

Econ 522

Economics of Law

Dan Quint
Spring 2013
Lectures 23 and 24

Logistics

- MT2 graded – see Nathan if you didn't get your bluebooks
- HW4 due next Thursday (May 2)

Criminal law

- ◀ We've been focusing on optimal enforcement
 - ↳ How much should we invest in catching criminals?
 - ↳ How should we punish them when we catch them?
- ◀ Very little on determining guilt or innocence
 - ↳ Get the facts, decide how likely it is they committed the crime
 - ↳ Based on relative costs of freeing the guilty and punishing the innocent, there's some amount of certainty above which we punish

So far this semester, we've focused on civil law

- ◀ Not Civil (Napoleonic) as opposed to Common Law (British)...
- ◀ ...but Civil as opposed to Criminal
 - ◀ Cases where one private individual is suing another...
 - ◀ ...generally looking for monetary compensation...
 - ◀ ...for some sort of wrong that was done
- ◀ Some cases are handled differently
 - ◀ Friedman quote we saw earlier: “When someone shoots you, you call a cop. When he runs his car into yours, you call a lawyer.”
 - ◀ All semester, we’ve been dealing with the second case
 - ◀ Time to deal with the first

Criminal law differs from civil law in several ways

- Criminal **intended** to do wrong
- Case brought by **government**, not individual plaintiff
- Harm done tends to be **public** as well as private
- **Standard of proof** is higher at trial
- If found guilty, defendant will be **punished**

What is the goal of criminal law?

- ◀ Just like with civil law...
- ◀ To achieve efficiency, **minimize total social cost**
- ◀ Social costs consist of...
 - ◀ Social **cost of crimes** that are committed **error costs**
 - ◀ Cost of **detecting (catching) criminals** }
 - ◀ And cost of **punishing** offenders **administrative costs**

Intent

- ◀ Unlike a tort, a crime generally requires **intent**
 - ◀ **Mens rea** – a “guilty mind”
- ◀ (Literal intent occasionally not required)
 - ◀ You've been hired as a lifeguard or a nurse
 - ◀ You show up to work drunk, and as a result someone dies
 - ◀ Criminally negligent homicide
- ◀ (Sometimes intent is enough even without harm)
 - ◀ Attempted murder

Criminal cases are brought by the state

- ◀ Recall wrongful death tort cases
 - ◀ Victim is dead, can't receive compensation
 - ◀ Family/friends can sue for lost wages, lost companionship, etc.
- ◀ Criminal cases don't require living victim
- ◀ This allows prosecution of “victimless crimes”
 - ◀ Theory is that all crimes harm the public – are “**public bads**”
 - ◀ That is, breakdown of law and order in society harms everyone
 - ◀ So public (represented by state) brings criminal actions

Distinction between civil remedies and punishment

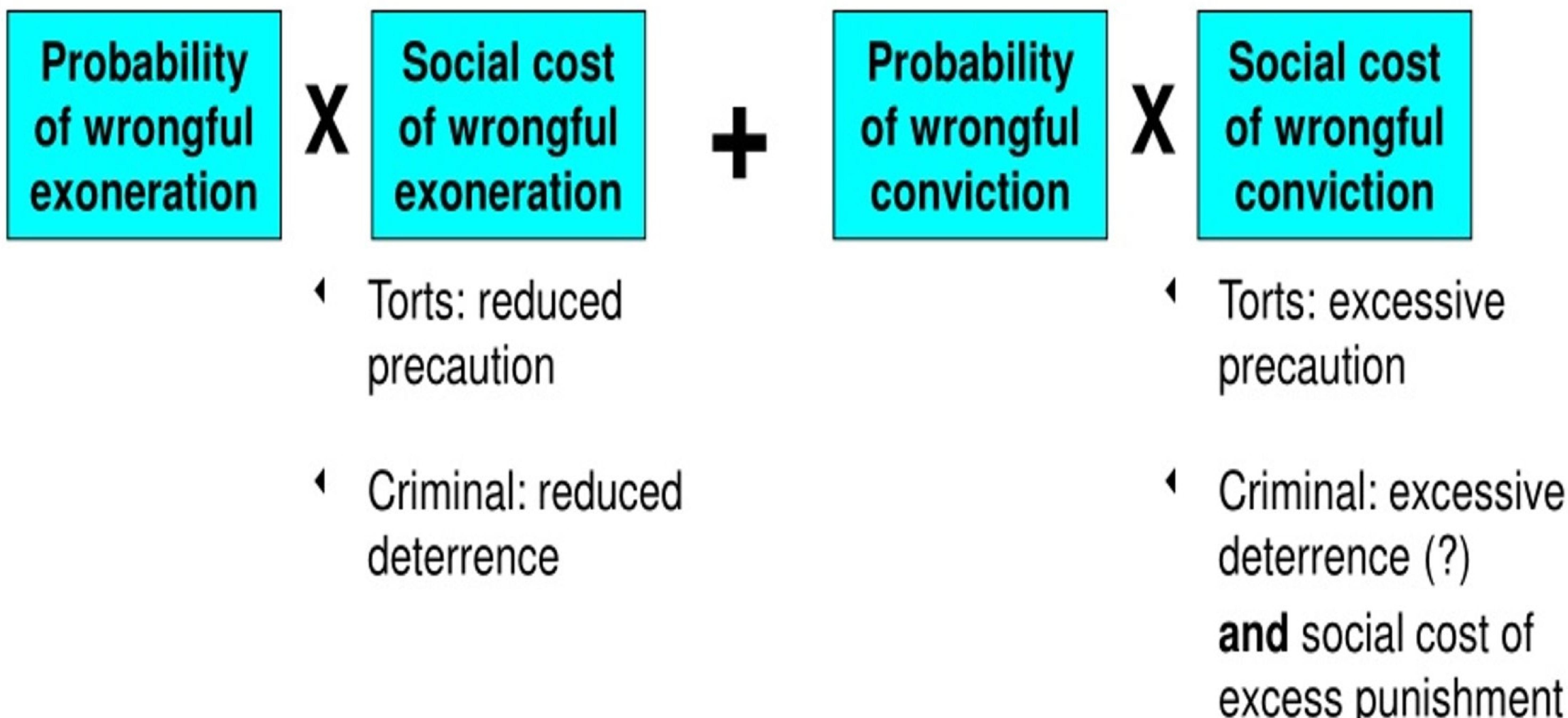
- ◀ Nuisance law, contract law, tort law: damages serve two purposes
 - ↳ Compensate the victim
 - ↳ Cause injurer to internalize cost of harm done
 - ↳ When injurer internalizes harm, we get pollution, or breach, or accidents, only when they are efficient
- ◀ Criminal law: intention is to **deter** crimes – that is, **prevent them entirely**, not just the “inefficient ones”
 - ↳ Punishment need not be limited to magnitude of harm done
 - ↳ Criminal punishments – imprisonment, execution – destroy resources
 - Make criminal worse off, may not make anyone better off
 - “Ex post, punishment is inefficient”

Criminal cases have higher standard of proof

- ◀ Most civil cases: **preponderance of the evidence**
 - ◀ Interpreted as: 51% certainty plaintiff is correct
- ◀ For punitive damages, **clear and convincing evidence**
 - ◀ Higher degree of certainty
- ◀ In criminal cases, prosecution must prove guilt **beyond a reasonable doubt**
 - ◀ Why so much higher?

Why should standard of proof be so high in criminal cases?

- ◀ Think about error costs in either tort or criminal case:



- ◀ If “false positives” are more costly in criminal law, suggests conviction should require more certainty

Are crimes ever efficient?

- In 2001, Armin Miewes posted an ad online, “looking for a well-built 18-to-30-year-old to be slaughtered and then consumed.”
- And someone answered.
- They met, discussed it, and agreed Miewes would kill and eat the guy.
- So he did. And videotaped it.
- At the time, cannibalism was not illegal in Germany
- Is it a crime to kill someone who has consented to be murdered?
 - In 2004, Miewes was convicted of manslaughter
 - In 2006, he was retried, convicted of murder, sentenced to life in prison
- But also... if Miewes and his victim agreed he should be killed and eaten, and no one else was harmed, was this crime efficient?



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Why not use tort law to cover crimes too?

- ◀ Tort law creates an incentive to avoid harms
 - ◀ If it worked perfectly, might be no need for criminal law
- ◀ Reasons tort law may not work for certain offenses
 - ◀ Relies on **perfect compensation**, which may be impossible
 - Loss of life, crippling injury
 - Even if possible in theory, might be impossible in practice
 - ◀ If **probability of being caught/convicted** is less than one, deterrence requires punishment **more severe** than benefit received
 - ◀ And if we made civil penalties severe enough, criminals might be **judgment-proof**

Theory of criminal law

- ◀ A theory of criminal law must answer...
 - ◀ **Which acts** should be punished as crimes?
 - ◀ **How** should they be punished?
- ◀ Cooter and Ulen:
 - ◀ Acts should be **punished** when aim is **deterrence**
 - ◀ Acts should be **priced** when aim is **internalization**
 - ◀ Aim should be **deterrence** when...
 - **perfect compensation is impossible**
 - people want law to protect **rights instead of interests**
 - or **enforcement errors undermine liability**
- ◀ Much of today is from ch. 15 of Friedman book

General model of crime and punishment

Economic model of crime and punishment

- ◀ To deter crime, we need to do two things:
 - ◀ **Catch** offenders...
 - ◀ ...and **punish** them
- ◀ Catching a higher fraction of offenders is more costly
 - ◀ Requires more police, more detectives, etc.
- ◀ More severe punishment also tends to be more expensive
 - ◀ Most common punishments are fines and imprisonment
 - ◀ Fines cost nothing – state even makes money
 - ◀ But fines don't always work, because **not everyone can pay them**
 - ◀ Besides fines, **most punishments are inefficient** – make offender worse off, and are costly to state

Economic model of crime and punishment

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Gary Becker, “Crime and Punishment: An Economic Approach”

- ◀ Suppose some crime is punished by 20% chance of being caught and convicted, and a punishment equal to \$20,000
- ◀ We could save money by...
 - ◀ Fire half the police and judges, so probability of being caught and convicted dropped to 10%
 - ◀ Raise the punishment to \$40,000
 - ◀ Punishing someone \$40,000 may cost more than punishing them \$20,000, but not more than twice as much...
 - ◀ ...and half as many people to punish
 - ◀ So cost of punishing people would be same or lower
 - ◀ But we'd save money on detection/apprehension
- ◀ Repeating the argument, the “optimal” system is an infinitely low probability of an infinitely severe punishment!

Marginal cost of deterrence

- With rational criminals, raising the expected punishment should lead to fewer crimes being committed
- On a **per-crime basis**, raising either the probability of being caught or the severity of the punishment is costly
- But as we increase expected punishment...
 - we get fewer crimes committed,
 - and maybe **fewer offenders we need to detect and punish**
- So the **cost of punishing** those criminals we do catch could go up or down
- Which means the **marginal cost of deterring another crime could be positive or negative!**

“The marginal cost of deterring another crime could be positive or negative”

- ↳ Social cost of each crime: \$10,000
- ↳ Cost of trial and punishment: \$100,000
- ↳ Increase fraction of crimes detected from 15% to 20%
- ↳ (c) Defend the following statement applied to this type of crime:
“Even when detection is cheap, more detection is only efficient if the supply of crimes is elastic.”

When the supply of crimes is inelastic, detecting more of them increases social costs – the number of crimes does not drop much, but more is spent punishing those who are caught.

When the supply of crimes is elastic, detecting more of them reduces social costs – fewer crimes get committed, and fewer criminals need to be punished.

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Optimal deterrence

- ◀ So depending on how much the crime rate responds to deterrence, increasing the likelihood of being caught could...
 - ◀ **Reduce social costs** – by reducing both the number of crimes committed and the number of criminals we have to punish
 - ◀ **Increase social costs** – by increasing the number of criminals we catch and have to punish (in addition to requiring more spending on detection)
- ◀ What does this say about the optimal level of deterrence?
 - ◀ Or, if you prefer, the optimal level of crime?
 - ◀ Or the optimal level of punishment?

Optimal punishment – example (Friedman)

- Suppose there's some crime for which expected punishment (probability X severity) equals \$900
- Suppose raising expected punishment from \$900 to \$901 would deter exactly one crime. Should we do it?
- Depends whether **social cost of that one crime** is more or less than the **social cost of deterring it**
- Suppose that...
 - Raising expected punishment from \$900 to \$901 would cost \$50
 - “Marginal crime” does \$1,000 worth of damage
 - To calculate social cost, also need to consider benefit to criminal
 - Marginal crime gets committed when expected punishment is \$900, but not when expected punishment is \$901; so benefit to criminal is \$900
 - So social cost of that crime is $\$1,000 - \$900 = \$100$
 - If social cost of raising expected punishment enough to deter that crime is \$50, we should do it!

Optimal punishment – general theory

*at efficient level
of deterrence:*

$$\text{Cost of deterring one more crime} = \text{Social cost of marginal crime}$$

since “marginal criminal” is indifferent...

$$\text{Cost of deterring one more crime} = \text{Harm to Victim} - \text{Benefit to Criminal}$$

rearranging,

$$\text{Expected Punishment} = \text{Harm to Victim} - \text{Marginal Cost of Deterrence}$$

At efficient level of deterrence,

$$\text{Expected Punishment} = \text{Harm to Victim} - \text{Marginal Cost of Deterrence}$$

- ◀ When **deterrence is free**, expected punishment = damage to victim
 - ◀ Offender internalizes costs of his actions
 - ◀ Just like with tort law, leads to **only efficient crimes**
- ◀ When **deterrence is costly**, expected punishment < damage to victim
 - ◀ When preventing marginal crime is costly, we allow all efficient crimes...
 - ◀ ...and some slightly inefficient ones, because it's **cheaper to allow them than to prevent them**
- ◀ When **marginal cost of deterrence is negative**, we should set expected punishment > damage to victim
 - ◀ When preventing the marginal crime saves money (because there are fewer criminals to punish)...
 - ◀ We prevent some efficient crimes too, because it's **cheaper to deter them than to allow them and have to punish them!**

Aside: why do we count the criminal's benefit?

- ◀ Why count criminal's payoff when calculating social costs?
 - ↳ We said fines cost nothing – make offender worse off, state better off
 - ↳ Why not just say, screw the offender, fines raise money?
 - ↳ And social cost of crime = damage to victim – benefit to offender
 - ↳ Why not: by committing certain acts, you give up right to be counted?
- ◀ Friedman argues it this way:
 - ↳ We want an economic theory for why things like murder and embezzlement should be treated differently than nuisances and torts
 - ↳ If we start out by assuming they're morally different, we're assuming the answer to our question
 - ↳ If we avoid making assumptions like that, and still come up with reasons they should be treated differently, then we've learned something

What would efficient punishments look like?

◀ Friedman:

- ‘ “[The system] would be designed to squeeze the **largest possible fines** out of convicted criminals, using the threat of more unpleasant alternatives for those who failed to pay.
- ‘ If the fines that victims can pay, even under such threats, are inadequate, they are supplemented by **penal slavery** for criminals who can produce more than it costs to guard and feed them, **execution** (with the organs forfeiting to the state) for those who cannot.
- ‘ Any prisons that do exist and do not pay for themselves are as **unpleasant as possible**, so as to produce as much punishment as possible per dollar of imprisonment cost.
- ‘ It is a consistent picture, and considerable parts of it can be found in the not very distant past, but not a pretty one.”

The problem with efficient punishments

- Punishments are designed to make someone worse off
- So if a punishment has social cost close to 0, it must make someone else better off
 - With fines: state gets the benefit of the money
- But this creates **incentive for abuse**
 - State benefits from convicting people!
 - Drug cases and forfeiture
 - Traffic cameras and yellow lights

Deterrence

Do harsher punishments deter crime?

- Hard to answer, because hard to separate two effects
- **Deterrence**
 - When punishment gets more severe, crime rates may drop because criminals are afraid of being caught
- **Incapacitation**
 - When punishment gets more severe, crime rates may drop because more criminals are already in jail
- Kessler and Levitt: natural experiment
 - Voters in California in 1982 passed ballot initiative adding 5 years per prior conviction to sentence for certain crimes
 - Found immediate drop of 4% in crimes eligible for enhanced sentences

Probability versus severity

- ◀ Empirically, crime levels more sensitive to **probability** of being caught, than to **severity** of punishment
 - ◀ Might be that criminals discount future a lot, don't care as much about last few years of a long prison sentence...
 - ◀ ...or, total cost of punishment may be more than "apparent" sentence
 - Punishment = time in jail...
 - ...plus other costs – time spent in jail awaiting trial, money spent on a lawyer, stigma of being a convicted criminal...
 - ...which may not depend on length of sentence
 - So $20\% \times (1 \text{ year in jail} + C) > 10\% \times (2 \text{ years in jail} + C)$
 - not because 20% of 1 year is worse than 10% of 2 years
 - but because 20% of C is more than 10% of C
- ◀ Means Becker's idea – tiny probability, very severe punishments – may not work in real life

Marginal deterrence

- ◀ Armed robbery vs. armed robbery plus murder
 - ◀ You break in to rob an isolated house, carrying a gun
 - ◀ Someone wakes up and confronts you; what do you do?
 - ◀ Punishment for murder is very severe
 - ◀ If punishment for armed robbery is not so severe, you might leave them alive
 - ◀ If punishment for armed robbery is very severe, you might be better off killing them
- ◀ Same argument against “three strikes” laws
- ◀ **“As good be hang’d for an old sheep as a young lamb.”**

- old English proverb

Punishment

- ◀ Other punishments tend to be inefficient
 - ◀ Make criminal worse off, costly to rest of society too
 - ◀ Direct costs of holding someone in maximum-security prison estimated at \$40,000/year
 - ◀ In some states, prisoners do useful work
 - Attica State Prison (NY) had metal shop
 - Minnesota firm employs inmates as computer programmers
 - Medium-security prisons in Illinois make marching band uniforms
 - But legal limitations
- ◀ Death penalty extremely expensive under current system
 - ◀ Longer cases, more jurors rejected, automatic appeals

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Discretion in sentencing

- ◀ 1980-1990: move from judicial discretion to mandatory sentencing
 - ◀ most state and federal courts
 - ◀ sentence mostly pinned down by crime and offender's history
- ◀ Recent move in opposite direction
 - ◀ MI, LA recently brought back discretionary sentencing
 - ◀ MS brought back discretionary parole for nonviolent first-time offenders
 - ◀ Various sentencing reforms in 18 other states

Fines

- ◀ Western Europe: many crimes punished by fines
 - ◀ Textbook cites a study from 1977 examining certain crimes:
56% of selected defendants in England/Wales, 77% in Germany
were punished only by a fine
 - ◀ U.S. federal court: 5% of defendants punished only by a fine
- ◀ In U.S., fines are in dollars; in Europe, “day fines”
 - ◀ Punishment = fixed number of days of salary
 - ◀ So, rich pay bigger fines than poor

For example...

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Switzerland millionaire hit by record speed fine

A Swiss millionaire has been handed down a record speeding fine of \$290,000 (£180,000) by a court.

The man was reportedly caught driving a red Ferrari Testarossa at 137km/h (85mph) through a village.

The penalty was calculated based on the unnamed motorist's wealth - assessed by the court as \$22.7m (£14.1m) - and because he was a repeat offender.

It is more than double Switzerland's previous record speeding fine - handed to a Porsche driver in Zurich in 2008.

In the latest case, the motorist was clocked speeding 57km/h (35mph) faster than the limit, according to the cantonal court in St Gallen, eastern Switzerland.

"The accused ignored elementary traffic rules with a powerful vehicle out of a pure desire for speed," the court said in its judgement.

Swiss media reported that the man owns a villa with five luxury cars, including the Ferrari.

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Should the rich pay bigger fines than the poor?

- ◀ Society may have other goals besides efficiency
 - ◀ Might place high value on law treating everyone the same...
 - ◀ ...even if we have to sacrifice some efficiency to achieve this
- ◀ Example: choice of a fine or jail time
 - ◀ Tend to put low dollar value on time in jail – might be sentenced to a \$5,000 fine or a year in jail
 - ◀ Most people who can afford the fine will choose to pay; those who can't, will go to jail
 - ◀ So rich pay a small-ish fine they can easily afford, and poor go to jail
- ◀ John Lott: equal prison terms for rich/poor may make sense
 - ◀ The rich value their time more than poor...
 - ◀ ...but the rich have better lawyers, may be less likely to be convicted



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Stigma

- ◀ Stigma as a punishment
 - ◀ Very efficient when applied to a guilty person
 - ◀ Very inefficient when applied to an innocent person

- ◀ Suggests that maybe...
 - ◀ criminal cases, where conviction carries a social stigma, should have higher standard of proof than civil cases, where it doesn't

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Death penalty

- ◀ In 1972, U.S. Supreme Court found death penalty, as it was being practiced, unconstitutional
 - ◀ Application was “**capricious and discriminatory**”
 - ◀ Several states changed how it was being administered to comply
 - ◀ In 1976, Supreme Court upheld some of the new laws
- ◀ Since 1976, average of 41 executions per year in the U.S.
 - ◀ Texas and Oklahoma together account for half
 - ◀ Nationwide, 3,000 prisoners currently on death row
 - ◀ Since 1976, 304 inmates on death row were exonerated, many more pardoned or had sentences commuted by governors
- ◀ Does death penalty deter crime? Evidence mixed.

Death penalty and race

- One concern about death penalty in U.S.: way it's applied is racially biased
- McCleskey v Kemp (U.S. Sup Ct 1987)
 - even solid statistical evidence of racial disparity does not make death penalty unconstitutional

*Probability of death sentence,
adjusted for other factors*

RACE OF VICTIM

RACE OF DEFENDANT	Overall	Black	Other
Black	18%	18%	21%
Other	13%	3%	14%