

# The United Airlines Forcible Removal: Economics and Law

April 17, 2017. 3:28 p.m.

## *Abstract*

These notes are for my G406 class and anyone on the Web who is interested. I will update them sometime. I have been busy doing my taxes and celebrating Easter, so please excuse the mess. I still hope this will be useful to people seeking information about this situation. As far as I know, nobody has provided any article even half as good as this, even though I probably still have lots of mistakes. There are lots of interesting issues, and even the expert lawyers who have posted things on the Web or in magazines have missed most of them, which is one reason I fear I have made mistakes— I have to try to answer questions nobody else has even asked, such as whether Dr. Dao could get specific damages instead of expectation damages for breach of contract.

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This paper: <http://www.rasmusen.org/papers/united.pdf>.

My original April 13 or 14 version had lots of mistakes. It's getting better over time.

I would like to thank Dave Hickisch, Dan Larsen, Peter Watts, the IU Law and Economics Lunch, and the bros at Economics Job Market Rumors for their input.

## WHAT HAPPENED

The United Airlines Kerfuffle of April 2017 is an excellent story for learning about economics and about law. I have seen an amazing amount of bad analysis, so I'm provoked to write this up. Also, I will teach it in my regulation class today, since it's such a good example of various things they've learned in the semester.

Here's what apparently happened (see [The Washington Post](#)). A flight from Chicago to Louisville was fully booked. This was a United Airlines flight, but it was operated by one of their low-cost partners, a separate company that is allowed to use United's name.<sup>1</sup> The flight was not overbooked; there was a seat for each passenger. United, however, decided it wanted to kick four passengers off so it could seat four employees who were needed in Louisville for a flight the next day. United first offered coupons worth \$400 plus a hotel room to any passenger who would voluntarily exchange their seat for one the next day. Nobody accepted, so United upped the offer to \$800 in coupons. Nobody accepted that either. The passengers were by this time seated in the airplane. United selected four passengers based on how much they'd paid for their tickets, whether they were loyal customers, etc. Three of them left peaceably. The fourth, 69-year-old Dr. David Dao, She was instead told to leave after Dr. Dao was removed. United called the police, who dragged him off forcibly. He bumped his face on something in the process and was bleeding. [His wife was also told to leave](#), though, oddly enough, she had not been bumped earlier. The other passengers were completely shocked at the violence. They jeered at the four United employees and told them they should be ashamed to work for the company.

The next day, President Munoz of United Airlines issued a statement (I am told, just for internal company use, but inevitably available to the public) blaming Dr. Dao and expressing regret that sometimes overbooking causes passengers to be bumped (recall that this flight was

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<sup>1</sup> I should talk about the connection between United Airlines and its partners more, and find out what that connection is.

*not* overbooked. He praised the police and the United employees.<sup>2</sup> A vast tidal wave of United Airlines jokes hit the Internet and the comedy shows, and public opinion was aroused. The stock price of United Airlines gyrated, and the value of the company's stock, its market capitalization, fell by something on the order of \$400 million.<sup>3</sup> President Munoz then issued a second statement that was milder, and then a third statement, signed "Oscar", which said they were going to review their policies and announce the results on April 30, two weeks later.<sup>4</sup> The [third statement](#) also said, "The truly horrific event that occurred on this flight has elicited many responses from all of us: outrage, anger, disappointment. I share all of those sentiments,..." though from his first statement it seems it took several days for him become horrified, outraged, angered, and disappointed.<sup>5</sup>

It was also discovered that Dr. Dao, an immigrant from Vietnam, had lost his medical license for trading pain pills for homosexual acts from a former patient.<sup>6</sup> He did not go to prison, though convicted of a crime. Psychiatric evaluations indicated his mind was disconnected enough from reality that it was not safe for him to return to being a doctor until 2015, when he was allowed to. His wife, who was with him

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<sup>2</sup> I need to get the details on exactly what has happened to the suspended police. It seems several have been moved to different jobs or sent home but with pay continuing. At EJMR, someone thought that meant they were being punished. Actually, this is the response police chiefs, who are under political control, always make when something controversial happens, even if the officers are 100% justified. It is an easy way to appease public opinion while not really hurting the officers, who may even be getting a vacation and who can be privately praised while being publicly investigated.

<sup>3</sup> United's stock price may have bounced back. The effect is maybe not identified, because they had very good news at a Monday presentation to analysts unrelated to the current fiasco. [Article here](#). [This article](#) is not very useful.

<sup>4</sup> Mr. Munoz [was interviewed on TV on April 12](#).

<sup>5</sup> I should add the CEO statements, which I didn't have time to before.

<sup>6</sup> Sarah Hoyt notes that it seems the Louisville newspaper knew the name of the doctor was Dao before anybody else. Did United leak it to them together with the info on his dirty past? Leandra Lederman emailed me some info casting doubt on United's culpability.

but not bumped, is also a doctor, and he lives in a beautiful mansion in Kentucky. He said he needed to be hospitalized after being dragged out of the plane, and he hired lawyers immediately, [who say](#) “that Mr. Dao had suffered a concussion, broken nose and two lost teeth, and would require reconstructive surgery.”

I may have some of those facts wrong. In general, I may be wrong on facts, since I am relying on what I see on the Web, so please correct me if I’m wrong. Note that some of what I say is deliberately vague. United’s market capitalization might have fallen \$400 million, or it might be \$200 million or \$600 million— it depends on the time at which you look at the stock price— but what is important is that it was in the 100’s of millions of dollars.

#### ANALYSIS

This case is like a question case for a capstone exam to get a law degree. It has contract, tort, criminal law, bailment, trespass, airline law, common carriers, FAA regulations, administrative law, admiralty, statutory interpretation, corporate law (I think the airline was a wholly owned subsidiary of United), agency law, bailment, malicious prosecution, unlawful arrest, how a counsellor should deal with a client for whom publicity matters more than winning a lawsuit, and practical lawyering matters such as whether enforcing one’s right would cost too much and whether the law controls the outcome when one litigant is so evil and the other so sympathetic. I guess this last brings in Jurisprudence, since Holmes’ Bad Man would instead say in that case that the evil litigant loses under the law. See [“The Path of the Law,”](#) Oliver Wendell Holmes, Jr. 10 Harvard Law Review 457 (1897).

I suppose I am saving law firms a lot of time with this memo, if they find it. That’s okay. . You’re welcome to my free consulting! If you want me to explain things to you individually, though, I’ll charge an initial fixed sum plus an amount similar to your hourly rate. It would be worth it, as you no doubt realize. My legal analysis is spotty and not entirely to be trusted, but it does a lot of issue-spotting.

1. IS IT ILLEGAL AND MORALLY WRONG (TWO DIFFERENT THINGS) TO OVERBOOK, TELL SOME PASSENGERS TO GET OFF, AND TAKE THEM OFF BY FORCE IF NECESSARY?

No. Everybody knows about overbooking, and most people would agree that it makes sense. Not everybody with a reservation shows up for a flight, and if the flight were exactly booked, that means some seats would go to waste. Thus, if there were an airline that didn't overbook, it would charge higher prices. Any airline is fully able to voluntarily stop overbooking and advertise that to potential customers— but that airline's prices would be higher. Only JetBlue does that— and I am surprised to hear people say they do— so it seems customers are not willing to pay that much extra to avoid the possibility of getting bumped.

Once we agree that an airline is entitled to overbook, it is obvious that it should have the right to take passengers off by force if necessary. A passenger with no legal right to be there is trespassing, and the owner of the plane has the right to call the police to remove trespassers— and in, fact, to charge them with criminal trespass. Once there, the police are full entitled to use whatever force necessary. If the trespasser resists, they can manhandle him. If he pulls a gun (not likely on the airplane, but think hypothetically), they are entitled to shoot him dead. Ultimately, the rule of law depends on force. The only reason we can stop ordinary people from using violence is by authorizing the police to do so when it's necessary.<sup>7</sup>

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<sup>7</sup> On EJMR, there is good discussion of whether the Rule of Law always requires the Death Penalty, as I think De Maistre says and I say in my G406 book. Also on EJMR there is a connection to the Barnes case that I wrote an amicus brief for, on whether citizens can legally resist illegal police behavior. Barnes v. Indiana, "Brief of John Wesley Hall, K. Babe Howell, Eric Rasmusen, Steven Russell, and Ronald S. Sullivan as Amici Curiae in Support of Appellant's Petition for Rehearing," Indiana Supreme Court, Case No. 82S05-1007-CR-343, (legality of resistance to illegal police entry, 2011). <http://www.rasmusen.org/published/rasmusen-2011-Barnes-Amicus.doc> .

I see no reason to blame the police in this incident. I would not even blame them for Dr. Dao bleeding from the mouth. It is impossible to evict a trespasser by being gentle. The easiest way would be to threaten to whack him on the head with a truncheon and then do it if he continues to resist. I would support that myself (or, better, a taser because it's safer)—and it would save on police manpower and black eyes— but most Americans would rather have several police struggle with the arrestee for a while instead, and that's what they did.

So, unless further facts come out, the suspension of a police officer is unjust. There may well be further facts on this— the status of the police is unclear. It seems they were Chicago Dept of Aviation (CDA) "Aviation Officers but were holding themselves out to be fully sworn law enforcement officers of the City of Chicago. They have only limited powers of enforcement of Illinois and city statutes delegated by the City of Chicago. I should think, however, that the airport would have some staff authorized to remove unruly passengers using violence, since otherwise such passengers could not be removed.

I doubt it matters legally that the passengers were already on the airplane when they were bumped. Some people, including lawyers, make a big deal of that. It does indicate that execution of the contract was in process, but that's true from the moment that a passenger gets a boarding pass. [Dorf on Law](#) commenter Destin notes that if *Boarded vs. Lobby* is an issue, United could simply tell all the passengers to deplane and after that they wouldn't be boarded yet and so could be denied boarding. have said that in airline law, boarding is not complete until the doors are closed, and "boarding" is a term of art here and does not mean simply that someone has entered the airplane. It seems to me that the contract and regulatory sections describing denial of travel for overbooking and denial of travel for cause (e.g., being "malodorous") are not meant to separate pre-boarding from post-boarding. If the flight is overbooked, it does not matter whether that is discovered pre-boarding or post-boarding— somebody has to be bumped. If someone is malodorous, it does not matter whether that is discovered

pre-boarding or post-boarding. According to the interpretation of [some commenters](#), the airline wouldn't be able to deny boarding to a smelly person— they'd have to wait till he boarded and then eject him.

But remember— United did not overbook. They kicked passengers off so they could put employees on instead.

## 2. DID UNITED ACT LEGALLY IN CALLING THE POLICE?

No. I am a bit shaky on the law here, but it seems there are two reasons why United's behavior was illegal.

### 2A. WAS IT ILLEGAL AND MORALLY WRONG FOR UNITED TO OFFER ONLY \$800 IN COUPONS PLUS A HOTEL ROOM IN EXCHANGE FOR BUMPING A PASSENGER?

Yes. The contract between passenger and United Airlines says in [section 25\(4\)](#):







#### Compensation for Passengers Denied Boarding Involuntarily

For passengers traveling in interstate transportation between points within the United States, subject to the EXCEPTIONS in section d) below,... If UA offers Alternate Transportation that, at the time the arrangement is made, is planned to arrive at the Passengers Destination or first Stopover more than two hours after the planned arrival time of the Passengers original flight, **UA shall pay compensation to Passengers denied boarding involuntarily from an Oversold Flight at the rate of 400% of the fare** to the Passengers first Stopover or, if none, Destination with a maximum of 1350 USD.

The section D exceptions do not apply here.

I looked up the price of tickets on that United flight and they're mostly over \$200. See the screenshot below. Thus, United was required

to offer more than \$800 in cash value. It did not, so United breached the contract. (There are interesting issues of what “the fare” means, but I don’t think they’re relevant here. Is the fare what the particular passenger paid, or the average fare? What if the person is using a flight coupon or frequent flyer miles and paid nothing for his ticket?)

Best flight <a href="#">Learn more</a>				
<b>\$195</b> round trip		11:55 AM – 2:15 PM United · Trans States Airlines DBA U · ORD-SDF	1h 20m	Nonstop
<b>\$204</b> round trip		9:00 PM – 11:22 PM United · Trans States Airlines DBA U · ORD-SDF	1h 22m	Nonstop
<b>\$229</b> round trip		5:40 PM – 8:02 PM United · Republic Airlines DBA U · ORD-SDF	1h 22m	Nonstop
<b>\$262</b> round trip		7:35 AM – 9:55 AM United · Skywest DBA United Exi · ORD-SDF	1h 20m	Nonstop
<b>\$262</b> round trip		2:55 PM – 5:17 PM United · Republic Airlines DBA U · ORD-SDF	1h 22m	Nonstop
<b>\$386</b> round trip		9:11 PM – 11:20 AM*1 United · Republic Airlines DBA U · ORD-SDF	13h 09m	1 stop 8h 40m in EWR

Worse yet, United did not offer cash. The contract is in terms of dollars, legal tender. United coupons are not legal tender. Their market value is far below their face value. A United coupon for \$800 would have a market value of, perhaps, \$500, being generous. But even that is higher than the relevant value here, because usually such coupons are nontransferable— they have to be used by the person named, and by a certain date. That means the true value would be \$0 for many passengers, those who would not have any reason to fly United over the next year.

Again, though, remember: this was not overbooking. Thus, we have a second legal problem for United.

## 2B. WAS IT ILLEGAL AND MORALLY WRONG FOR UNITED TO BUMP A PASSENGER TO SEAT ONE OF ITS EMPLOYEES?

Although everybody agrees that United can overbook, and although the contract says United may bump a passenger for any reason, FAA regulations forbid airlines from bumping passengers in oversold



flights in order to seat their own employees.<sup>8</sup> So United was legally wrong in a second way (contracts cannot override federal or state regulations).<sup>9</sup> From Yves Smith at [Nakedcapitalism.com](http://Nakedcapitalism.com),

14 CFR 250.2a Policy regarding denied boarding.

In the event of an oversold flight, every carrier shall ensure that the smallest practicable number of **persons holding confirmed reserved space** on that flight are denied boarding involuntarily.

An employee is not a “person holding confirmed reserved space”. On the other hand, this was not “the event of an oversold flight”. The flight was not oversold. FAA regulations and the contract both are silent on what happens if the airline bumps a passenger without any reason whatsoever. Probably it was intended that such passengers would get better treatment than ones bumped by overbooking, but it isn’t written that way. One interpretation is that since the regulations and contract are silent, ordinary contract law governs, and the bumped passenger might not get even 400% of the fare, but would instead just get expectation damages, which might be smaller. This does seem strange, though, because if the flight were oversold by one person and the airline decided for frivolous reasons to bump four people, the regulation and contracts clearly say that the 400% compensation *does* apply—that is an oversold flight, even though the overselling isn’t the reason for most of the bumping.

Note that there is a part of the United contract which United will probably try to apply to this situation but which does not apply:

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<sup>8</sup> I have seen claims that the MAXIMUM an airline can offer is constrained by regulation. I doubt that is true. It is conceivable such a stupid regulation could exist, and even that the airlines would have lobbied for it despite being hurt by it, but I haven’t seen it.

<sup>9</sup> [Aviation Stack Exchange](http://AviationStackExchange) pointed to [order 8000.75](http://order.8000.75) as the only Dept of Transportation regulation close to this case. It says in a lot of places that the airline cannot bump passengers to seat FAA inspectors.

**“RULE 24 FLIGHT DELAYS/CANCELLATIONS/AIRCRAFT CHANGES...”**

B. Definitions - For the purpose of this Rule, the following terms have the meanings below:...

4. Force Majeure Event any of the following situations:...

(d) Any shortage of labor, fuel, or facilities of UA or others;...

D. Force Majeure Event - **In the event of a Force Majeure Event, UA without notice, may cancel, terminate, divert, postpone, or delay any flight, right of carriage or reservations (whether or not confirmed) and determine if any departure or landing should be made, without any liability on the part of UA. UA may re-accommodate Passengers on another available UA flight or on another carrier or combination of carriers, or via ground transportation, or may refund any unused portions of the Ticket in the form of a travel certificate.”**

What this says is if there is “any shortage of labor”, United can bump a single passenger and compensate him pitifully, with just a voucher for a flight from Chicago to Louisville, a voucher that would be practically worthless. That sounds bad, but the key is what “shortage of labor” means. The full phrase is “Any shortage of labor, fuel, or facilities of UA or others.” In context, it clearly means that UA cannot operate this particular flight because it doesn’t have the staff, fuel, or equipment, *not* that it is *force majeure* if UA wants to kick off a passenger to move its employees around the country. This is also clear from the common meaning of “force majeure”, which is a force that blocks action and is not under the control of the parties. For example, I am told that if Homeland Security tells the airline that it has to seat a federal marshall on a flight, the airline has no choice: it must bump a passenger or get in deep trouble with the law, no matter what the contract and regulations say. That is *force majeure*.

For purposes of the contract United could have redefined “force majeure” to mean “convenience”, just as it could redefine it to mean “baseball games” or “Taiwan” or any other meaning, but a contract has

to redefine a term clearly if it departs from ordinary usage. Note, too, that the common law says contracts are construed against the drafter when they are unclear, and United is the drafter.

Was United also morally wrong? That's easy. First, United was inflicting significant harm to its customers in order to provide convenience to its employees. United could have hired a driver and car to take the employees from Chicago to Louisville—it just wanted to save money. Or, [Marginal Revolution commenter 14](#) said it would cost about \$10,000 to hire a charter jet, which is faster. To be sure, the passengers could have made emergency arrangements too, but the passengers are passengers, not big corporations in the transportation business, and it's much harder for them to make arrangements. Moreover, all of those passengers had planned on being at Louisville at a certain time, whereas the airline employees presumably just needed to be there the next day for work and had nobody waiting at the Louisville airport to take them home.

But let's suppose that there was no way to get the four employees to Louisville in time for their jobs on a flight the next day. Isn't it much more important to get them there than to get the passengers? If the employees aren't there, wouldn't a flight have to be cancelled?

First, maybe no flight would have to be cancelled. If United paid enough, surely it could find pilots and stewardesses in Louisville on short notice. What happens when employees suddenly get sick? Do they cancel flights?

Second, cancelling a flight is not the end of the world. Airlines do it all the time. We passengers suspect that often it's because they don't make enough money because the flight is filled up, not for any good reason. But whatever the reason, flights do get cancelled.

Third, theft is immoral even if the thief can make good use of what he steals. Suppose I own a house I bought for \$100,000 and a real estate developer could make a million dollars if he had the land. It would be unjust for him to take my house, give me \$20,000 in exchange,

and bulldoze it for his new apartment building, even if somehow the law allowed him to do so. Suppose Dr Dao were walking in the airport and a United Airlines pilot grabbed him, knocked him to the ground, took his ticket, and tucked an \$800 coupon into his pants pocket to make him feel better. That is essentially what happened.

A friend asked me whether I was talking about “moral” from a biblical point of view or something else. I answered that I think most systems of morality would arrive at the same conclusions here. It’s not hard to get agreement that theft is immoral, whether your listeners are Christians, pagans, or economists.

## 2C. REVISED THOUGHTS ON CONTRACT AND TRESPASS<sup>10</sup>

There are two parts to this legal dispute: contract, and property. Contract I have talked about above. That is clearest. United Airlines breached its contract with Dr. Dao. But then we have to determine what the remedy is for that breach of contract, and after that, property law enters. If United Airlines has the right to the seat on that flight, Dr. Dao violated their property right, and is guilty of something like Trespassing or Theft. If Dr. Dao has the right to the seat, then United violated *his* property right, and United is guilty of something like False Arrest and Robbery.

I think a strong case can be made that Dr Dao is guilty of Theft under Illinois law, though I think the case for United to be guilty of Robbery is even stronger (perhaps because of my natural bias in favor of the morally right party, though). Heres the Theft theory. United breached its contract with Dr Dao. It then told him to get off the airplane. He refused, remaining in a seat owned by United. Under Illinois law, that is not Trespassing (no general statute exists) or Trespassing

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<sup>10</sup> Discuss procedure and the practical realities of law. Here, the jury would be hot against United, regardless of the law. United would have to win at the motion to dismiss stage, and even there might fail due to bias, of the judge. Also note that United would want to settle quickly to avoid a sequence of news items on stages of the legal process.

on Property (which only applies to real property) or Trespassing on a Vehicle (which includes airplanes but only if you illegally enter or operate, not if you enter legally and then refuse to leave). But in Illinois, Theft is:

720 ILCS 5/16-1 (a) A person commits theft when he or she knowingly:

(1) Obtains or exerts unauthorized control over property of the owner;

There is also a case to be made for Robbery, on the part of United, though I don't think it could be proved beyond a reasonable doubt because probably that requires the United employees to know that the property taken was not theirs (a general criminal law point I am ignorant on— mens rea?) The Robbery theory is that United breached the contract and Dr. Dao was in this special case entitled to specific performance because money damages were not a good substitute and would have come years too late because of the slowness of the courts, and performance of the contract would have been easy. Moreover, we would have to say that since specific performance was the correct remedy, he had a property right to a seat on that flight, and United could not take that property away from him by force.

In Illinois, the law on Specific Performance as a remedy is typical. It is an equitable remedy. It is usually not granted for personal services, but I think (though I may be wrong) that that means it is not granted if a particular person must provide the service, which would introduce voluntary slavery via contract law. Here, the contract is for a service, but by no particular person; it is the provision of an airplane flight.

[\(810 ILCS 5/2-716\)](#) (from Ch. 26, par. 2-716)

Sec. 2-716. Buyer's right to specific performance or replevin.

(1) Specific performance may be ordered **where the goods are unique** or in other proper circumstances. ...

(3) The buyer has a right of replevin for goods identified to the contract **if after reasonable effort he is unable to effect cover for**

**such goods or the circumstances reasonably indicate that such effort will be unavailing ...**

The crucial difference between the Theft theory and the Robbery theory is in whether Dr. Dao had a Liability Rule right to his seat on the flight or a Property Rule right (see Calabresi and Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral; Harvard Law Review 1972).

It is probably also relevant that United is a common carrier, with special duties towards its customers. Most sellers are free to refuse to do business with buyers they don't like, for example, but common carriers cannot refuse unless they have a good reason that applies generally, e.g., a malodorous customer. I don't think a common carrier would be free to reject an otherwise suitable customer because it has a personal preference for someone else—that someone else being, in this case, its own employee. I don't know that area of the common law, though.

Illinois trespass law covers vehicle trespass and real property trespass. Vehicle trespass includes airplanes but refers to entering illegally or operating, not Dr. Dao.

[720 ILCS 5/21-2](#) Criminal trespass to vehicles. (a) A person commits criminal trespass to vehicles when he or she knowingly and without authority enters any part of or operates any vehicle, aircraft, watercraft or snowmobile.

Thus, it seems that, for example, a taxi passenger who refused to leave the taxi would not be guilty of vehicle trespass. I wonder what law would allow the police to remove him, if any? The theft statute might apply, and I would argue for its application. It is also an "illegal bailment" sort of statute.

[720 ILCS 5/16-1](#) (a) A person commits theft when he or she knowingly:

(1) Obtains or exerts unauthorized control over property of the owner;

3. DOES IT MAKE SENSE FOR THE AIRLINE TO HOLD AN AUCTION, OFFERING MORE AND MORE MONEY UNTIL THEY HAVE FOUR VOLUNTEERS, INSTEAD OF STOPPING AT SOME FIGURE SUCH AS \$1,350 AND PICKING PASSENGERS RANDOMLY TO BUMP?

Yes. The idea should be to put the people on the flight who most want to be there. We can't just ask, because everyone would say they had good reasons for wanting to be in Louisville today rather than tomorrow— in fact, they would all truly have good reasons. If we have an auction, then the four people who most value cash compared to flying today will accept cash, and they will all be better off than they took the flight. The only loser will be United, who has to pay them, but even United is happier than if its employees couldn't fly.

Suppose various people on the flight value flying today at 100, 300, 350, 425, 426, 500, 900, 1,100, 1,300, 9,000, 20,000, and 50,000 dollars. (This last guy needs to be in Louisville tonight to close a business deal.) If United bumps them randomly, it might well bump the \$50,000 passenger. It might not bump the \$100 passenger at all. If there is an auction, it could be run various ways. One good way is to keep raising the price until four people say they accept, and then give them that price.<sup>11</sup> Here, that means first the \$100 guy would sign on, then the \$300, then the \$350, then the \$425, and they would each receive \$425. Voila, the auction price has allocated the seats to the people who least need to get to Louisville tonight!

But what, you might say, if none of the passengers is willing to accept any price to fly the next day? That won't happen. If the price rises to \$50,000, even the businessman in the example would be willing to be bumped, and the others would be extremely happy. United Airlines would be very unhappy, of course. Maybe United really isn't willing to pay more than \$1,000 per seat, because it doesn't the four employees to be in Louisville *that* badly. Well, in that case, United can

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<sup>11</sup> At the law lunch we discussed different auction forms. I think they would all be equivalent by the Revenue Equivalence Theorem for which Vickrey won the Nobel Prize in economics, but I'd have to check.

give up on bumping passengers once it offers \$1,000. Its unwillingness to pay more is a sign that United doesn't really benefit that much from getting the seats for its employees.

Couldn't the passengers do the auction on their own? Why didn't Dr. Dao hold his own auction, starting at \$100 in real cash (not coupons) and paying, perhaps, \$1,500 to exchange with another passenger?

If there was more time available, that might have happened. Dr. Dao could have paid another passenger \$1,500 and then sued United to get his money back. But it is much easier for United to hold an auction than for an ordinary person to figure out how that would work. Also, Dr. Dao would be outraged that he would have to pay another passenger as well as United, and pay an emergency price. If he sued United, to be sure, he would win in court and get compensation from United. His lawyer fees would be on the order of \$5,000, though, and his time billed at the hourly rate of a doctor might be another \$5,000, and the court wouldn't make United pay him for those losses.

What about a hold-up problem? If United has an auction for overbooking, and sometimes a passenger gets \$5,000 for giving up his seat, won't people start making reservations just so they can get the rewards? No. The amount of overbooking is entirely under United's control. It can avoid paying compensation if it doesn't overbook at all. If it has overbooking on 90% of its flights, that's United's fault and it's the one who should pay for miscalculation, so they have incentive to overbook less. I doubt anybody would become a professional giver-up of seats, because it is too risky. On most flights, there would be no rewards offered, because even though United would overbook by a few seats, not all passengers would show up. On others, United would have to have an auction, but the compensation would be small— perhaps \$200— especially if professional speculators who didn't really want to fly were there, since they'd be willing to accept even very low offers and



would bid against each other. Only on a few flights would the auction price rise to \$5,000.<sup>12</sup>

#### 4. HAS UNITED AIRLINES ACTED WISELY?

No. This is an easy one, it seems, but we have to ask why the president of United Airlines would do something this stupid.<sup>13</sup>

One of my colleagues said that the president broke the first rule of crisis management: “Don’t listen to anything the lawyers say.” The first job of a lawyer is to keep you from losing when people sue you, or keep you from being convicted of a crime. If that is your only objective, you shouldn’t say a single word to anyone about the case, and you especially should not say you’re sorry. What you say is evidence, and your lawyer wants as much control over the evidence as possible. You might make a mistake if you say anything, so he’ll tell you to keep quiet, or to issue vague statements that don’t mean anything. He wants to save your side of the story for the trial, because he wants you to win.

You, on the other hand, want to protect your reputation, and maybe to behave as a decent human being. Your lawyer does not get paid to protect your reputation. He does not get a bonus if you behave as a decent person. He only gets paid to make you win the lawsuit.

Very often, your reputation is much more important than winning the lawsuit, or even than winning the criminal case. It certainly is worth reducing your chance of winning by 2% in order to keep your reputation from declining by 90%. That means you should get your side of the story out quickly and fully, and you should accept any blame you deserve. This is true for individuals and it is even more true for

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<sup>12</sup> Someone in a blog comment suggested that if the airline just says they need 4 seats or the flight won’t leave and tells the passengers to sort out among themselves which 4 won’t go, things would go better. Discuss why this wouldn’t work.

<sup>13</sup> A standard Public Relations adage is that what everybody remembers is your first statement after a crisis, none of your later corrections or apologies.

companies, because any company that is still operating has a reputation to lose, but many people already have ruined their reputations. (Companies can ruin their reputations too, but then they go bankrupt and nobody bothers to sue them.)

The best lawyers are not just legal experts, but are truly “counsellors”. They explain the legal situation to their clients, and they also explain if the client might want to hurt his legal situation slightly in order to preserve his reputation or to avoid sin. If the client doesn’t care about his reputation or about sin, the lawyer has done his job warning him. If the client is willing to lose the case in order to be a good person or keep his reputation, that should be fine with the lawyer too. The lawyer’s job is to explain the options and give advice, not just to win cases.

For lawyers to give good advice, though, they have to be rewarded for it. If a company fires its lawyers whenever they lose lawsuits, its lawyers will only care about winning lawsuits. The intelligent client needs to avoid the temptation to blame the lawyer if things go badly in court because the lawyer told the client how to preserve his reputation. Also, of course, clients need to understand the ways lawyers think, and that most lawyers are *not* good counsellors. Thus, the client should not just ask the lawyer what to do, but also exactly how risky it would be if the client does something like apologize to the victim or issue a public statement.

A separate reason why President Munoz issued a statement like he did is the reason why the Roman Catholic Church’s priests and bishops covered up for pedophiles: defending your people against outsiders. A good boss looks out for his employees. He is loyal to them if they are loyal to him. He is like a good friend, sticking with them in bad times and risking his own neck. Besides, people in the organization are the ones he is most sympathetic too, because he spends most of his waking hours among them, listening to their concerns. It was only natural for a Catholic bishop to protect his priests against outsiders. But the bishops made two big mistakes in doing so. First, when your employees

are seriously at fault— or your friend— then principle should trump loyalty. Second, you have to define “outsider” right. Too many bishops thought of the priesthood as being “the church” and the laity as being bothersome outsiders. (I was a bit shocked when the Pope generously declared one year “The Year of the Laity”— this sounded to me like calling for “The Year of the Roman Catholic”.) Similarly, the United President defended his employees when he should have either criticized them or, better, put the blame on upper-management people like himself who had designed the bad procedures or created bad incentives. And he thought of customers as outsiders, where he should have thought of them more as partners in the value creation process.



## 5. WHY DID UNITED’S STOCK PRICE FALL SO MUCH?

Stock prices fall if there is new, bad, information about a company. The main reason the stock price fell was because this incident revealed information to customers about the value of the product United Airlines was selling, airplane trips.

- A. United will bump passengers from flight not just from overbooking but if they want to transport employees.
- B. United does not care much about bad publicity from mistreating passengers, unlike most airlines, from which we may deduce that they do mistreat passengers more often.
- C. United will not offer passengers much in compensation if someone has to be bumped.
- D. United values its employees more than its customers.

Stock traders do not care directly about customers, but they know that now customers will think of United Airlines as the worst airline for several years, and United will have to lower its prices to compete

with other, normal, airlines. Indeed, I'd suggest to United that they change the name of the airline entirely.

There are three other bits of new information about United.

First, the president is an idiot. If he didn't realize his statement was stupid, how can he be trusted to make truly difficult decisions about airliner purchases, union negotiations, and bond financing? And what kind of publicity and marketing departments does United have, that let this statement go out without telling the president he was going to cost the company an extra \$50 million with it?

Second, the president and his staff are careless about details. In his statement, he talked about overbooking, but there wasn't any overbooking in this case— it was caused by putting employees into passenger seats. The first thing the president should have found out was what actually happened. Apparently he didn't read his briefing materials or listen to what people told him. Worse yet, his staff didn't either.

Third, United's planning for which employees are where when is bad. Why were four employees suddenly needed in Louisville? It seems there is no slack at all in their system. Suppose this flight hadn't existed. Then, it seems, United would have been short one flight crew in Louisville. How many times are their cancelled flights due to simple mismanagement like this, as opposed to mechanical failure and other routine problems?

Fourth, United's choice of who to involuntarily bump is stupid. They chose to bump Mr. Dao and three other people rather than Mr and Mrs Dao and two other people. Also, apparently United then bumped her, for no reason noted in the news report, though perhaps she was objecting loudly to her husband being dragged off. So in the end, United travelled with one seat empty.

6. THE PROFESSIONAL MEDIA IS BAD AT DISCOVERING THE FACTS,  
AND BAD AT KNOWING WHEN IT DOESN'T KNOW.

Lots of professional reporters got facts and law wrong (me too, some!).<sup>14</sup> They seem, for example, to have taken what President Munoz said about overbooking as being true without checking it and without reading the numerous early accounts that said it was employee seating, not overbooking. Or, the reporters were too dull to know the difference between overbooking and simply kicking passengers off. For a discussion, see Yves Smith at [Nakedcapitalism.com](http://Nakedcapitalism.com). In contrast, if you looked at amateur sources on the Web, the facts were available. That requires some work, though, and, more importantly, the ability to sift the Web for what sounds right and what sounds silly and to then know how to check the right-sounding stuff to know that it really is right. For example, when someone on the Web said FAA regulations prohibited bumping passengers for employees, that sounded plausible, so I googled to find a source that cited the exact regulation.

So remember the old saying: “Don’t believe everything you read in the newspapers.”

## 7. SOME THOUGHTS ABOUT THE LESSONS FOR BUSINESS

When something obviously stupid is done, dont assume the lesson is learned. Tell people it was stupid, OR THEY WILL DO IT AGAIN. I just hear this last week in a different context. A law professor said that a group of his faculty had told students they liked a certain student idea, without telling the students that the fact that these particular professors liked it meant next to nothing as far as the law school and university actually implementing the idea. Thus, the students were encouraged, but were doomed to disappointment with 90% probability. He didn’t tell the professors, though, that they should have warned the students that other faculty or administrators would probably block the idea. And then the same group of professors did it again.

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<sup>14</sup> Links to wrong CNN, New Yorker, New York Times reports. <https://www.inc.com/cynthia-than/the-controversial-united-airlines-flight-was-not-overbooked-and-why-that-matters.html>

## APPENDIX NOTES

These are things to add or change. Probably I will have to just list them here and clean them up after I finish filling out various tax returns.

CFR 250.5 (c) **Carriers may offer free or reduced rate air transportation in lieu of the cash** or check due under paragraphs (a) and (b) of this section,if -

(1) **The value of the transportation benefit offered**, excluding any fees or other mandatory charges applicable for using the free or reduced rate air transportation,**is equal to or greater than the cash**/check payment otherwise required; (2) The carrier fully informs the passenger of the amount of cash/check compensation that would otherwise be due and that the passenger may decline the transportation benefit and receive the cash/check payment; and  
 (3) The carrier fully discloses all material restrictions, including but not limited to, administrative fees, advance purchase or capacity restrictions, and blackout dates applicable to the offer, on the use of such free or reduced rate transportation before the passenger decides to give up the cash/check payment in exchange for such transportation. (See also 250.9(c))

But in the auction, they dont have to say that. Did they disclose to all 4 Passengers here that they could have Cash instead?

CFR Section 250.5 (e) **The Department of Transportation will review the maximum denied boarding compensation amounts prescribed in this part every two years** except for the first review, which will take place in 2012 in order to put the reviews specified in this section on the same cycle as the reviews of domestic baggage liability limits specified in 14 CFR 254.6. **The Department will use any increase in the Consumer Price Index for All Urban Consumers (CPI-U) as of July of each review year to calculate the increased maximum compensation amounts.**

econ DEPT. CAsE OF A lecturer who was turnd down for his next contcate on those grounds.

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<sup>15</sup> Passengers taking pictcures on cellphones. Apparently against regulations, but United didn't enforce the regulation. No good source yet. Lunch conversatino.

<sup>16</sup> Maybe make the point that it's good to have dumb people follow rules rather than improvise.

<sup>17</sup> Admiralty law gives broad powers to the captain of a ship. In this case, though, the airline was still "moored to the dock" so I think admiralty law would not apply.

<sup>18</sup> We should all join frequent flyer programs, even if we never use the Miles, in order to be safe on the bump priority list.