctions monitor conduct much more closely. If some activity is sufficiently troublesome or dangerous to merit an injunction, a blanket prohibition replaces a standard of care. My neighbor can be required to repair his car alarm even if I am a sound sleeper. My other neighbor can be required to desist from shooting, even though so far he has not so much as scratched my fence. Some activities cannot be carried out safely. Thus, my neighbor is not enjoined from shooting carelessly, but from shooting in the direction of my yard. In this way, injunctions are more demanding than the duties imposed by negligence law, as they apply in the absence of harm and despite various attempts at caution. As a result, the burden of justification for an injunction is much higher. For the same reason, injunctions draw bright lines, so that the boundaries of forbidden conduct are unambiguous.

III. LIBERTY, SECURITY, AND AUTONOMY

This brings me to the third factor that needs to be taken account of in justifying an injunction. As well as the potential injurer's liberty interest, and the potential victim's security interest, we need also to look at the potential victim's liberty interests. I have a legitimate interest in coming and going as I please. I also have an interest in my own safety, an interest that is not exhausted by my interest in receiving damages if I am injured. My interest in safety matters because I want to be able to live my own life without interruption. Even if compensatory damages could wholly repair my physical injury—something that they do at best imperfectly—being injured and being compensated leaves me with the burden of dealing with my injury and the loss of time, which is lost for good. I might be interrupted from a low-paying but fulfilling job. Replacing my lost earnings is a start, but

I would clearly prefer the package <no injury, earn my salary> to <injury, receive the equivalent of my salary plus extra money for my trouble>.

The problem is not, as Robert Nozick once bruited, that my fear of injury justifies an injunction.[5] It is that I have a security interest in avoiding unreasonable injury, which underwrites a liberty interest in not needing to take precautions against the danger posed by my neighbor's target practice. That liberty interest tips the balance in favor of an injunction. We can call this hybrid interest, in making sure my liberty is not absorbed by looking out for my security, an interest in autonomy. I have an interest in certain decisions—what I do in my backyard is a familiar example—being up to me and nobody else. This is not an idiosyncratic interest that I happen to have, but one that, described in suitably abstract terms, all persons can be expected to have, the right to refuse to interact with others on terms that might seem attractive to a third party. In the same way, my other neighbor's interest in protecting his car from thieves is not sufficient to require me to protect my sleep from his disturbances.

The connection between autonomy and the inadequacy of compensatory damages is familiar from other contexts. Consider the point of laws proscribing theft. Most material things are readily replaceable. If one person takes another's property, the standard private law remedy is damages for conversion. But damages for conversion are not adequate in a certain range of cases, even if they fully make up the loss. Those are the cases in which one person knowingly takes another's property without the latter's consent. Damages for conversion are inadequate in such a case; if they were the sole response, the law would become the means through which those who wish to acquire another's property can force a sale at the market price. Suppose you have a vase I admire. You like it too, and aren't willing to part with it, for reasons of your own. If I can help myself to it, and simply pay you the market rate—perhaps I pay right away, to keep administrative and transaction costs down—then you have lost one of the important aspects of your rights of ownership, namely the right to decide for yourself what to do with your goods.[6] So some further remedy is required, in order to protect your right.

Note the parallel with injunctions, which also serve to ensure that certain things are up to the person the injunction protects, rather than leaving his or her liberty subject to the choices of others. If my neighbor can shoot at cans on our common fence, and simply pay me for any injuries he causes, I lose the ability to determine what goes on in my yard. Although it would be unduly mysterious to say that my neighbor would have stolen part of my

5. Robert Nozick, ANARCHY, STATE, AND UTOPIA 81 (1974).

6. A macabre example may make this point vivid. I recall an episode of the TV program *Law and Order* in which someone arranged to steal another person's kidney for transplant to his daughter. The transplant recipient tried to convince the district attorney to drop charges against the perpetrators on the grounds that a huge trust fund had been set up for the person from whom the kidney was taken. But neither the sum of money nor the fact that the victim was left with one kidney justifies such behavior.

yard in such circumstances, the underlying idea is not much different. If I care for my safety, over and above caring about gaining compensation if I am injured, his choices end up dictating what I can do. The role of my right to refuse plays a central part in traditional common law and equitable discussions of injunctive relief. An injunction vindicates the autonomy of a property owner by upholding his right to refuse to accept the defendant's injuries, even if full compensation is offered.[7] Injunctive relief does not create a veto; it recognizes one.

Still, I do not mean to suggest that injunctions are appropriately modelled on actions for trespass. The notion that they are is attractively (and deceptively) simple: If you enter my property without permission, you must leave at once, clean up any mess that you have made, and perhaps also pay me nominal damages. Why not think of injunctions as simply enforcing my rights against trespass? After all, people are always prohibited from crossing other people's boundaries.

The trespass model has two problems that are significant here.[8] The first one concerns identifying the relevant boundary. Many sounds wander from one person's property to another. Not all of these amount to abatable nuisances. Nor are they all in principle abatable, but tolerated by the person whose property is "invaded." Property owners have a right to quiet enjoyment, not a right to hermetic seals. Something like a test of unacceptable and irreparable harm, measured in terms of the liberty and security interests of representative persons, is needed to determine whether or not an "invasion" matters enough to enjoin it. Second, trespass fails to capture the appropriate remedy for violations of an injunction. Intuitively, the person who knowingly crosses another's boundaries ought to receive a response different from the person who is deposited across that boundary by a tornado. The latter person at most needs to leave. (Even that requirement is unclear in cases of emergency, whether or not the boundary crossing is intentional.) Cases like these suggest that the "prohibition" on the conduct in question is different and is enforced in different ways. If the only remedy in case of trespass is actual damages, trespass provides no model at all for injunctions. If we add nominal damages, we get no further, as we lose track of what is distinctive about the wrong of violating an injunction. Although repeated trespasses can be enjoined, an action for trespass is not itself an injunction.

The sense in which injunctions protect autonomy is highlighted by the fact that an injunction can be waived, or sold for a fee. If I am willing to

7. *See, e.g.,* Krehl v. Burrell (1878), 7 Ch. D. 551 at 554, *per* Jessel M.R.: "It would never have meant to invest the Court of Chancery with a new statutory power . . . to compel people to sell their property without their consent at a valuation." Quoted in Sharpe, INJUNCTIONS AND SPECIFIC PERFORMANCE 10 (1983).

8. A third problem is doctrinal: Any invasion counts as a trespass, whereas only an injurious invasion counts as a nuisance. For an example of confusion on this point, *see* Epstein, *Corrective Justice and its Utilitarian Constraints,* 8 J. LEGAL STUD. 49 (1979).

put up with a nuisance or even a danger in return for some consideration from my neighbor, we are free to make such arrangements as we wish. But my neighbor cannot require me to put up with either, simply by foisting payment on me. It is up to me to decide whether I am willing to put up with it.

IV. Interlude: Some Other Models of Injunctive Relief

I realize that injunctions have been understood in other ways. In particular, some American courts deciding nuisance cases have explicitly considered the overall social utility of the nuisance in deciding whether to award an injunction to the plaintiff. The *Restatement (Second) of Torts* goes so far as to maintain that a court must consider whether "the gravity of the harm outweighs the utility of the actor's conduct" (s. 826.1). I do not mean to claim that a public purpose can never justify the imposition of costs on a private citizen; the point is, rather, that one private citizen cannot unilaterally impose a cost on another, even if third parties benefit as a result. Reducing auto theft is a laudable social purpose, but there is a limit to the cost that I can be asked to bear. My neighbor may sleep easier knowing that his alarm will sound if anyone so much as brushes against his car. But my sleep matters too. Any increase in security resulting from a steady stream of false alarms—if he gains any—is not something he is entitled to if it comes at my expense.

The example of my neighbor's car alarm involves a nuisance, the benefits of which are dubious. What if my neighbor has a factory, which makes an important and uncontroversial contribution to the economy of our community? (Perhaps he makes car alarms, and the disturbing noise comes from testing them.) I want to argue that, even in such circumstances, I am entitled to an injunction. The reason is the same: The court has no business choosing between us based on our overall contribution to social wealth. No doubt there are public purposes for which the state can exercise its power of eminent domain. What the state cannot do, though, is license a private power of eminent domain by allowing my neighbor to evict me. Nor can my neighbor enlist its support to press me into service in pursuit of broader social goals.

Again, injunctions have sometimes been interpreted as a court-imposed default point so as to encourage parties to negotiate.[9] The claim is that in cases in which interests are difficult to price for purposes of assessing damages, an injunction encourages people to reach agreements that reflect each party's assessment of the acceptable costs of the activity. If the person against whom the injunction is awarded is unwilling to pay enough to convince the other person to let the activity continue, then it will stop,

9. Coase's discussion of how parties can bargain around whatever rights are given is seminal. *See* Coase, *The Problem of Social Cost,* 1 J. L. & ECON. 1—44 (1960).

because it cannot pay its own way. But if it can pay its own way, so the argument goes, it should be allowed. So understood, injunctions are simply a pricing mechanism. As a pricing mechanism, they are supposed to ensure that resources go to their most efficient use.

Still, the fact that the parties *could* bargain does not show that the point of injunctions is to encourage bargaining. An injunction will often encourage the creator of a nuisance to negotiate permission from his or her neighbors, and a court may well be aware of this in awarding one. If an injunction is granted, though, the party complaining of the nuisance is able to decide unilaterally the terms on which to put up with it. This may lead to negotiations, or it may lead to an end to the nuisance. The crucial point is that an injunction gives the plaintiff power to refuse any offer unilaterally. This power to refuse rather than bargain is familiar in a variety of contexts. I do not want to negotiate with my neighbor over the car alarm—I just want to sleep. Again, a restraining order is an injunction to prevent one person from harassing another, whether by stalking them or picketing outside their home. Whatever the exact circumstances in which restraining orders should be awarded, it is clear that their purpose is *not* to encourage people to find a mutually agreeable price at which harrassment might continue.

Another analogy with theft may help here. One consequence of the law of theft is that some people seek to negotiate before using property belonging to others. (I would like to think most would negotiate anyway!) But the point of the law of theft is to protect autonomy, so as to allow people to decide against selling their property, even when it is in their economic interest to do so. To suppose that injunctions are incentives to negotiate is like supposing that laws against theft are supposed to encourage parties to conclude sales more quickly. It gets the picture exactly backwards. Although people can negotiate to mutually agreeable outcomes once rights have been assigned (and however they may have been assigned), the basis for assigning them is to ensure that parties interact on fair terms. Protecting your right in this way may well have beneficial consequences—you may be a better judge than a court is of the price, if there is one, at which you would be willing to part with the property it protects.[10] But the point of protecting your right is not that things are likely to work out well in the long run if we so protect it. Instead, the point is that it is up to you to use your goods as

10. This point is sometimes put in the vocabulary of Pareto-improvement: Consensual sales are guaranteed to make both parties better off by their own lights, whereas forced sales have no such guarantee. But Pareto-improvement is only of normative interest if we have some independent account of why choice matters in this way. Autonomy interests of the sort I describe provide a compelling account of why choice matters. Epistemological arguments about the impossibility of interpersonal comparisons of well-being are often thought to provide an alternative account, but they can only hope to explain the importance of choice by rendering damages utterly unintelligible. (If only I know what something is worth to me, how can a court assess the magnitude of a loss I suffer? If only I know, words won't help me to express it, and no particular amount of money is any better than any other amount.)

you see fit, including using them in ways that do not conduce to your happiness.

By the same token, although it is true that consent is a defense to many criminal charges, the criminal law does not prohibit acts because of the difficulties in calculating damages for nonconsensual trespasses and assaults. As a matter of fact, those who commit such crimes are subject to punishment and expected to pay damages calculated in the ordinary way. The problem is not that the damages cannot be calculated—it is that the criminal has violated the victim's rights.

But I am getting ahead of myself. There is also a reason, internal to private law, that injunctions are not simply incentives to bargaining. Granting an injunction gives the plaintiff additional bargaining power. As a court-enforced remedy, it raises the stakes in bargaining. Courts may be uneasy about allowing their processes to be so used. As a nineteenth-century case puts it, a plaintiff cannot use an injunction to "make the defendant subject to any extortionate demand that he may by possibility make."[11] More generally, private law protects rights. It does not assign them in the hope that social benefits will follow.

V. DO INJUNCTIONS COMPROMISE FREEDOM?

Of course, there may be some particular persons who would prefer a system in which they shoot at cans on their fences and risk bullets from the shots of their neighbors. Like those who would prefer to put up with falling roof shingles and be able to carefully fix their roofs in return, these people may be disappointed by the standards to which the law holds them. The analysis so far provides no grounds for objecting to their setting up private arrangements that they favor, provided they can find like-minded neighbors. What they cannot do, though, is impose such arrangements on others. The only way we can make sense of a right to quiet enjoyment of property is in terms of some idea of reciprocity. Just as my freedom of movement with my fist stops somewhere short of your nose, so my right to do as I will more generally is limited by your interests, and your right to do as you will is limited by mine. Against this background, private negotiations are usually possible. But we have nothing to negotiate with unless we have some precontractual rights. Those rights need to be equal, protecting the same kinds of interests against the same kinds of invasions. Their analysis must take place in abstraction from the extent to which you or I care about those interests, just as they must abstract from the ease or difficulty with which

11. Isenberg v. East India House Estate Co. Ltd. (1863) 46 E.R. 637 *per* Westbury L.C. In the less colorful language of the *Restatement of Torts* 2d, an injunction will not be granted if it will "make the court a party to extortion" *Rst. 2d (Tort)* s. 941. In the still less colorful language of economic analysis, we might say that injunctions create transaction costs and provide opportunities for strategic behavior.

each of us can look out for particular interests of others. Your right to security does not give way to my clumsiness, and my right to security does not give way to your passion for target practice.

Still, injunctions do prevent people from doing things they otherwise might. As such, some might find them objectionable in principle. Robert Nozick, for example, suggests that if you prohibit someone from doing something, that person is entitled to compensation. My neighbor with the car alarm shares this view. When I first asked him whether his alarm required adjustment, he huffily suggested that if I didn't like it I should get an injunction to force him to get rid of it. He then went on, somewhat gleefully, to tell me that if I did, I would have to pay the increased insurance premium on his sports car. Nozick puts the point in terms of prohibiting someone from doing something that he or she subjectively values in a way that does not allow for easy substitution.[12]

Both Nozick and my neighbor have misunderstood the basis of injunctions. They use the language of liberty and rights but are ready to allow one person to set the terms of his interactions with others unilaterally. The fact that someone enjoys doing dangerous things does not entitle him to a subsidy from others who would prohibit them out of fear for their own safety. Indeed, the fact that someone can make no substitution from the point of view of his own satisfaction does not matter either. The adverse effects of a prohibition on somebody's welfare is also not sufficient to mandate compensation. This reflects a deeper point, implicit in the earlier discussion of the reasonable person standard. A system of ordered liberty does not, indeed cannot, take a direct interest in whether or not people get to do what they want, whatever that might be. Instead, it takes an interest in protecting particular freedoms. I do not have a right to the abatement of a nuisance because I happen to dislike it. For that matter, I have no such right even if I have an idiosyncratic need.[13] If I had a right to have my unusual sensitivity protected, I would thereby be able to dictate unilaterally my neighbor's use of his property.[14]

Conversely, my neighbor does not have a right to compensation just because he would prefer to continue with his nuisance. If I have a right to be free of a certain kind of nuisance or peril, that right is sufficient to require my neighbor to comply. No further consideration or compensation is required. If I have no such right, my neighbor need not accommodate me, and I cannot force him to accommodate me by paying him damages. If I have no right, I can offer him money to stop. But I must pay him what he demands, not just what it will take to cover his losses.

On the view I am exploring, then, the only proper grounds for exacting compensation from one person to give to another are violations of rights.

12. Nozick, *supra* note 5, at 82.

13. Whatever my fellow citizens as a whole must do to meet my special needs (a good deal, in my view) my neighbor cannot be selected to bear their full costs.

14. Rodgers v. Elliot, 15 N.E. 768 (Mass. 1888).

Skating over some important details, violations of rights are injuries to a person's freedom, where freedom is understood broadly to include security of the embodiments of that freedom, including such things as health and property.[15] But the freedom of the person who is subject to an injunction is not compromised. In the one-on-one case that is our current focus, an injunction is only granted if the plaintiff is right about the law. If the injunction is granted, the defendant is only being informed of the plaintiff's rights. He is not being prevented from doing anything that he had a right to do. Indeed, the granting of the injunction entails that others are prohibited from imposing like costs on him. He therefore has no grounds for complaint about any violations of his rights, however disappointed he might be from the point of view of his welfare. One person is only entitled to compensation from others if he has a right to do something. Where he has no right, because of the costs to others, he cannot claim compensation.[16]

Put slightly differently, not every limitation on freedom is objectionable, because freedom does not get its importance from the satisfaction that people gain from doing as they wish. Conversely, security does not get its importance from the satisfaction people gain from others being restrained, or the dissatisfaction some suffer from seeing people doing things of which they disapprove. Instead, particular freedoms matter, as do particular interests in security.

This focus on protecting people equally from each other explains the traditional doctrine that in an action for abatement of a nuisance, the plaintiff's having "come to the nuisance" is no defense.[17] Accounts that allow such defenses take the status quo as a baseline, departures from which require compensation. Thus the fact that someone was polluting, or shooting toward his neighbor's yard, is treated as acceptable, so that the costs of any change from that situation need to be compensated. In *Spurr Industries v. Del Webb,*[18] for example, the court enjoined the operation of a feedlot near a recently constructed housing development, but required the developer to pay the costs of the feedlot owner in moving his operation. The rationale offered was that the developer would otherwise have received a windfall at the feedlot operator's expense, as the price of the land was reduced by the feedlot's presence.

15. This is a claim about necessary conditions for requiring compensation from one person to another. It does not exclude the possibility of broad-based redistribution to secure the conditions of freedom for all. But it does exclude case-by-case redistribution from the happy to the less happy.

16. In talking about rights here, I do not mean to take any stand on whether the right to be free of a certain sort of hazard or nuisance is a "natural" right or the result of legislative decision. The present point is that in determining what is to be prohibited and who is entitled to compensation, a court needs to appeal to a public standard that outruns the particular desires of the parties before it.

17. Salmond, TORTS 228–31 (10th ed., 1945).

18. 494 P.2d 700 (Ariz. 1972).

Putting aside the potentially circular nature of this argument—whether or not the price of the land would be depressed would depend on the law of nuisance in effect, and so cannot be the basis for setting the law one way rather than another—it ignores the rights of property owners to a level of quiet enjoyment of their land.[19] However exactly we set this level, the fact that someone was able in the past to engage in activities that would have interfered with such enjoyment is a windfall to that person, even though it is not a cost to anyone else. Losing the opportunity to generate *further* windfalls is not grounds for compensation.[20] Nor is it a windfall to those who subsequently enforce their rights. Forgoing a benefit in the past does not preclude claiming it in the future.[21] In the same way, the fact that my neighbor was once able to shoot at cans on the fence does not mean that he is wronged when he is required to desist. His good fortune in being able to do something that he had no right to do is no concern of mine—he is entitled to keep any benefits he might have gained. Conversely, the fact that stopping is a burden for him is also no concern of mine.[22]

Injunctive relief is thus importantly different from the sort of self-help that I might resort to by disabling my neighbor's car alarm. It is preferable on two grounds. First, it is preferable on Lockean grounds, because private enforcement of rights is, as Locke says, chief among the inconveniences of the state of nature. Private enforcement is a threat to the security of all. Second, and to my mind more important, it is preferable on Kantian grounds, because the public declaration of rights is a precondition of freedom. An injunction clarifies the rights that are at issue. As a result, it enables people to recognize, and so to respect, the rights of others. In so doing, it specifies the terms of equal freedom.

19. The law of nuisance typically imposes a local usage rule. Having built homes in an agricultural area, it is not clear that Del Webb was entitled to an injunction.

20. For discussion of this point, *see* Jethro K. Lieberman, *The Relativity of Injury* 7 PHIL. & PUB. AFF. 68 (1977). Lieberman argues that it is impossible to define property in a way that includes the right to do everything that people have been accustomed to doing without state interference.

21. Except in cases where an estoppel operates. Estoppel operates narrowly, so that it usually does not bind successors. More on this another time.

22. Why does the order of arrival matter in the law of property, in the form of the doctrine of first possession, but not in nuisance? The brief answer is that first possession is the way in which an object enters into the stream of property rights. What the rights of ownership are is a separate matter, set by the equal freedom of the property owners. That is, prior possession can limit the holdings of latecomers. But it cannot define their rights over such property as they own. The difficulty is that the effects of the use of land are essentially without limit. If the first occupant of a piece of land thereby gained rights over the full area in which his occupancy had effects (so that, for example, a feedlot owner became owner of all of the air to which his operation spread its odors) those who were first in time would be able to unilaterally dictate the ways in which others could use their property. The solution is a regime of reciprocal freedom, which cannot be explicated purely in causal terms. For a more general statement of this point, *see* Stephen R. Perry, *Libertarianism, Entitlement, and Responsibility,* 26 PHIL. & PUB. AFF. 351–96 (Fall 1997).

VI. REMEDIES AND META-REMEDIES

What sort of response is appropriate if someone violates an injunction? As we have seen, compensatory damages certainly are not sufficient. Injunctions get their entire point from that insufficiency. Of course, if the violation of the injunction leads to injury of the sort the injunction sought to prevent, compensatory damages are necessary. But they are not sufficient in that case, and they are not necessary in cases where no harm ensues. Yet something is required in order to vindicate the right that the injunction is supposed to protect, and thus in some sense to vindicate the injunction itself.

The standard response to the violation of an injunction is a penalty for contempt of court.[23] This is as it should be, for the wrong involved is a wrong against the rule of law, in addition to any wrong against the particular person who has been harmed. Put somewhat differently, those who violate injunctions do not simply wrong those the injunctions are supposed to protect. They also wrong the category of right, because they act in the face of a court's declaration of the rights at issue. They thus do the thing that is distinctive about criminal acts, namely substitute the private rationality of pursuit of one's own ends for respect for the public reasonableness of fair terms of interaction. As such a substitution, violating an injunction is also a public challenge to the court's authority. Simply to award damages to be paid in such circumstances would deprive the injunction of meaning. As a result, some further penalty is required, over and above whatever damages are appropriate.

The person who violates an injunction not only attacks the rule of law but also injures the plaintiff. It is important to distinguish this sort of affront to the rule of law from other ways in which intentional wrongdoing is sometimes said to amount to an attack on "society." Lawrence Becker has sought to explain the criminal law's requirement of *mens rea* in terms of the danger that intentional wrongdoing poses to social order more generally.[24] From a somewhat different perspective, Antony Duff and Sandra Marshall have argued that certain sorts of intentional wrongdoing attack the values of a community.[25] My claim is different: Intentional or knowing violation of an injunction is an attack on the court's ability to give justice, in addition to whatever harm it may do to the interests the injunction is supposed to protect. As a result, penalties for contempt of court are required in addition to whatever remedy is awarded to the plaintiff.[26]

23. I leave aside for now the distinctions among criminal contempt, civil contempt, and coercive contempt.

24. Lawrence Becker, *Criminal Attempt and the Theory of the Law of Crimes,* 3 PHIL. & PUB. AFF. 262–94 (1974).

25. Antony Duff & Sandra Marshall, *Criminalization and Sharing Wrongs,* 11 CAN. J. LAW & JURISPRUDENCE 7–22 (1998).

26. Robert Nozick once argued that the state can have no rights that would not be possessed by individuals in the state of nature. *See* Nozick, *supra* note 5, at 102. A court's power of contempt is just such a power, as is its more general right to punish wrongdoing.

When the penalty for contempt of court takes the form of a fine, it is payable to the state rather than to the plaintiff for whose benefit the injunction was granted. The state or, strictly speaking, the court, has an essential role, as it is charged with impartially upholding the rights of the parties involved. Those who violate injunctions challenge the authority of the court; they also challenge the authority of impartiality, the claim of law to settle disputes by identifying rights. Because the violation of an injunction brings the state into the picture, it is appropriate that the burden of proving contempt of court should be higher than the balance of probabilities in an ordinary civil action. The question does not concern which of two parties should bear a loss, but one party's stance toward the court's authority. A finding of contempt is thus coercive in a way different from an award of damages. If a defendant fails to pay damages, his or her assets might be seized and sold on the plaintiff's behalf. In such a case, the use of force is addressed to the wrongdoer's *failure,* rather than his refusal; the use of force in enforcing a damage award ensures that the court's will is ultimately done. The use of force in holding a defendant in contempt of court is a response to the *refusal* to do the court's bidding.

A court's powers of contempt underscore the state's claim to a monopoly on the legitimate use of force. That monopoly is justified by its role in *upholding* rights. It is not justified by its role in *enforcing* rights (though it is also charged with doing that). The difference is subtle but important. It is tempting to think of an injunction as a sort of threat, an outside enforcer raising the stakes in a dispute that essentially concerns only the parties. A better way of looking at injunctions focuses on the way in which they serve to clarify and specify the rights of the parties. In specifying the right, the injunction also guides behavior. Those who violate injunctions are subject to punishment because of their behavior toward the law as it has been declared. No doubt the possibility of punishment is often perceived as a threat of punishment. As a result, injunctions often guide behavior in a way that sincere beliefs about the rights of others might not. Still, the appropriate quantum of punishment is not set by considerations of optimal deterrence, but by the seriousness of the wrong done. Deterrence is in this sense a welcome effect of injunctions, but not the purpose that gives them their point.

A court may use its powers of contempt in other ways as well—for example, by holding someone until he or she testifies. In such cases, the defendant is said to "hold the key to his own jail." The ability of contempt powers to encourage obedience is not irrelevant to the decision to use them in response to violations of injunctions more generally. My reasons for focusing on the backward-looking role of findings of contempt will become clearer below. For now, the crucial point is that a finding of contempt is a response to a defendant's violation of a right a court has identified in advance. To fail to address such a violation is to render the

court's identification of the right irrelevant from the point of view of guiding action. That is why a penalty for contempt remains appropriate even if the defendant abates the nuisance during the proceedings.[27] Contempt orders are not simply credible threats.[28]

VII. ANONYMOUS INJUNCTIONS

The examples we have looked at so far all involve one person imposing a nuisance, or a risk, on another. In these cases, neighbor creates problems for neighbor. There are other cases in which an activity passes the test for an injunction that I have outlined, but the danger is not posed to one particular person, but to some class of persons. I'm not thinking of the cases in which the danger is to the public—the dumping of toxic wastes, say—but those in which lots of particular people impose risks on lots of other particular people. Such risks are imposed all the time, and the law of negligence deals with most of them, by deciding which are acceptable and which excessive, and ensuring that the costs of excessive risk creation are brought home to those who create them. But there are other cases in which the risk is greater, to the point where any particular person would be entitled to an injunction against those who impose them.

Think, for example, of dangerous driving. Put to one side, for now, the question of exactly what sort of driving counts as dangerous enough. Driving down a residential street at 100 miles per hour will do as an example. I am entitled to an injunction to prevent you from doing that because it meets our three-element analysis: The liberty interest in driving that fast is not very important. The security interest in not being run down is very important. The risk of injury is high. And the liberty interest of those who might be injured in not needing to constantly look over their shoulders is also high. This liberty interest translates into a security interest as well: People have an important interest in being able to come and go as they please, safe in the assumption that others will not pose certain kinds of hazards. It is better to not need to worry about whether or not someone will

27. I am aware that courts sometimes vacate contempt decrees in response to compliance. *See, e.g.*, New Jersey Zinc Co. v. Local 890 of International Union of Mine, Mill and Smelter Workers 261 P.2d 648 (N.M. 1953). The court in *Local 890* left open the possibility of criminal contempt proceedings, however. It is also worth noticing that the court appears to have understood its powers of contempt in purely instrumental terms, as one reason it gave for waiving those powers in the instant case was that its dignity would remain intact if it chose to forgive a particular response to them. But the point of powers of contempt does not depend on their ability to deter disrespect any more than they depend on the ability to exact compliance in a particular case. Instead, their basis is in the need to address a denial of the court's authority to announce the law.

28. If a finding of contempt was merely a way of putting pressure on a recalcitrant defendant, a civil standard of proof on the burden of probabilities would be appropriate, as the plaintiff's interest in receiving payment or abating the nuisance would count for just as much as the defendant's interest in being free of sanctions.

suddenly come up from behind at twice one's own speed.[29] Gaining an injunction in such circumstances might be difficult, however. Although the risks are recurring, it will typically be the case that which particular person imposes which risks on which other person will vary. As a result, a personal injunction will be difficult to enforce. And the sheer administrative cost in getting such injunctions against all likely injurers will be crushing.

In this sort of example, those who seek injunctions and those who are restrained by them are by and large symmetrically situated. In other cases, an injunction might be appropriate against a group of people for whom problems of identification go deeper. Think of fraud. Those who plan to defraud others, whether through sharp business practices or as veterinarians posing as physicians, make a point of *not* identifying themselves in advance. In many such cases, there is considerable potential for irreparable harm. Moreover, the burdens of a rule of *caveat emptor* against fraud fall entirely on those who wish to protect themselves. As a result, it is reasonable to seek an injunction against those committing fraud. Once again, though, the administrative cost of obtaining injunctions against those who hope to keep their identities secret is crushing.

One-on-one injunctions are normatively appropriate in these kinds of cases. No court would refuse to grant one. Getting one in each particular case is not easy, though. To get an injunction, one must identify the defendant in advance and show that the peril is imminent. Where one neighbor keeps another awake, those criteria are easy to satisfy, at least in principle. Where the source of the peril is unknown, there is seldom time for a court appearance before one is injured.

Fortunately, there is another solution: a public anticipatory injunction. A public anticipatory injunction is enforceable against everyone, and does not require identifying the person against whom the injunction is granted in advance. They are, of course, more familiar by another name: criminal statutes. I offer the following general claim, which I will qualify somewhat in what follows: Public anticipatory injunctions are justified to prevent risks against which a private injunction would be appropriately granted if sought. Rather than requiring each person to get an injunction against every other person, everyone is granted an injunction against everyone else.[30]

29. Some might suppose that this issue only comes up if roads are not privatized, leaving each property owner free to make whatever rules he or she wished to regarding safety on that property. But even that solution presupposes some prior account of who bears which risks, as people can only enter into such private arrangements regarding acceptable behavior provided they are entitled to surrender those interests that are the terms of the arrangements. The entire structure that leads to my account of injunctions is necessarily presupposed by any sort of ordering by contract.

30. I do not mean to suggest that all criminal law readily fits the injunction model. The model works best for acts that are prohibited because of their danger to others. These are typically cases in which the harm to be prevented is the result of someone trying to accomplish something else. Other acts, such as murder and assault, are appropriately prohibited because they involve the intentional infliction of injury, rather than its infliction. The prohibition of such acts does not require the same sort of balancing of a person's interests in liberty and

Modern states create criminal law via statute. Such codification has many virtues. Prominent among these is the democratic legitimacy of legislatures. Codification also provides notice, and removes at least part of the element of judicial discretion inherent in the granting of one-on-one injunctions. Statutes provide a systematic way of making contempt sanctions proportional to the seriousness of the wrong done.[31] They also provide constitutional protections: A statute can be violated and then have its legality challenged, whereas a defendant must challenge an injunction in court before violating it.[32] Still, it is worth recalling that a common law of crime developed for centuries. Just as those who seek private injunctions are only entitled to them if they are right about the rights that are at stake, so too those who seek the protection of public injunctions are only entitled to them if they can be justified in terms of the rights of interacting persons. The fact that states sometimes criminalize behavior without any good reason should not blind us to the fact that there are good reasons for criminalization. Those reasons are often captured by the idea of a public anticipatory injunction.

Think of traffic laws in this light: Driving over a certain speed in a residential neighborhood imposes unacceptable risks on others. The risks are unacceptable because of the relative unimportance of the liberty interest that is at stake, the potential of serious harm to others, and the burden on their liberty of staying out of harm's way. Rather than requiring each of those whose safety is threatened to get separate injunctions against all who threaten it, a general law, applicable to all, prohibits the activity in question. The same analysis applies straightforwardly to rules requiring headlights for night driving, and to licensing requirements. Whether or not it applies to other familiar traffic offenses, such as driving while impaired, depends on the actual danger created.[33] To protect security without excessively burdening liberty, the descriptions of potentially dangerous activities must be chosen carefully. The fact that they are sometimes chosen carelessly should not blind us to the fact that they can be chosen wisely.

On this analysis, traffic laws are not simply the codification of common law standards of negligence. Instead, they are the codification of injunctions. This difference is important: If they were simply codifications of standards of negligence, no preemptive prohibition would be appropriate. Instead, it would be appropriate to wait for an accident to happen, and leave the costs of cleaning up the accident with the person responsible for it. Codification of negligence law would provide an explicit statement of the

security, because there is no important liberty interest at stake in engaging in acts of aggression. As a result, the structure I have outlined for the justification of an injunction is trivially satisfied.

31. Linking the extent of contempt sanctions to the seriousness of the wrong done is a special case of the criminal law's more general concern with proportionality.

32. Conversely, a court can only grant an injunction against those who have had their day in court. *See* Alemite Mfg. Corporation v. Staff, 42 F.2d 832 (2d Cir 1930) (Hand J).

33. *See* Douglas Husak, *Is Drunk Driving a Serious Offense?* 23 PHIL. & PUB. AFF. 52–74 (Winter 1994) and *Reasonable Risk Creation and Overinclusive Legislation* BUFF. CRIM. L. REV. (1998).

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standard of care, but it would provide no basis for penalizing those who were careless but harmless.[34] By codifying injunctions, by contrast, traffic laws afford a greater level of protection to security. Ideally, they do so without compromising important liberty interests. They also allow people to come and go with more confidence about the driving behavior of others.

But if traffic laws do not codify common law standards of negligence, they *supply* such standards. A driver who causes an accident by violating a traffic law is liable for damages under the doctrine of negligence per se. Negligence per se has the same structure as the rest of negligence law: The injurer is only liable for injuries caused by his or her negligence if the injury is within the risk against which the statute in question was supposed to protect. Although liability appears to be strict if a statute has been breached, that is because, if liberty and security interests have been weighed properly in justifying the statute, the factors sufficient to show negligence will already have been established by the breach of the statute. Put in the language of injunctions, liability in damages lies only if the injury was to the interests for the protection of which the injunction was granted. If no injury results, no tort of negligence has been completed. But a fine or other penalty is appropriate, because the dangerous driver has violated an injunction, and so showed himself or herself to be in contempt of the law.[35]

VIII. THE FORD PUZZLE

I now want to return to the Ford puzzle. The Ford puzzle, recall, is about punishing people who have not done anything wrong. As President Ford said, *criminals* should be punished, not honest gun owners. Honest gun owners, after all, do not commit crimes. Punishing them would be wrong, because it would be punishing the innocent. Punishing the innocent is always wrong, but it is especially wrong to punish the innocent for the deeds of the guilty. And that, according to President Ford, is just what gun control does. Rather than registering guns, Ford suggested, we should reserve punishment for criminals.

At the risk of overinterpreting a political speech, I want to draw your attention to several features of Ford's position. I am not certain that he

34. There are those who suppose that negligence law should penalize on the basis of carelessness rather than injury. *See, e.g.,* Christopher Schroeder, *Corrective Justice, Liability for Risks, and Tort Law,* 38 U.C.L.A. L. REV. 143 (1990). I criticize Schroeder's view in detail in a piece jointly authored with Benjamin Zipursky, *Corrective Justice in an Age of Mass Torts, in* PHILOSOPHY AND TORT LAW (Gerald Postema ed., forthcoming 1999). Schroeder's proposal is concerned with accident costs and does not consider the role of injunctive prohibitions.

35. We can see why a "lesser evils" defense would be appropriate for those laws, such as traffic laws, that are *mala prohibita* rather than *mala in se.* There is no contempt for the rule of law in overriding traffic laws in a genuine emergency. Indeed, the weighing of evils—though only in emergencies—can be thought of either as a fine-tuning of the injunction, or as implicit in it all along. The same analysis does not apply to crimes *mala in se,* such as killing one person to save several others.

holds all of these views, or that he would even recognize some of the distinctions I am about to draw. First, Ford does not deny that gun control would reduce violent crime. He claims that it is illegitimate even if it does. Indeed, the point of his argument is that we do not need to resolve that question. Instead, we can know from first principles that gun control is wrong. Second, Ford's argument rests on some version of retributivism. It may be that he means to support what some have called "negative retributivism," the view that guilt is a necessary, but not sufficient, condition for punishment. On the negative retributivist view, it is legitimate to punish people for forward-looking purposes, but the punishment can only be inflicted on those who have done wrong. Hence, Ford's readiness to be hard on crime, but unwillingness to punish honest gun owners.

So presented, Ford's position has much to recommend it. I think that it can be made to look even stronger by framing it in terms of a more general retributivism, according to which the *only* legitimate use of punishment is backward-looking. This more robust retributivist position rests on the idea that the state may never use someone for broader social purposes. The use of force must be reserved for righting wrongs. On this reading, then, Ford's argument is that gun control offends against justice in two ways: It involves using people for broader social purposes, and it involves punishing the innocent. It uses people inasmuch as it limits their freedom for ends they may not share. It punishes them because it singles them out to bear a burden, despite the fact that they have done nothing wrong.

Now consider a different way of thinking about gun control. Think of it not as a punishment for the innocent, but rather as an analogue of both traffic laws and private injunctions. It is analogous to private injunctions because it prevents people from doing things on the grounds of the comparative unimportance of the liberty interest at stake, in relation to the security interests and liberty interests of those who might be injured by guns. It is analogous to traffic laws inasmuch as it restricts people in general from doing things they otherwise might. To get these analogies to work, of course, I need to say more about the precise nature of the liberty and security interests involved. I will say less than might be required to satisfy some, but my interest here is in the structure of the argument rather in the details of gun control. Change the details enough, and perhaps gun control is not legitimate. That is just to say that Ford's is not the only possible argument against gun control. Indeed, change the details enough and perhaps traffic laws are not legitimate, but if they are not legitimate, it is not for the Fordist reasons examined here. Still, I'll digress briefly to make the structure clear.

The liberty and security interests that are at stake are easy enough to identify. Guns are dangerous, and widespread ownership of them increases the likelihood of their fatal discharge. As I said, much depends on details. In particular, the importance of the liberty interest in gun ownership depends in large measure on the dangers that gun ownership might prevent.

Perhaps if illegal gun ownership were sufficiently widespread, and police services sufficiently unreliable, private gun ownership would be necessary for people to protect security. Short of that, though, the salient facts are the danger to life and limb posed by the possibilities of accidental discharge, theft, and guns at hand during moments of anger. In addition, there are liberty interests of those who might be injured: The fewer guns in circulation, the fewer precautions are required. As I change lanes in traffic, I should not have to worry about whether fellow drivers are armed and subject to road rage. Handguns in particular are easy to conceal. As a result, it is difficult to take precautions against them.

These matters are controversial, and I cannot claim to have resolved the controversy. The controversy has an ineliminable factual component, and factual matters are notoriously difficult to resolve to the satisfaction of all. Still, the factual assumptions I have made are plausible, and the same analytical approach applies in other cases—for example, if the question is whether or not to restrict ownership of hand grenades. The liberty and security interests differ in magnitude but not in kind, and so are sufficient to make my abstract point. The point of the gun control example, in both its familiar and more extreme versions, is to illustrate the structure within which particular interests in liberty and security can be taken into account without reducing either to a utilitarian calculus of overall consequences.

Still, this approach might be thought to face an insurmountable hurdle in the case of gun control. The apparent stumbling block to balancing liberty and security interests in this manner is that so many of the dangers posed by guns arise when they fall into the hands of people other than their owners. Indeed, this might be thought to be Ford's point: Wait for the crime, and punish the criminal. But matters are somewhat more complicated. There is a limit to the extent to which you can avoid responsibility for the act of another in cases in which you provided an opportunity to do evil, which you knew that this person (or someone similar) was likely to take. In a negligence action in which more than one person is responsible, the sum of the responsibility must add up to the total of the damages payable. No such constraint applies in cases of breach of an injunction. More than one person can be responsible for some outcome. Those who leave dangerous things within the reach of small children are responsible for the results. Other cases, involving fully responsible agents, have the same structure. The guard who falls asleep at his post is responsible for the break-in, even though the burglar is also, indeed primarily, responsible. But the burglar's responsibility does not show the guard did nothing wrong in providing the opportunity. In this example, the guard has an affirmative duty to guard. But that is just the point. If guns are dangerous enough to others because of the dangers posed by third parties, then it is legitimate to impose restriction on their use, including either a ban on private ownership or an affirmative duty to guard them. The role of intermediaries in much gun-related violence underscores this point: If my owning some article puts you

in danger because of the possible actions of an intermediary who neither of us is in a position to control, the danger to you may justify imposing controls on me, requiring me to exercise control indirectly. I am not entitled to provide opportunities for others to do wrong and then evade responsibility for the wrongs by pointing to those others. Again, I do not mean to suggest that my inability to control those who seize the opportunities I provide deprives them of responsibility. They are responsible for what they do. But their responsibility is not incompatible with mine.

Admittedly, no proposed gun-control legislation has the structure I have just defended. The restrictions on gun ownership that are defensible in principle might only prohibit using guns dangerously, and storing them where they can be stolen or grabbed quickly in moments of anger. This might be thought to show that Ford is right after all. Gun-control regulations are often said to be too broad, as they punish even the most conscientious gun owners who might come up with novel and inventive ways of reducing the dangers of gun ownership. A law prohibiting gun ownership punishes them, despite the fact that they have not even posed any risk. Perhaps this is Ford's real concern. Perhaps more nuanced, even byzantine, regulations covering such cases in all of their detail might be preferable in some respects. Only "dangerous" gun ownership would be prohibited.

The difficulty with a more fine-grained approach to a general anticipatory injunction is that it would burden liberty more than a more broadly crafted law would. The danger lies in the degree of discretion a narrowly tailored law would give to law enforcement officials. If officials are allowed to decide what counts as dangerous by weighing the equities in a particular case, they would be able to enforce selectively. Imagine letting police officers decide when carrying a concealed weapon was and was not dangerous, or when driving at 100 (or 40) miles an hour was and was not dangerous. These questions may have answers; the point is that we may be uneasy about the extent to which law enforcement officials have discretion in answering them. This is not to say that any such law should not recognize clearly demarcated exceptions for safe ownership and storage. What it should not do is allow issues of safety to be decided on a case-by-case basis.

Suppose, then, that I have shown that given certain factual assumptions, gun control is defensible on grounds of the safety of third parties. What becomes of Ford's objection? Ford identifies restrictions of choice with punishment. That identification no longer stands up to serious scrutiny. The point is not just that banning something backed up by the threat of force is not the same as applying force, but that the threat of sanction is not as serious a limitation on freedom as the application of a sanction. Rather, it is that the purpose of the injunction is the same as the purpose of any injunction, namely the protection of reciprocal freedom. To say that banning concealed handguns coerces some people for the sake of others is like saying that traffic laws illicitly coerce some for the sake of others. Would Ford, or anyone else, really want to say that laws prohibiting speeding

"punish the wrong people"? Presumably not. Although the justification of the injunction, whether one-on-one or general-anticipatory, is forward-looking, the justification of punishing those who violate an injunction is that they have declared their contempt for the law by knowingly pursuing their private ends in the face of fair terms of interaction.[36]

Think of this point in terms of one-on-one injunctions. If I have a right to an injunction against your storing a weapon in a way that puts me at risk—whether I am your housemate, your neighbor, or the stranger who will be shot if your handgun is stolen—then you are liable for contempt of court if you continue to store your weapon that way. No court will hear you say that you did nothing wrong, as the injunction was predicated on a wrong being identified. In exactly the same way, if the injunction has been granted in advance so that all might be subject to mutual restraint, the person who violates it cannot complain of having done nothing wrong. On the contrary, he or she has knowingly participated in an activity that exposes others to an unacceptable risk that cannot be adequately compensated.

The Ford puzzle makes two mistakes. The first is to suppose that any prohibition is a form of punishment. The second, more subtle, mistake is to suppose that all wrongdoing must take the form of either intending or causing harm. By looking at injunctions and the penalties for their violation, we see that willful disregard of an injunction is a familiar kind of wrongdoing that merits sanction. If gun-control laws can be justified on grounds of liberty and security, those who violate them are wrongdoers even if they neither intend nor cause harm.

The purpose of an injunction is, in the first instance, to guide behavior. The grounds for backing up an injunction with a sanction is not simply to ensure that behavior is so guided. It is rather to address the contempt for the rule of law that is inherent in any knowing violation of a law that has been declared authoritatively. The injunction is forward-looking, whereas the sanction is backward-looking. The same structure of forward-looking injunctions and backward-looking sanctions also informs the criminal law more generally. Assuming that an injunction is justified in some particular case, it is a mistake to say that the person who violates it has done nothing wrong. That gets things exactly backwards: Whether or not the person has done anything wrong depends on whether or not the injunction is justified. If it is, then a wrong has been done, namely the violation of an injunction. If my neighbor shoots at cans on our common fence after I gain an injunction forbidding it, he has no basis for claiming that he neither meant

36. I explain why a punitive response must take the form of hard treatment in chap. 5 of EQUALITY, RESPONSIBILITY, AND THE LAW (1998). The basic point is that contempt for the law involves rational pursuit of one's ends in the face of standards of reasonableness. As such, the only way it can be answered is by addressing itself to the putative rationality of the deed, making the wrong a failure from the point of view of rationality, as it is already a failure from the point of view of reasonableness.

wrong nor caused harm. Either the claim that the person has done nothing wrong is equivalent to the claim that the injunction is not justified, in which case it is not an independent argument against the injunction, or else it rests on a misunderstanding of the nature of injunctive relief as a kind of punishment. In neither case does it provide any argument against the injunction.

I want to close this discussion of the Ford puzzle with an observation. Ford's argument gets part of its edge from the idea that the introduction of restrictions where none had existed before is often perceived as an affront to "ancient liberties." Whether or not it is such an affront depends crucially on whether or not the restrictions are justified. That is, the ancient-liberties argument is a variant on the defense of "coming to the nuisance." Like the coming-to-the-nuisance defense, it has an air of plausibility if we think of the injunction as changing what was an acceptable status quo. But the fact that some people were able to impose unjustifiable risks in the past does not show that those risks are justified. It shows only that those who bore the attendant risks failed to enforce their rights.[37]

IX. PREVENTING AND GUIDING BEHAVIOR: SOME CONTRASTS

Familiar laws and regulations that enjoin behavior without waiting for actual harm to result should not be thought of as limiting liberty. The use of force when someone violates an injunction is backward-looking. I now want to say something about its forward-looking use. For example, self-defense is legitimate in order to repel an aggressor. The force used is not a punishment—the aggression may only be apparent, yet the force is justified. Moreover, the legitimate use of defensive force is proportional to the apparent danger, not the wrongfulness of the aggressive deed. If you point a gun at me menacingly, I am allowed to respond, even if you were only joking, or mistook me for a fellow actor in the play you were rehearsing. The use of defensive force is easy to justify, as it is legitimate in just those cases in which the defender believes on reasonable grounds that there is no other way to preserve life.

The ease with which self-defense can be justified should not mislead us into thinking that it is the paradigmatic cases of legitimate preemption. As I have suggested, injunctions are such a case. Although their justification depends on their ability to prevent harm, they are meant to *guide* action, and are only enforced when they fail to. By contrast, defensive force is meant to *prevent* action rather than to guide it. It involves the forward-looking use of force, and thus could not be more different from the use of an injunction.

37. Those who fail to enforce their rights to one-on-one injunctions may be subject to laches. No such argument plausibly applies here.

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This point can be made by considering the difficulties faced by a familiar view of freedom, according to which there is no important difference between saying "Stay away from him or else!" and locking someone up to make sure he stays away. That is, it might be objected that a credible threat is as much of a limit on freedom as is physical restraint. The excuse of duress seems to recognize this point: Those who commit crimes in response to threats are not responsible for their deeds. Does not the same point apply here? Is not the constant threat of force the worst nightmare of friends of liberty? H.L.A Hart once suggested that the key to understanding the rule of law is to recognize the difference between the rule of law and one person threatening another in order to induce some desired response, that a legal system is not a gunman writ large.[38] The gunman also gives his victim a choice—your money or your life. How do anticipatory injuctions differ?

No doubt the threat of sanctions often does induce behavior. We are frequently glad that it does, just as we are glad when the fear of paying damages leads people who are otherwise indifferent to the safety of others to exercise greater care. Nonetheless, neither punishment nor damages are systems of threats. To think of them merely as forms of social control is to miss the crucial fact that they can be obeyed voluntarily by those who respect the rights of others.

The core difference between a restraining order and locking someone up is that in the first instance, the restraining order is meant to guide behavior by identifying the rights that are at issue. In identifying those rights—whether it is the right of one person to the abatement of another's nuisance, or of someone to be free of the dangers inherent in some type of conduct—the court does not infringe freedom in any way. Or, at least, the only sense in which freedom is infringed, all justified laws limit freedom in the same way, for they preclude people from doing things that they otherwise might. It is unhelpful to view such limits as standing in need of a special justification, even if that justification is often very easy to supply. For a prohibition on murder or reckless driving limits freedom as a way of protecting people equally from each other.

Moreover, we can distinguish between precluding some action on grounds of respect for the freedom of others, and restricting liberty in the more general ways that detention does. Prohibitions on such things as shooting at cans on my fence, making loud noises, driving recklessly, storing weapons, or throwing bricks from tall buildings onto crowded streets preclude actions that unacceptably infringe the rights of others. Preventive detention, by contrast, does not simply preclude acts that injure or endanger others. It also precludes a wide variety of innocent acts. The person who is restrained because dangerous is forbidden from doing something in particular, but is free to do as he or she pleases in all other aspects of life. The person who is detained because dangerous, by contrast, is prevented

38. H.L.A. Hart, THE CONCEPT OF LAW 6 (1962).

from doing such innocent things as grocery shopping and walking the streets.[39] Thus the criminal law allows people to interact freely on grounds of mutual respect, rather than putting up physical barriers to ensure that they so interact. The criminal law is not a Hobbesian sovereign that preempts private preemption, not a matter of the state stepping in to disable my neighbor's car alarm. An injunction allows my neighbor to repair his alarm voluntarily, rather than having me use force to disable it. In the same way, the criminal law makes voluntary compliance possible, rather than simply forcing people to behave in a certain way.

Even the broadest of injunctions is, in this sense, narrowly tailored to protect a particular interest that is vulnerable in a particular way. General anticipatory injunctions are (as I have said) not always narrowly tailored. But in another sense they are narrowly tailored, for they limit liberty as little as is necessary in order to prevent a certain kind of harm. Preventive detention, by contrast, though typically aiming to prevent a particular class of harms, and perhaps justified sometimes by the prevention of those harms, prevents a far greater range of activities. Preventing sex offenders from spending time in schoolyards is more narrowly tailored than preventing them from living in a certain neighborhood. But both are mild compared to preventing someone from leaving prison.

But the difference goes even deeper. Anticipatory injunctions are not a peculiar sort of low-technology, second-best solution to problems of supervision. Various behavior-modification techniques have been suggested for offenders. Radio-controlled electronic anklets are supposed to prevent criminals from going particular places. In Anthony Burgess's dystopia *A Clockwork Orange,* offenders were conditioned to become physically ill whenever they were in danger of committing further crimes. Laws work differently, even if socialization sometimes leads to an intuitive revulsion at their violation. Laws serve to remind us of the rights of others. Their enforcement may remind honest citizens of their duties, and may even prod citizens who are less than honest. But their point is social cooperation, not social control.

By contrast, preventive detention limits the freedom of innocent people for the sake of the safety of others. There may be a level of dangerousness at which an offender should be permanently incarcerated for reasons of safety, but the case about the dangers posed must be overwhelming. Preventive detention deprives someone of freedom because of crimes he or she has not yet committed. (Past wrongful deeds would merit punitive detention; preventive detention is something more.) Like quarantine, preventive detention sacrifices liberty for the sake of the security of others. Like quarantine, it may be legitimate in extraordinary circumstances. It is only

39. Restraining orders provide an intermediate case. If I am prohibited from walking within 300 feet of your house, some of my other activities are also limited. Those limitations are typically small.

legitimate in cases in which there are clear grounds for thinking the offender dangerous because the offender is literally, and permanently, out of control. Mentally ill people who are incarcerated because they pose a danger to others fall into this category. So do sane psychopaths and sociopaths, at least on common understandings. If they really are totally indifferent to the rights of others, there may be grounds for incarcerating them permanently, not as punishment, but merely for protection. Like the aggressor against whom defensive force is warranted, the psychopath is for the moment beyond reach of the law's ability to guide action, either by persuasion or threat. In the case of the aggressor, force is justified only if there is no other way of avoiding the danger. Given the time frame, it may be necessary to act quickly, because there is a limit to the chances one must take in the face of apparent aggression.

In the case of the psychopath, there is time to investigate the dangers much more fully. So the burden of evidence is much greater. But at bottom, the only possible justification is the same: There is a limit to the chances one must take in the face of those who are beyond the law's reach.[40] As a purely forward-looking response to danger, it must be reserved for those who can be neither guided nor deterred by the law. It is thus as different as can be from the sort of preemptive action represented by injunctions, large or small. Injunctions guide action. In so doing they protect freedom.

40. Some have been tempted by a state-of-nature picture, according to which the right to defend oneself is prior to other rules of order. It turns out that the situation is just the reverse. The right to defend oneself is a right to respond to wrongdoing in cases in which legal protection is not available. Wrongs must be defined if the right to use defensive force is to have any content. The contours of that right are given by urgency and lack of alternatives, so one's licence to exercise the right reaches beyond actual wrongdoing to reasonably perceived wrongdoing. But it is a right to prevent wrongdoing, which widens in response to dangers where the risk of mistake is certain to fall somewhere.