

1 → Ex Ante and Ex Post

A thief walks into a bank, puts a gun to the head of one of the customers, and announces that he will shoot unless the teller hands over all the money in the drawer. The teller does nothing. The thief shoots the customer, runs off, and never is seen again. The customer dies of his injuries, and his estate brings a lawsuit against the bank, complaining that the teller should have given the money—it was only \$5,000, let us imagine—to the thief. What should the court say?

There are two quite different ways to think about this question. The first looks at the case like this: it is a dispute between the bank and the estate of one of its customers. They've come to court because they haven't been able to resolve their differences informally; the judge serves as an adjuster of last resort, producing an answer the parties agree to accept because it has the force of law. One of them will walk away a winner; the question is *who*. We find the answer by looking back at what happened and asking whether justice requires that the bank pay damages to the plaintiff. Did the bank do anything wrong? If the teller's refusal saved the bank some money, would it be fair for the bank to pay nothing to the party who was injured as a result (or, more precisely, to his estate)? Can the bank bear the economic burden of the customer's death more easily than his kin? We might consult our sense of fairness. And it might be possible to draw analogies to this case from others that seem similar—perhaps cases where a customer slipped on a puddle left behind by the bank's janitor, or where a bank was held liable because one of its tellers tipped off a thief that a customer soon would leave the bank with a great deal of money. We could try to decide this case like others that sort of resemble it.

That much is, again, a first way of looking at the case. But now here is a second one: what happened that day at the bank is unfortunate but of secondary interest at this point; it's *over*; and nothing a court says can change what happened. Money can be moved from one person to another now, or punishments inflicted, but these are just rearrangements, and they are too late to be of any serious consequence. What's appalling about the day at the bank (or any crime or accident) is the *waste* of it:

the lost life, the demolished car, the broken window, or whatever the harm might be. When any of those things happen, the world is made poorer—irrevocably so. This is intuitive and obvious to the family of the person who was killed. They are painfully conscious that nothing the law says can bring him back. But it's also true, if less obvious, after an accident that merely wrecks a car. The car can be repaired, and whoever was to blame can be made to pay for it, and now the car's owner might feel that the law *did* bring back the car: a miracle! It's as if the accident never happened. But it isn't a miracle. It's a waste. No matter how satisfied the owner feels, the world would have been better off without the accident, because it ate up money that would have been better spent on something else—anything else. Just ask the person who ended up paying for it. The point is that the law doesn't *fix* bad things that have happened. It can't: they've happened. All the law can do is redistribute the suffering a bit. That isn't nothing, of course; assigning blame and making the right person pay for it might make the victim feel better, or make the rest of us feel better. But the law's dream—anyone's dream—would be to turn the clock back and stop the bad thing from happening in the first place. That would be much better than quarreling afterwards about who should justly suffer for it. Too bad it's impossible.

Yet in a sense perhaps it *is* possible, for the court may be able to do something almost as good. It might make a rule that would cause horrible events like the bank robbery to be less likely from now on. This wouldn't undo the killing that already happened, but it could stop some killings in the future—and that's equally good, isn't it? Or better than equally good: for we would be stopping lots of bad things, not just undoing one of them. (If they *aren't* prevented, we'll be just as unhappy about those killings after they occur as we are now about the one that already did; we'll wish we could turn the clock back—perhaps to today.) So here we arrive at a different vision of what the law can do about a case. Instead of looking back and deciding who should bear the suffering, it can look ahead and decide what ruling will make the suffering less likely to occur later.

What would this train of thought look like? In the case of the bank, it means asking what incentives people will have after the case is over. Here is an interesting possibility: if the court says that the plaintiff wins, then from now on banks will have an incentive to hand over the money when thieves take hostages (to avoid paying in court again next time). And that, in turn, means that thieves will have an incentive to take hostages. True, thieves might not know the legal rule, but then they might not need to know it. Maybe they would just observe that taking hostages has

become wonderfully effective: the teller always hands over the money. The trouble becomes apparent. Letting the customer's estate win might cause *more* hostages to be taken in the future. Perhaps fewer of them would be shot since the thieves would get the money they demand, but it's hard to be sure what will happen once guns have been drawn and hostages taken.

On this view the bank *has* to win the case brought by the customer's estate. It's not a question of what's fair as we look back on the fateful day. It's a question of making the right rule for the future. The bank has to win for the same basic reason that governments won't give in to hijackers of airplanes when they demand money or whatever else. It's tempting to make the payment and save the passengers' lives. You probably would make the payment if you knew it never was going to happen again. But that's the point: not just that it might happen again, but that if you make the payment it becomes more likely that it *will* happen again.

So now we have seen two distinct ways of thinking about a problem. The first can be called the *ex post* perspective. It involves looking back at a disaster or other event after it has occurred and deciding what to do about it or how to clean it up. The second perspective is called the *ex ante* point of view. It involves looking forward and asking what effects the decision about this case will have in the future—on parties who are entering similar situations and haven't yet decided what to do, and whose choices may be influenced by the consequences the law says will follow from them. (The first perspective also might be called *static*, since it accepts the parties' positions as given and fixed; the second perspective is *dynamic*, since it assumes their behavior may change in response to what others do, including judges.) Part of what makes judicial decisions interesting is that courts think in both of these ways when they decide cases, and the two styles of thought can point to different conclusions. Does a court's decision settle the dispute between these parties or does it make a rule for others in the future? It almost always does both.

This chapter (and much of the rest of this book) emphasizes the *ex ante* perspective because it creates lots of interesting possibilities for thought and argument, and because it usually comes more slowly than thinking *ex post*. It's only natural to think in an *ex post* fashion when a lawsuit comes up: here are two parties in a vigorous dispute, perhaps blaming each other for a disaster. Their attention is fixed on the past and what should be done about it. *They* don't care what effect the decision has on others down the line; they just care who wins right now. (That's especially true in a case involving a random accident. The bank

in our example may be a little different; it may be worried both about winning the case and about the rule in the long run, because it deals with these situations repeatedly.) But the court has to care about both perspectives, for it will be declaring a winner now *and* making a rule that affects others later.

In fact most courts to consider the problem of the bank teller have found in favor of the bank on the ex ante grounds sketched a moment ago. The Illinois Supreme Court put the point like so: “In this particular case the result may appear to be harsh and unjust, but, for the protection of future business invitees, we cannot afford to extend to the criminal another weapon in his arsenal.”¹ In other words, the argument from the ex ante perspective won out over the ex post. The practical challenge is to learn to see that sort of argument every time it’s available: to learn to think the ex ante way when a case is full of cues tempting everyone to only look backwards. The simplest way to find the ex ante angle is to picture either side winning the case and then imagine how the parties will think a week later—what either of them might do differently now that they know how the courts will respond. Thus you can imagine the bank learning of the decision and changing its rules to make sure that its tellers hand over the money; and then you can ask how this would, in turn, change anyone else’s incentives, starting with the thief. In real life, of course, the parties whose incentives we care about the most probably aren’t the ones before the court—*this* bank, *that* thief, and so on. We’re worried about banks generally and thieves generally. But sometimes it helps to think concretely about the parties you can see and then try generalizing to the ones you can’t.

Another way to come up with ex ante arguments is to imagine how a legislature would think about the problem facing the court. Legislatures make general rules for the future; they don’t resolve individual disputes that have already occurred. So if a legislative committee or a government agency were considering a rule about how banks should handle hostage takers, it less likely would be distracted by the equities of any one case. Its role would be to make decisions that have consequences ex ante—going forward. Granted, a court isn’t in quite the same role. It is supposed to decide cases according to the authorities on point: statutes, case law, and the like; and in the case of the bank teller, that is where a real court would start its search for an answer. But it often happens that there are no authorities entirely on point. In effect a judicial decision then serves as a little piece of legislation as well as the resolution of a conflict. The balance between these two functions varies among courts, and students

of these matters often argue about how the balance should be struck.² But judges at most levels of the legal system accept the importance of giving at least some thought to the *ex ante* effects of their decisions, as do the lawyers who make arguments in their courtrooms. When you hear that a lawyer is making a “policy” argument, that usually means it’s an argument from the *ex ante* perspective—that is, a claim about the effects the decision might have on someone’s incentives.

Let’s look at some other examples. I build a house. Unfortunately I was mistaken in my measurements, and the structure extends onto your neighboring property by eighteen inches. There is no cheap way to correct the problem; either the house stays where it is or much of it will have to be torn down. What to do? The *ex post* style of thought accepts the situation as it is and asks how it might best be resolved. Nothing the court says can change the fact that the house encroaches; all we can do now is try to keep the damage caused by the mistake to a minimum. So the natural remedy might be an order that I pay you for the strip of land I built on, perhaps with a little premium since the sale is, in effect, being forced on you. Why waste a perfectly good house by tearing much of it down? But the *ex ante* perspective is entirely different. On this view it matters little how our particular mess gets resolved. The important question is how the resolution of it will affect our behavior in the future—and the behavior of others like us. From this standpoint an award of damages—a forced sale—might seem a terrible solution. It deals sensibly with the problem we already have, but it doesn’t give me or anyone else an incentive to be more careful next time. Indeed, it might create the opposite incentive: if I wanted to build on a bit of your property but were unsure whether you would be willing to sell, my best plan would be to go ahead and build and then let you sue for the value of the land. Even if I have to pay a premium, I still might be better off this way than by negotiating with you.

So the usual rule in encroachment cases is that the plaintiff—the complaining neighbor—gets an injunction entitling him to insist that the house be removed. There is more to say about this case, and we will return to it in other chapters. For now the important point is to see that it’s another win for the *ex ante* perspective. *Ex post*—after the thing is done—having one neighbor pay the other might seem attractive; *ex ante*—thinking about the incentives for next time, before anything has happened—payment of money seems decidedly unattractive precisely because it makes the bad thing more likely to happen again.³ Notice the analogy to making the bank pay damages to the hostage’s estate, which might cause the number of hostages to increase.

And notice also that the *ex ante* point of view is more than just a useful tool for courts to use in deciding cases. It's also important to remember when deciding more broadly how well a rule works. A rule requiring buildings to be torn down when they encroach might look ugly if you just study the cases where the rule actually gets used. All you would see are buildings getting torn down or neighbors demanding extortionate prices from each other to avoid that result. But the consequences of the rule don't appear only in those cases, or even primarily in those cases. The results of the rule also include all the cases where the building never encroaches in the first place because everyone was careful to get a proper survey done—for fear that otherwise the house would have to be torn down later. So new houses that *don't* get torn down are evidence of the rule's operation, too. A rule that looks brutal and wasteful when invoked might actually be working beautifully, if invisibly, by causing the occasions for its use to be rare.

These same trade-offs arise often when courts decide whether to allow evidence into a case. A police officer sees a fellow with a butcher knife chasing someone out the front door of a building. The officer shoots and kills him. Or at least that's what she says happened. The trouble is that no knife was found on the dead man afterwards. The officer has some sessions with a therapist to discuss the incident. Meanwhile she is sued by the estate of the man she killed. The plaintiff demands to see the notes the therapist took during the sessions with the officer. Should this be allowed? *Ex post*—now that the notes exist and the two sides are arguing about them—the answer might seem clear: of course the plaintiff should be allowed to have them. They might show something important. What if the officer privately admitted that the story about the knife was an invention? What if she admitted that she shot the man because she had a grudge against him? Surely the jury ought to know those things. And if the officer didn't say anything incriminating, what's the harm in finding out? All this might seem a little unfair to the officer if she thought she was speaking in confidence, but that interest pales in comparison to getting at the truth behind the killing, does it not?

To repeat, however, this whole line of reasoning starts by taking for granted that the notes exist. The *ex ante* perspective doesn't take it for granted. It asks how everyone's incentives will be changed next time if the plaintiff wins this time. Next time the officer won't go to the therapist, or won't be as likely to talk; for a good therapist will start the session with a warning that anything said there can be used in court. Seizing the notes of the therapist, one might say, is an example of a trick that only

works once. The trade-off here isn't just between getting all that good information on the one hand and discouraging candid discussions with therapists on the other. That good information will be less likely to *exist* next time if it can be brought into court. This doesn't necessarily mean, of course, that the conversation ought to be kept confidential, or "privileged." That final decision depends on the details—in particular on how important it is for people to talk to therapists and how important confidentiality is in making those conversations happen. In the case of the officer and the butcher knife, the Supreme Court answered both those questions in favor of the officer and said that the notes of therapists are off-limits.⁴

This style of reasoning comes into play often when information of any sort is created.⁵ There frequently is tension between the rules that are best for distributing information once it exists (*ex post*) and for causing it to be created in the first place (*ex ante*). The information revealed in the therapist's office is one example; information revealed to a lawyer is another: the case for the attorney-client privilege runs along the same lines as the case just discussed. When an attorney knows something important about a case, the court might like to hear about it; but forcing the attorney to talk this time makes it less likely that a client will talk to an attorney next time. The same goes for the rule that you can't bring statements into court that were made during negotiations to settle the case. We'd like very much to have that information (we'd like to have *all* information), but *ex ante* the effect of allowing this would be to discourage frank settlement negotiations next time, and we want them to occur.

Or leave behind the question of evidence and think of intellectual property. Once I discover a useful drug, it might seem sensible to let you copy it. Your copying the drug doesn't prevent me or anyone else from having it; and why should the first person to combine chemicals in a certain way be able to prevent others from doing the same? Yes, that is the *ex post* analysis—the analysis that makes sense once the drug exists, two parties are feuding over it, and we take those things as givens. But the *ex ante* point is that if you can copy the drug freely, other drugs may not come into existence in the first place. People won't have as much incentive to create them. It's a delicate trade-off, and the patent laws are the legal system's current solution to it. They give the inventor of the drug a limited right to the exclusive manufacture and sale of it. The same story could be told about copyrights in books or music. Once books and music exist (*ex post*), there's a great case for free distribution of them. But then they are less likely to exist at all next time (the *ex ante* point).

Instead of evidence or a drug or a song, our subject could be a whale. Imagine that we live in the golden age of whaling, and a dispute has come up between a party who harpooned a whale and another who captured the animal later while it still was swimming for its life. Who has the better claim to it? Various *ex post* arguments come to mind: putting a harpoon in a whale doesn't make you the owner of it; it's still swimming around and might live for years more. We call this an *ex post* argument because it assumes that everything in the case already has happened: a whale was harpooned, got away, and then was caught by someone else; the question for the court is simply who keeps it. The *ex ante* angle on the problem is different. It means asking how the decision about *this* whale will affect what other whalers do later—and how the whole industry will fare as a result. The courts that were confronted with these questions in the nineteenth century didn't always answer them the same way, but they always did tend to worry about whether their decisions, however appealing they might have seemed in the case at hand, would create trouble for everyone else down the line. The size of the trouble depended, as usual, on details, such as whether a whaler would be likely to give up the job if he couldn't count on collecting the whales he harpooned.

An extreme example was presented by the finback whale. The usual method of hunting it was to throw a bomb lance, or exploding harpoon, into its back; the whale would disappear, die, and wash up on shore days later. The lance would still be there, and its owner would appear to claim the whale. Then one day a passerby found one of the whales washed up on shore and decided to keep it. The whaler responsible for the kill complained, and the court found his argument unanswerable: if the passerby were allowed to keep the whale, "this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder."⁶ One might find this an appealing consequence of letting the passerby win if one didn't like whaling, but the court unsurprisingly wanted to protect an industry on which many communities in the state depended.

By this point it might seem as though *ex ante* arguments come up with respect to lots of legal questions. Actually that may be an understatement. About *every* question of law it is possible to ask what the *ex ante* effects of a decision one way or the other would be. We merely have been looking at examples where that question has great and obvious importance—where there can be no doubt that the court's decision between the parties will affect the incentives of others. The case where the effect on incentives is most in doubt probably is the first one about the bank

robber and the hostage; one might wonder whether the court's decision really would have much effect on the behavior of either banks or thieves. As we saw, courts consider the *ex ante* argument decisive even there; but it's possible that they are wrong, and there are plenty of other cases where the ability of courts to affect anyone's incentives is controversial. Think of a case about a car accident, and an argument that a judgment in favor of the driver on some issue will give bad incentives to other drivers. One can ask how the legal knowledge will be transmitted to those other drivers (might insurance companies have a role to play here?), what other incentives drivers have that might blot out the signals sent by the law, and so forth. Those are good questions, but they can't be asked until one sees the *ex ante* argument in the first place.

There are those who regard just about every legal question as calling for resolution entirely on *ex ante* grounds: entirely on the basis, that is, of what decision between the parties will create the best incentives for others in the future.⁷ The adherents to this approach write books, hold meetings, and even have their own name: economists. They prefer the *ex ante* perspective because it is the point of view relevant to the things economists care about. Trying to decide who should win on an *ex post* basis—that is, just looking back and assigning blame—is basically a distributive exercise. It's a decision about how a stake should be divided, about who should pay whom. Those decisions are of no interest to most economists because their usual goal is to figure out how to increase the amount of value in the world, not how to divide it up once it exists (except insofar as the act of dividing it up affects how much of it gets created in the first place). From that standpoint the *ex ante* perspective is the only one that matters because it is the court's only chance to do something useful—something that will cause events to work out better next time and thus prevent some waste, instead of just sorting out the blame for a disaster after it's too late.

Meanwhile, of course, the parties to a case naturally care very much about who pays whom, and so does the legal system. That is why *ex post* arguments are important as well as the *ex ante* kind, and why the tension between them is interesting. But many of this book's chapters nevertheless amount to lessons in how to think about legal problems the way an economist would. We will be spending time on this because the *ex ante* style of reasoning is less intuitive to most people than the *ex post*. It opens the door to fascinating insights about why legal rules look the way they do, and the insights often aren't obvious; they involve subtleties that take some help to see. The next chapters begin to reveal and explain them.

SUGGESTIONS FOR FURTHER READING. The scholarship analyzing legal questions from an ex ante point of view—in other words, by considering the incentives created by various answers to legal questions—is endless, but a classic introduction to this perspective is Frank H. Easterbrook, *The Court and the Economic System*, 98 Harv. L. Rev. 4 (1984). Some sophisticated recent discussions focusing on particular implications of the ex ante perspective are Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. Rev. 1803 (1997); Lucian A. Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 Mich. L. Rev. 601 (2001); and Mark A. Lemley, *Ex Ante and Ex Post Justifications for Intellectual Property*, 71 U. Chi. L. Rev. 129 (2004). For more skeptical accounts of appeals to incentives in legal argument, see Paul H. Robinson and John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 Geo. L.J. 949 (2003); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413 (1999); and Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?* 42 UCLA L. Rev. 377 (1994).