ESSAYS

REMEDIES AND INCENTIVES IN PRIVATE AND PUBLIC LAW: A COMPARATIVE ESSAY*

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When civil and common lawyers observe one another's legal systems from a law-and-economics perspective, they quickly learn the value of focusing on the properties of legal rules that distinguish various systems. Thus, Steven Shavell's exploration of the economics of fee-shifting rules, William Bishop's investigation of the different rules governing breach of contract, and Mark Ramseyer's inquiry into Japanese and American water law, all support the conclusion that when competing legal rules survive in different countries it is quite likely that both rules may be fairly efficient.[1] Differences between civil and common law systems are thus interesting (from an economic perspective) because the differences draw attention to the positive and negative incentive effects, or other costs and benefits, of inherited rules. In this Essay, we emphasize such a comparative law-and-economics approach by drawing on seemingly unrelated areas of law, where civil and common law rules are generally (but not always) dissimilar, and by arguing that fundamental and universal incentive problems go a long way toward explaining both the similarities and the differences among the various rules. In particular, we choose one theme: the choice between damages and disgorgement—that is, the question of whether to control behavior with a rule requiring an antisocial party to pay over damages or with a rule calling for the restitution of unjust enrichment—and we show that this choice permeates the law of torts and contracts, the law governing unreasonable searches for evidence, and the law of governmental takings of private property. With this unifying theme, we try

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1. Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); Bishop, *The Choice of Remedy for Breach of Contract*, 14 J. LEGAL STUD. 299 (1985); Ramseyer, *Water Law in Imperial Japan: Public Goods, Private Claims, and Legal Convergence*, 18 J. LEGAL STUD. 51 (1989); *See also* Levmore, *Rethinking Comparative Law Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235 (1986).

both to provide the basis for positive theories of these areas of law and to demonstrate the value of comparing legal rules within an incentive-oriented framework.

I. DAMAGES VERSUS DISGORGEMENT IN TORT LAW[2]

A factory owner who should take a precaution costing 100 in order to avoid causing 101 of damage to other parties may be induced by the threat of tort damages to take the precaution, because a net savings is available. If a restitution, or disgorgement, remedy is to offer a similar incentive, then the law could call for the disgorgement of unjust enrichment (of 100 in this case) *plus* some small amount in order to ensure that the potential wrongdoer is not indifferent between behaving well and behaving antisocially. Why, then, do we use tort damages rather than disgorgement to control tortious behavior? It is probably *not* because of any savings in administrative costs, for the costs of running a restitution system are likely to be comparable to those of a tort system. Where tort liability is negligence-based, for example, it is necessary to decide whether expected costs of accidents require that certain precautions be taken; but this threshold determination, whether easy or difficult, is needed as much in restitution as in tort, because the restitution remedy is triggered by a finding that the defendant's enrichment was unjust. The critical remaining comparison, therefore, is between measuring damages—the task in torts—and measuring the costs of untaken precautions—the means of restitution.[3] Both can be difficult to assess. In medical malpractice cases, for example, damages are notoriously difficult to quantify, but it would also be difficult to answer the question of how much a physician gained by allowing a particular injury to occur.

The choice between tort and restitution remedies is, instead, best understood through deterrence considerations.[4] Imagine that *T*'s failure

2. The analysis in Part I of this Essay is drawn from Levmore, *Probabilistic Recovery, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. ___ (forthcoming 1990).

In this Essay we often use the terms disgorgement and restitution interchangeably. The traditional connotation of restitution is that *A* returns to *B* that which *A* unjustly received as a result of *B*'s efforts or misfortune. And inasmuch as some of the circumstances discussed in this Essay concern situations where *B* has not caused *A*'s enrichment, some commentators and readers will prefer the label of disgorgement. *See* DeLong, *The Efficiency of a Disgorgement as a Remedy for Breach of Contract*, 22 IND. L. REV. 737, 743 n.19 (1989); Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1342 (1985); Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 (1985).

3. When liability is strict, the comparison is somewhat different, but it leads to a conclusion much like the one reached in the text's discussion of restitution and fault-based liability.

4. A restitution-based tort system must also be sensitve to moral hazard and other incentive problems. Thus, when *T*'s failure to take a $50 precaution causes $8 in harm to each of 10 people, it is apparent that each victim can not be allowed to recover *T*'s full gain of $50 both because there will be overdeterrence and because of the moral hazard that it will

to take a precaution which costs fifty leads to one of three outcomes: a 50% chance that each of ten people will suffer harm of ten; a 25% chance that each of five people will suffer harm of four; and a 25% chance that no injuries will occur at all. A simple restitution rule, which allows plaintiffs to collect an antisocial defendant's savings from not taking needed precautions, will obviously underdeter T because some persons will be injured with only a 75% probability. Plaintiffs will materialize with a probability of less than one—and then they will collect nothing more than the wrongdoer, T's, enrichment. If T's maximum liability is fifty—the amount of T's unjust enrichment—then T will prefer an expected restitution liability of 37.50 (a 0.75 chance of paying fifty) to spending fifty on the actual precaution—even though the precaution would save fifty-five in expected injuries.

Put differently, legal rules must control the behavior of wrongdoers who sometimes create risks but not victims. Tort law deters such behavior by requiring wrongdoers to pay full damages—which often greatly exceed the cost of precaution taking—when injuries do occur and victims come forward. Restitution law, however, extracts only the wrongdoer's enrichment from not taking a precaution when there is a victim, and thus underdeters wrongdoers who, essentially, can count on disgorging only when there are victims, but on pocketing money otherwise.

The disgorgement remedy could be salvaged by requiring wrongdoers to pay a multiple of their present undeserved gains in order to make up, in deterrence terms, for those occasions where no one knew of, or had standing to complain about, their wrongful behavior and unjust enrichment. But these "multipliers" would need to be industry- or even actor-specific in order both to achieve the right level of deterrence and to avoid serious moral hazards. Thus, the hypothetical wrongdoer described in the previous paragraph requires us to multiply plaintiffs' claims by 1.33, to make up for the 25% chance that no victims (plaintiffs) will be forthcoming, in order to collect the full amount of unjust enrichment and, in turn, not to leave T with an incentive to behave negligently. But a similar defendant whose negligence was 50% likely to cause 110 in harm and 50% likely to cause no harm must face a multiplier of two, or he will profit from his wrongdoing. The need to calculate these multipliers is itself a good reason to prefer tort over restitution.

Multipliers will also create moral hazards. If, for instance, T's negligence in not spending fifty is 50% likely to cause eighty in harm,

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be quite profitable to be a victim under such a rule. The problem might be solved by letting each plaintiff recover only one-tenth of the whole enrichment, although it may be necessary to give an extra reward to the first plaintiff who identifies the unjustly enriched defendant.

25% likely to cause sixty in harm, and 25% likely to cause no harm, the required multiplier of 1.33 will, once again, either make it profitable to be a victim (because 1.33 times fifty is more than sixty) or require the expenditure of administrative costs in order to tax away part of the recovery (perhaps to finance compensation for other plaintiffs injured at some future point by the very same defendant or to fund plaintiffs whose own damages exceed the unjust enrichment of their defendants).[5] In sum, a restitution system *could* be substituted for the tort system but, in order to reproduce the deterrent qualities of the tort system and to guard against moral hazards, a variety of corrective devices would be necessary. That a restitution system could only take the place of the tort system either by sacrificing a good deal of efficient deterrence or by incurring heavy administrative costs should not distract us from the fact that restitution might be useful in other areas of law, where multipliers would be unnecessary or where the damage remedy itself has disadvantages. And, as a comparative matter, we might expect to find (as we do) that no legal system relies on the restitution remedy to control tortious behavior, but that disgorgement is used in other areas of law where the relative advantages of the two remedial tools are different.

II. The Coexistence of Damages and Disgorgement as Remedies for Breach of Contract

Under American law (which favors money damages rather than specific performance in the event of a breach of contract) *S*, who promises a widget to *B1* for a price of 100, and then sells it to *B2*, who appears and is willing to spend 120, had better take into account that she will owe *B1* damages. The rule is quite consistent with the notion of "efficient breach" because *S* is encouraged to breach when *B2* will pay more but not less than what *B1* agreed to pay. The real question, of course, is whether it would not be better still to use a specific performance rule, so that *S* is forced to deliver to *B1*—but then *B2* can find *B1* and purchase the widget at a price profitable to *B1*.

It is common in the United States for law-and-economics scholars to say that damages are preferable because *B2* can transact with *S* (who

5. Similarly, under a more radical version of the multiplier strategy, the first victim to come forward (or any private attorney general) might be awarded damages equal to the wrongdoer's total enrichment attributable to the negligently imposed risks on similarly situated parties. But this scheme generates an obvious moral hazard, takes us away from the restitutionary ideal that the defendant's gain was tied to the plaintiff's loss, and introduces large multipliers of the sort that the common and civil law have largely avoided. Perhaps most importantly, it introduces the serious hazard that an insider (employee of defendant) will collude with a potential victim under a scheme in which the employee behaves negligently and the "victim" rushes forward to collect a large amount of money.

often advertises as a seller of widgets) more easily than *B2* can locate and negotiate with *B1*. Professor Bishop has also compared what happens if *S* owes *B1* some damages and sells to *B2* with the situation where there is a specific performance rule in place and *S* contacts *B1*, acknowledges the backdrop of the performance rule, but negotiates out of the first contract.[6] In this situation, *S* and *B2* must agree on a price *and S* and *B1* need to agree on a settlement which, in turn, will reflect *both B1*'s damages (which *S* must learn about) and *S*'s profit on the resale to *B2* (which *B1* will have reason to learn about). In contrast, under the damages rule, *S* and *B2* must again agree on a price, but now *B1* has no need to learn about *S*'s profit on the sale to *B2*. In short, specific performance involves the cost of extra information and extra negotiation. Putting the latter cost differently, *B1* and *S*, in a classic bilateral monopoly, may sometimes miss a bargain, whereas under the damage rule no bargain is needed between *B1* and *S*, for *S* simply deals with *B2* and then worries about liability to *B1*.[7]

We might modify Bishop's superb analysis with the point, in defense of specific performance, that there is the alternative of *S*'s performing, followed by a sale from *B1* to *B2*. The cost of this alternative is the extra transaction, or telephone call if you will (because it is generally easy for *B2* to find *S* but not *B1*), but there is no need to compute *B1*'s damages.

In sum, one might rationalize the American rule by saying that damages are preferred because with specific performance there is either an extra transaction or both extra information and negotiation costs. It is also noteworthy that with specific performance, contract prices will be a little lower than with damages, but it is hard to see why buyers should care; they either pay less and get some damages, or they pay more and get extra profit (above and beyond damages) from *B2*.

An unambitious way to explain the use of damages for breach of contract is to note that specific performance is in the restitution family, because it is the tool that forces *S* to disgorge some of the gains enjoyed by breaching with *B1* and dealing with *B2*, and to reason that a legal system is likely to be doctrinally consistent. If one rule is to be used consistently in both tort and contract law, it is easy to see that it would be the rule of damages, because while either damages or restitution could be the tool to control inefficient breaches of contract, the damage rule appears significantly superior in tort.

As a comparative matter, however, it is plain that there are many

6. *See* Bishop, *supra* note 1; DeLong, *supra* note 2; Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

7. Note that there will not be too many surprises with regard to *B1*'s damages because of the rule which provides that in contract law damages are normally limited to foreseeable damages. That rule, of course, helps breachers allocate their mitigation efforts.

legal systems which use specific performance, or a relative of restitution, in contract, and yet these systems employ the rule of damages rather than restitution in tort. It is therefore sensible to recognize the link between restitution and specific performance, but to think of the debate between damages and specific performance as reflecting a real difference in judgment as to which rule is prefcrable in contract law. If one were inclined to accept the analysis above, which points to the transaction costs superiority of the damages rule, then the availability of specific performance in many civil law systems might be understood as reflecting the observation that the superiority of the damages rule is at best a very close call, because specific performance surely economizes on court costs. It calls for some supervision, but a damage rule requires a real determination of money damages.[8] Indeed, in comparative terms, the most striking thing about this area of law is that in many legal systems the disappointed promisee can often *choose* between remedies[9]—and this seems quite sensible because such a promisee, like *B1*, often knows best the costs of ascertaining her own damages.[10]

If the discussion up to this point seems to imply that chaos reigns, and that theory is useless to lawyers, then it is especially useful to introduce another theme: the presence or absence of a kind of *symmetry* in legal rules. Consider a case in which *S* contracts to sell goods to *B*, *S* delivers, and *B* fails to pay at the time specified in the original agreement. Can *S* repossess the goods? As far as American law is concerned, there are two doctrinal paths to the conclusion that *S* can *not* do so.

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8. Note that the use of specific performance in United States law for such unique goods as land is easily explicable because it is especially easy for *B2* to find *B1*, by searching local land records or local realtors.

E. Allan Farnsworth notes that in planned economies without well-developed markets for substitute goods, the preference is for specific performance, apparently on valuation grounds. Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247 (1979).

9. G. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT 47-51 (1988).

10. The choice between damages and specific performance is even subtler, or closer, than implied in the text. It is arguable, after all, that the fact that *B2* pays more to *S* than *B1* agreed to pay for a good or service does not prove that it is worth more to *B2*, because *B1* may simply be a superior bargainer. *B1* may not have revealed her true preferences to *S*, despite the fact that revelation would now lead to greater damages because of the foreseeability rule, because *S* would then have held out for a higher price. And the foreseeability rule would not be satisfied by *B1* informing *S* of her high potential damages only after the contract is made (because *S* then loses the chance to charge an "insurance" premium).

In response to this argument about the ability of the damage rule to support efficient breaches, it might be said that at least *on average* there *is* reason to think that *B2* values the item more than does *B1* because *B1* may in fact have been the worse bargainer. Without further information, there is no reason to think that one is systematically a poorer bargainer than the other. *B1* can always go to *B2* and start all over again—or, when hearing from *S* about the pending breachs, she can induce *S* to breach with *B2* and "resell" to *B1*.

First, such retrieval would interfere with the relatively careful rules regarding security interests in personal property, under article 9 of the Uniform Commercial Code, because other creditors have no means of learning about the contract between *S* and *B*. There is a filing system and a serious order of priorities among creditors, and *S* is neither recorded in that system nor otherwise especially deserving. Second, and more plainly, section 2-702(2) of the Uniform Commercial Code gives *S* rights if *S* discovers that *B* received the goods (on credit) while insolvent, and *S* demands the goods back on these grounds within ten days of the delivery to *B*. (*S* does better if *B* has specifically lied about his solvency to this seller within three months before the delivery.) Since no other section of the commercial code seems relevant, the implication is that *S* otherwise has no repossession right, and *S* is left to sue for damages.

A more thematic (and perilous) way to reach the same result is to reason that this is an area of law where symmetry will be found, because whatever reason a legal system has for preferring damages over specific performance when *S* breaches probably carries over to the case where *B* breaches. Forcing *B* to return the goods, or allowing *S* to repossess, is, after all, the closest thing to specific performance. And allowing *S* to repossess would certainly amount to a restitution rule, because *B* will be unjustly enriched by keeping the goods. The symmetry argument is thus another way of saying that the preference for damages over restitution might continue unless there are affirmative reasons to prefer restitution. This is not to say that such symmetry or consistency is required as a matter of efficiency theory. The original argument, after all, was that sellers are more easily located by third parties (likc *B2* above) than are buyers—and this point argues in favor of damages when *S* breaches (to sell to *B2*)—but this says nothing about the case where *B* breaches.[11] But because it would appear that *B2* can indeed find *B1* quite readily once the goods are already in *B1*'s possession, the argument for continuing the logic of the damages regime, so that there are symmetrical rules, is quite strong. And as a comparative matter, the remarkable thing is that in Japan, for instance, where *B1* has a choice of remedies when *S* breaches in *B2*'s favor, it is the case that when *B1* breaches, *S* can choose to retrieve.[12] There is, in short, a kind of sym-

11. Where breach occurs because of a drop in value of the item in question, it is likely that the seller is in a better position to resell. But in a case where *B* has simply no longer a need for the item or, most generally, where *B* has run out of funds, so that the damages rule will run into *B*'s insolvency and the seller very much cares whether a specific performance or a damages rule is in place, *S*'s comparative advantage is less relevant.

12. MINPŌ art. 545 (Japan). In France, rescission is also an option. *See* F. LAWSON, A. ANTON, & L. BROWN, AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 197-99

metry, or commitment in favor of or against the restitution remedy, in these areas of law.

III. WRONGFULLY OBTAINED EVIDENCE

In the United States, as elsewhere, the most commonly imposed remedy for a wrongful police search or seizure is exclusion of the illegally seized evidence from the suspect's criminal trial. This remedy can be seen in terms of the restitution, or disgorgement, concept, since it does not force the police officer or the government to pay for the harm caused by the illegal conduct, but instead requires the government to give up its gains—the evidence that was obtained because of the police misconduct. As with contract law and quite *un*like tort law, the advantages of the disgorgement rule in this context are primarily administrative.

There are two such administrative or practical advantages of exclusion, or disgorgement, rather than damages: ease of valuation and procedural convenience. And each of these advantages is imposing. The harm caused by a typical illegal search is largely nonmonetary. Property damage aside, the injury consists of the victim's humiliation and loss of privacy, and the more diffuse harm to society's sense of security. Harms such as these cannot be priced by the legal system with any accuracy. Yet, accurate pricing is essential to a well-functioning damages system. The actors (police officers) receive no tangible reward for the marginal *legal* search or arrest, and are usually free to avoid acting altogether—that is, to avoid performing the search or making the arrest—without suffering substantial sanctions. Under these circumstances, if damages are imposed for illegal action (and if, as is probably the case in all legal systems, the standards that determine what is legal are somewhat vague), there is the serious danger that society will not only get fewer illegal searches and seizures, but will also get many fewer *legal* ones.[13] This activity-level effect is exacerbated if the relevant damages are overestimated—and the risk of such overestimates is likely to be high, given that the harms in question are both socially sensitive and irreducibly subjective.

Disgorgement—that is, exclusion of illegally obtained evidence—largely avoids this measurement problem. No valuation is necessary in order to exclude evidence; the only determination required is

(1963). *See generally* Cooper, *The Reclamation Rights of Unpaid and Unsecured Sellers in International Trade*, 1987 COLUM. BUS. L. REV. 17. (reporting limited rights of reclamation, with no unifying theory but making no attempt to link the right of reclamation to the remedy available when the seller breaches).

13. *See* P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 59-81 (1983); Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 29-33 (1978).

whether the police misconduct *caused* the discovery of the evidence in question. Any difficulties encountered in determining causation are unlikely to be different from those confronted in a regime based on the remedy of damages, where it will be difficult to decide whether to count such harms as the discovery of a crime (through an illegal search). In short, problems of causation are unlikely to influence the choice between the remedies of disgorgement and damages in this area.

The second major advantage of a disgorgement, or exclusionary, rule is its potential to economize on court costs. The remedy of damages requires lawsuits as the means of enforcement, and the costs associated with litigation are well known. In contrast, exclusionary rules do not generate additional work for the court system, because these rules come into play in criminal cases that the state would wish to prosecute regardless of the existence of the exclusionary rule itself. The administration of an exclusionary rule requires only a brief hearing within the framework of an existing criminal case; the damage remedy requires a full-blown civil suit.

It would therefore appear that, as a theoretical matter, exclusionary rules are superior to damage rules in enforcing restraints on police investigation of crime. And this theoretical conclusion seems to translate into a successful positive theory because it is consistent with the law of several countries. A number of countries have some form of an exclusionary rule,[14] and in at least one country—the United States—it is the primary tool for enforcing search and seizure law.[15] In contrast, we know of no legal system that uses damages as the primary deterrent mechanism in this area. The real choice is not between disgorgement (exclusion of evidence) and damages, but between exclusion and political (or cultural or other nonlegal) constraints, a distinction we return to below.

The advantages of the exclusionary rule, both in terms of valuation costs and administrative efficiency, arise out of the fact that the rule involves the suppression of evidence and not the measurement of a gain or loss. This distinction points to the major limitation of the rule: it works only when the motivation for the relevant police conduct was the gathering of evidence. If a police officer wishes to search a suspect's house or car not to find evidence, but purely to inflict harm on the suspect (perhaps out of spite or bias), the threat of exclusion will not

14. *See, e.g.*, sources cited *infra* note 27.

15. Thus, for example, the American exclusionary rule applies to *all* violations by police officers of search and seizure or interrogation law, not merely to violations that a court finds, after the fact, to have been egregious. *See, e.g.*, Arizona v. Hicks, 480 U.S. 321 (1987) (applying the exclusionary rule in a case where a police officer, lawfully in the defendant's apartment, turned over the defendant's stereo to copy down the serial number, on the ground that the officer should have gotten a warrant for the stereo "search"). For a general discussion of the role the exclusionary rule plays in American criminal procedure, see Stuntz, *The American Exclusionary Rule and Defendants' Changing Rights*, 1989 CRIM. L. REV. 117.

deter the officer. Some other enforcement device will be necessary to deal with such searches undertaken in bad faith. Thus, under American law, damage remedies *are* available when a police officer behaves with something akin to gross negligence or when both the governing law and the violation are clear.[16] In these cases, the nature of the officer's behavior (plus the fact that all American police officers will be familiar with the exclusionary rule) suggests that exclusion was not an effective deterrent, perhaps because the gains to the officer from the illegal conduct were not primarily evidentiary in nature.

This emphasis on the motivation of those who obtain evidence may also serve to explain a difference between American and German law. In the Federal Republic of Germany, evidence can be suppressed even if it is illegally seized by *private* parties.[17] In American law, only police illegality triggers the exclusion sanction.[18] The difference may reflect different judgments about the hard behavioral, or empirical, question of why private trespassers wrongfully obtain evidence that is later used in court. If the motivation of the wrongful private "searcher" is to find evidence for subsequent use in court against the victim of the search (as, for example, where an ex-husband breaks into an ex-wife's house and rummages through her financial records in order to turn incriminating information over to the tax authorities), then exclusion works in the same fashion as it does for police in the United States. It accurately disgorges from the wrongdoer (it takes away the pleasure of revenge in seeing the ex-spouse in trouble with the tax authorities) without a complicated valuation decision, and it is administratively easy because it can be implemented in the subsequent criminal (or civil tax) prosecution. On the other hand, if the private, wrongful searcher has other, more self-serving (or perhaps less spiteful) goals, the suppression of the evidence that is obtained will accomplish neither disgorgement nor deterrence.

Remarkably, the leading German cases appear (at least to the eyes of outsiders) to fit the first of these fact patterns, with private parties trying, usually for personal reasons, to injure other private parties in some civil or criminal proceeding.[19] In one case, for example, an estranged husband hired a spy who monitored the wife's movements and

16. *See* Anderson v. Creighton, 483 U.S. 635 (1987).

17. This is true both in civil cases, NJW 1848 (W. Ger. Fed. (Sup.) Ct. 1970), and in criminal cases, 34 BVerfG 238, 246-47 (1973). These cases are discussed in Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch* (pt. 2), 52 TEX. L. REV. 621, 622-24 (1974).

18. United States v. Jacobsen, 466 U.S. 109 (1984).

19. *See* sources cited *supra* note 17. In one of the cases, the court explicitly stated that exclusion of the evidence was necessary because otherwise there would be some incentive for the private trespass—something that would be true only if the trespass were motivated by evidentiary concerns. *See* NJW 1849 (W. Ger. Fed. (Sup.) Ct. 1970) discussed in Baade, *supra* note 17, at 623.

conversations in her home, all for the purpose of gathering evidence to be used in the couple's divorce proceeding.[20] The best-known American cases, on the other hand, fit the second pattern. The leading American case involved an employee of a private parcel delivery company, who opened a damaged package, found illegal drugs, and then turned the package over to the police.[21] There is clearly no personal spite involved in the invasion of privacy, or trespass, in this case, because the owner of the package and the delivery person were strangers. Consequently, there is no reason to suspect that the searcher had any particular interest in seeing to the arrest of the owner. Rather, the searcher was quite plainly motivated by other concerns—chiefly protecting the company against claims for damage to the package's contents. Where the motives for search are of this sort, exclusion will likely be an inadequate deterrent because it does nothing about the non-evidentiary reasons for the trespass or illegal search. More generally, the differences between the American and German rules may have something to do with the facts of the particular cases that worked their way to important courts.

In theory, even when the motivation for the wrongful search is purely evidence-seeking, and motives are not mixed, exclusion alone might be an inadequate deterrent. As noted earlier, disgorgement alone leaves the wrongdoer indifferent about the wrongful activity; it forces disgorgement of the gains but nothing more. Some "premium," or restitution-plus-a-fine, might therefore be necessary.[22] In the case of wrongfully obtained evidence, this premium may exist quite naturally in the form of a skewed distribution of outcomes at the time of the illegal search. Suppose an officer is deciding whether to search a suspect's house without probable cause and without a warrant (which, under American law at least, would make the search illegal). Imagine further that the reason for the search is to look for illegal drugs. If the officer finds the drugs, the evidence will be suppressed unless the officer can later show that discovery was inevitable—in other words, that the search was not the but-for cause of the discovery of the illegal substance.[23] In practice, such a showing can very rarely be made; in order to win, the officer would probably have to satisfy the court that other officers had already sought a warrant to search the house.[24] Yet, the probabilistic truth is that if the illegal search were *not* undertaken, there

20. NJW 1848 (W. Ger. Fed. (Sup.) Ct. 1970) discussed in Baade, *supra* note 17, at 622-23.

21. *Jacobsen*, 466 U.S. at 109. The package had been torn by a forklift, and the employee opened it to see if any damage had been done to the contents. *Id.* at 111.

22. *See supra* text accompanying note 2.

23. Nix v. Williams, 467 U.S. 431 (1984).

24. *See, e.g.*, Segura v. United States, 468 U.S. 796 (1984).

would be a substantial likelihood that the evidence would be obtained because the suspicious officer can continue to gather more information, and may eventually satisfy the probable cause standard and then undertake a *legal* search of the house. If this opportunity-cost story is true often enough, then suppressing the evidence found in illegal searches is not the same as simply forcing officers to disgorge what was gained from wrongful searches. Instead, the exclusionary rule requires that the wrongful searcher give up the gains from misconduct (the evidence) *and* sacrifice the possibility (which exists, but is surely less than 50%) that the very same evidence would be legally obtained later in the investigation. In other words, the illegal search may itself lower the criminal defendant's chances of conviction—and this reduction can be seen as the premium that the exclusionary rule extracts.

Given the existence of this natural premium, there is no need to apply the exclusionary rule to evidence that a wrongful searcher stumbles upon with no foreseeability. And American law reflects this distinction with precision, because everything the police find as a result of an illegal search is excluded, *except* for evidence discovered in a manner extremely remote from the misconduct.[25] The classic example is the witness who comes forward months after an illegal search, but who probably would not have done so had the illegal search never occurred. It seems fair to assume that such rare and unforeseeable events do not significantly affect police incentives to search; consequently, American law does not exclude the witness' testimony.[26] All this suggests that a fairly strict exclusionary rule, subject to foreseeability limitations, is a reasonably efficient means of policing the police, at least insofar as the relevant police conduct is aimed at evidence-gathering. The real descriptive puzzle for comparative lawyers, then, is why such a rule is not more common outside of American law. Even in countries that have an exclusion, or disgorgement, sanction for some kinds of police misconduct, such as the Federal Republic of Germany and Great Britain, the sanction tends to be imposed only in cases of gross misconduct.[27] Given the nature of restitution rules, such a stan-

25. Wong Sun v. United States, 371 U.S. 471 (1963). This rule is modified in one respect: only the victim of the illegal search (defined as the party whose privacy was invaded) may invoke the exclusionary rule. Rakas v. Illinois, 439 U.S. 128 (1978). This is problematic to the extent that the officer may be induced to search illegally in suspect *A*'s house if the searcher expects to find evidence that will incriminate suspect *B*. For this problem to exist, however, the searching officer must be willing to trade off in advance any likelihood of catching *A*. Particularly given the premium discussed earlier, this may happen only rarely.

26. United States v. Ceccolini, 435 U.S. 268 (1978).

27. For general English-language discussions of the German exclusionary rule, see Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032 (1983); Pakter, *Exclusionary Rules in France, Germany, and Italy*, 9 HASTINGS INT'L & COMP. L. REV. 1, 38-48

dard must surely lead to underdeterrence, as it forces police officers to disgorge only when misconduct was severe. Nor do these legal systems fill this deterrence gap with a remedy for damages; successful damages actions against the government or individual police officers are at least as rare in these countries as in the United States (where the exclusionary rule is plainly the primary deterrent to police illegality). Why this difference in various countries' rules, given the apparent advantages of the exclusionary rule?

The answer lies not in the virtues of other legal remedies, but in political sanctions, which constitute a remedy that is even less costly in administrative terms than is disgorgement, or exclusion. The government needs to worry about public approval, since disapproval may lead to reduced funding for, or increased restrictions on, government activities. If the police department regularly breaks into voters' homes without good cause, elected officials will surely spring into action. When such political accountability exists and functions well, it is much cheaper to administer than any remedy that relies on litigation for its enforcement.

Unfortunately, political checks are of uneven quality. This is particularly so where crime, and therefore police investigation, is concentrated in communities that are not very powerful politically. Imagine, for example, that (1) one ethnic or racial group's members constitute a solid majority in a given jurisdiction; (2) the same jurisdiction's highest-crime neighborhood is overwhelmingly populated by members of a different ethnic or racial group; and (3) voting is race-based—that is, biracial political coalitions tend to be unsuccessful. In these circumstances, political pressure would not lead to optimal police investigation, since the costs of such investigation to the minority group would not be internalized by elected officials, who are accountable, by hypothesis, only to the majority group.

It may be that the exclusionary rule in the United States is broad, and that search and seizure law is relatively restrictive of police, because in the United States there is substantial experience with ethnic and racial tensions of this kind. Other countries, with less demographic heterogeneity or with less history of majority-minority inequalities, may be understandably more inclined to use the exclusionary rule only as a secondary remedy. Exclusion, or disgorgement, may be the most efficient *legal* remedy with which to deter illegal evidence-gathering, but it is, after all, surely less efficient than a system which can rely on political and cultural checks.

(1985). On the English rule, see Ashworth, *Excluding Evidence as Protecting Rights*, 1977 CRIM. L. REV. 723; Sanders, *Rights, Remedies, and the Police and Criminal Evidence Act*, 1988 CRIM. L. REV. 802, 806-08.

IV. DAMAGES AND DISGORGEMENT IN TAKINGS LAW

We turn, finally, to one other area of public law where it is useful to think about the difference between damages and disgorgement. There are a number of well-known reasons which support or explain rules requiring a government to pay when it takes or devalues private property. The prominent efficiency-based reasons include: (1) the idea that uncompensated takings generate an activity-level effect, so that a government which did not compensate for "investment-backed expectations" it destroyed would find that there would be too little investment in some activities; (2) the argument that if majorities could freely exploit the property of minorities there would be inefficient over-investment in rent-seeking and in coalition formation; and (3) the notion that it is desirable to push government decision makers to "internalize" the burdens imposed on others, and a government which must raise revenues to pay those who are burdened by its actions (or justify such expenditures to voters) will think about the burdens it imposes.[28] On the other hand, there are efficiency costs to taxes, so that raising money is not socially costless, and a rule requiring payments for all burdens would surely lead to an inefficiently low level of government activity. Virtually all legal systems compromise, as it were, between these arguments, requiring payments for most (but not all) physical invasions of private property, and for some (but not most) devaluations of property, or "regulatory takings."

Here, the contrast between damages and disgorgement is revealing in several ways. When takings law requires that the government compensate a private property owner, the government must pay the fair market value of the property *without* any premium for the value added because of the government's plans or projects of which the taking is a part.[29] A rule which instead allowed the property owner to extract the greater of the value of a property to its owner or the value of the property to the government would reflect the principle of disgorgement, as would a rule which gave the *post*-taking value of the property to the private owner. Instead, the actual rule is best described as allowing recovery only for damages.

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28. R. POSNER, ECONOMIC ANALYSIS OF LAW 51 (3rd ed. 1986) (efficiency of internalizing cost of land used to construct public buildings).

29. *See, e.g.*, United States v. Virginia Elec. & Power Co., 365 U.S. 624, 636 (1961) ("The value of the easement must be neither enhanced nor diminished by the special need which the Government had for it"). For the equivalent German rule, see Kimminich, *Compensation for Expropriation of Land and for "Worsenment" in the Federal Republic of Germany*, in COMPENSATION FOR COMPULSORY PURCHASE: A COMPARATIVE ANALYSIS 206 (J. Garner ed. 1975) (compensation, but no profit from government action). *But see* Ehlers, *Compensation for Compulsory Purchase in Denmark*, in *id.* at 178 (claiming that compensation looks to price at time of surrender so that "expectations increase the compensation claim").

None of these rules would be devastatingly inefficient. There is the danger that a generous disgorgement rule, such as one which gave the property owner the value of the property to the government, would lead to corrupt politics because property owners would want to have their property taken by the government in return for generous payments. But this is the familiar danger associated with many government procurement plans, and it is one that we normally know must be monitored rather than avoided at all costs.

A better argument against the more generous restitution rules is that the pre-taking value of a property is generally easy to assess because one can examine previous sales of this and similar properties. In contrast, the government's reservation price and the post-taking value of the property are hypothetical or largely unknown amounts. In this setting, unlike that in torts,[30] it is therefore arguable that the administrative costs of the restitution-based system are indeed greater than those associated with damages. One might also argue that the internalization function of the damages rule would be poorly carried out by a restitution rule, which would often leave the government's decision makers indifferent as to whether to pursue a plan because only a very few voters, the generously compensated property owners, would be made better off.[31]

The damages-disgorgement dichotomy also draws attention to a very different point about takings law. Many goverument projects, including ones which take and pay for private property, also cast benefits, or windfalls, on various private parties. A new highway, for example, is likely to involve: (1) the physical taking of property from owners who will be compensated; (2) the devaluation of property interests which are near enough to the highway to suffer from the pollution and other negative side effects of the road; and (3) the appreciation of properties which benefit from improved transportation or from better access to markets. Much as legal systems virtually never compensate (with damages or with restitution payments) for those interests falling in the second category, no disgorgement is required *from* those falling in the third group. It is possible to imagine either the government or the owners of property in the second category collecting in this manner; one might be tempted to think of payments by the government as representing damages, while payments from the "winners" to the "los-

30. *See supra* text accompanying notes 4-5.

31. There is still a social benefit to the plan, but its value will be captured through the disgorgement remedy by those whose property interests are taken. The political impetus for the project must come from these owners. In contrast, under the familiar damage rule, a few property owners receive (minimal) compensation for their physically taken interests, many are burdened without compensation—and are likely to lobby against the project—and often very many more will receive windfalls. The last group forms the political coalition in favor of the project.

ers" would reflect a plan of restitution, but to the extent that the government simply funded its liability through taxes on the winners in the third group, it is convenient to think of either scheme as based on the restitution, or disgorgement, idea. Such a plan, which through one means or the other collected from those who were benefited and compensated those who were burdened, would obviously promote the internalization function of takings law. But inasmuch as modern legal systems rarely collect or compensate in this manner, such schemes are mostly of theoretical interest at this point.[32] There is some legal precedent for thinking about the benefits as well as the burdens of government activities. In Australia, as elsewhere, there were rules of resumption, under which land grants included a reservation of some percentage (on the order of six to twenty percent) of land on which the government could later construct highways (and in some places reservoirs and other projects) with no requirement for compensation to private property owners.[33] Some legal systems simply afforded no compensation for property taken in order to build roads.[34] It is noteworthy that these legal rules normally applied in areas with low population densities, and it is likely that property owners benefited when a highway or reservoir was built nearby. In other words, the damage or restitution claim that might have been brought by the landowner whose property was taken would likely have been offset by a counterclaim for the property owner's undeserved enrichment (or the absence of net damages). The doctrines in question might in this way be thought of as rules of thumb meant to save the administrative costs of actual damage (or enrichment) determinations.

The symmetry that is reflected above in the listing of the second and third categories of affected property interests is apparent; one can scarcely imagine extractions of windfalls from the third group (consisting of those who receive windfalls from government projects) without including payments for losses suffered by the second (those who are burdened, although their property is not physically taken or completely destroyed). In a transaction-cost-free world, restitution (whether available directly from the winners in the third group or from the government itself) would almost surely be a better rule for takings, because costs and benefits would be incorporated into a government's calculations. Once the costs of measuring benefits (windfalls) and costs

32. An important strand of the takings literature has favored such transfers. *See* WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (D. Hagman & D. Misczynski 1978).

33. Brown, *Compensation for land Acquisition in Australia*, in COMPENSATION FOR COMPULSORY PURCHASE, *supra* note 29, at 73-74.

34. J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 1.22[1] (1973) (first statute requiring compensation for road building in colonial America passed in Massachusetts in 1639).

(burdens) are considered, it is easy to see why takings law has not experimented much with restitution. In the tort law setting, it is well known that the damage rule is an excellent means of internalizing calculations of costs and benefits, and we suggested that restitution, or disgorgement, could come close to doing the same only at great cost. Here, in takings law, the situation is half reversed, especially because we need to measure pre-takings values in a post-takings world. The disgorgement rule, with symmetrical application, is now the great internalizer, but its implementation costs are also great.

V. Conclusion

A good deal of traditional, doctrinal legal scholarship is of little interest or use beyond the borders of the jurisdiction which generated the doctrines in question. The opposite is the case for the law-and-economics literature. Analyses of the incentive effects (and the content) of civil law rules are of great interest to the common lawyer, for example, because the tools of different legal systems are very much the same. We have tried to show that in various areas of law, where distinct rules prevail in different countries, it is very much the case that there are common analytic themes. In particular, we have stressed the usefulness of thinking about the relative advantages of remedies based on one party's losses or another's gains, and we have tried to demonstrate that a variety of legal topics can be illuminated by exploring this competition between damage and disgorgement remedies.