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Remedies: A Guide for the Perplexed

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REMEDIES: A GUIDE FOR THE PERPLEXED

DOUG RENDLEMAN*

“The fox knows many things, but the hedgehog knows one big thing.”

-Archilochus

INTRODUCTION

I wrote this modest effort for the edification of anyone who is puzzled about the law school course in Remedies, including, but not limited to, a law student, a law dean, and, its primary audience, a beginning or experienced law teacher. I based it on several perplexed decades of teaching and writing about Remedies.

I will begin by identifying the reason I am perplexed. Archilochus, famously quoted by Isaiah Berlin in *The Hedgehog and the Fox*, wrote that “[t]he fox knows many things, but the hedgehog knows one big thing.”¹ Archilochus referred to the fox’s wide variety of ideas versus the hedgehog’s single defining idea. The starting point for our study is that Remedies is the law of Archilochus’s fox.

To illustrate my point about the foxlike variability of Remedies, let’s take a little step outside our subject and summarize the context for Remedies. The United States lacks a single private law appellate court. The United States Supreme Court limits itself to federal issues. This may be just as well, because when it deals with a federal issue in Remedies, the Court has been at best confusing, as in contempt,² and at worst, wrongheaded and regressive, as in punitive damages.³

* Huntley Professor, Washington and Lee School of Law. Thanks to the *Saint Louis University Law Journal* and its staff for planning this top-notch symposium and for helping me to bring this Article to print. I wrote this Article in the summer of 2012 after an excellent experience with my spring semester Washington and Lee Remedies class, and I thank those students for improving these modest efforts. Thanks also to the Frances Lewis Law Center for supporting my 2012 summer research and writing.

1. ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY’S VIEW OF HISTORY* 1 (1953).

2. See *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994); Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 390–99 (2000); Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer*

Each state in the Union and each separate jurisdiction has a legislature and a court with the final appellate word over its constitutional, statutory, and common law of remedies. The states' legal cultures differ. The business community ranks the states from plaintiff-favoring "Judicial Hellholes" like West Virginia to its safer neighbor to the east, Virginia.⁴ Many basic remedies issues sport parallel lines of contradictory authority. The canny plaintiffs' lawyer might reverse the business community's hierarchy, perhaps using their list of "Judicial Hellholes" to pick a friendly venue.

To alter Tip O'Neill's aphorism only slightly, all remedies are local. Local legal or courthouse cultures vary widely. Lexington, where I work, is the county seat of rural Rockbridge County, Virginia. The courthouse sees very few jury trials. When trials do occur, defense verdicts are not unusual. When they favor a plaintiff, Rockbridge County juries are notoriously "tightfisted," often returning verdicts for medical expenses and wages only, hence, no pain and suffering in Rockbridge County. So far back as memory runs, there have been no jury verdicts in Rockbridge County for punitive damages.⁵ In 2012, a young man's wrongful death, which would probably have settled for around \$1 million in St. Louis where this Article is published, brought the startlingly low Rockbridge jury's verdict of \$100,000.⁶

Litigated lawsuits, and even more so those that are appealed, are the visible tip of an almost invisible iceberg of disputes that are settled either without lawsuits or with lawsuits that are settled without trial. These are negotiated and settled in the local courthouse culture in the shadow of the state's common and statutory law, often for "an undisclosed sum." A lawyer advancing a client's interest in an adversary system lacks any abiding interest in developing a coherent and logical legal system. "[P]ractitioners and judges do not normally give a pin for legal development. Their duty is to these clients and the proper

Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age, 37 RUTGERS L.J. 355, 376 (2006).

3. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?*, 7 U. ST. THOMAS L.J. 1, 23 (2009).

4. See AM. TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2012/13 (2012), available at http://www.judicialhellholes.org/wp-content/uploads/2012/12/ATRA_JH12_04.pdf.

5. Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089, 1168–69 (2006).

6. Matt Chittum, *Jury Finds Lexington Negligent in 2006 Maury River Park Drowning*, ROANOKE TIMES (July 3, 2012), www.roanoke.com/news/breaking/wb/311122. According to judicialhellholes.org, downstate Illinois, just across the Mississippi River from St. Louis, would have been even better for the plaintiff's family. See AM. TORT REFORM FOUNDATION, *supra* note 4, at 3 (ranking Madison County, Illinois third on its list of "Judicial Hellholes").

disposition of this case.”⁷ Settlements and almost all unappealed trial court decisions fly under the professor’s radar, focused as it is on appellate decisions. Empirical studies and statistics of lawsuits and their results, remedies, are scarce. The best studies are from Cornell and the National Center for State Courts.⁸

Remedies teachers are an introspective lot. Only a dozen years ago, they published a law review symposium about teaching Remedies in the *Brandeis Law Journal*, which included my modest contribution.⁹ In the meantime, veteran Remedies teacher Otto Stockmeyer favored the field with his advice to a Remedies beginner.¹⁰ Also, Jeff Berryman wrote about Remedies teaching and scholarship from a Canadian Commonwealth perspective.¹¹ Finally, Remedies teachers are extremely fortunate to have Professor Douglas Laycock’s comprehensive article about their course’s genesis.¹² Thanks to the *Saint Louis University Law Journal* for organizing and publishing this splendid symposium.

In the dozen years since Brandeis’s symposium, the United States has suffered through a serious recession. Legal education has not escaped. “Legal education,” my colleague Ben Spencer began, “is under attack.”¹³ The critique of law school features the charge that law school is not preparing its students for law practice.¹⁴ This critique focuses my remarks about the Remedies course. The truths that appeared to me in 2000 haven’t changed much, but I will address them in a different way today.

7. S. F. C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 77 (2d ed. 1981); see also *id.* at 61 (noting that the transformation of the early common law system was not the aim of lawyers at the time).

8. For the latest study on this topic, see Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?*, 8 J. EMPIRICAL LEGAL STUD. 325 (2011). The Court Statistics Project at the National Center serves as a national archive of state court caseload statistics. See, e.g., NAT’L CTR. FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS* (2012), available at http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx.

9. Doug Rendleman, *Remedies—The Law School Course*, 39 BRANDEIS L.J. 535 (2001).

10. Norman Otto Stockmeyer, *An Open Letter to a Colleague Preparing to Teach Remedies*, 12 T.M. COOLEY J. PRAC. & CLINICAL L. 115 (2010).

11. Jeffrey Berryman, *The Law of Remedies: A Prospectus for Teaching and Scholarship*, 10 OXFORD U. COMMONWEALTH L.J. 123 (2010).

12. Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008).

13. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1951 (2012).

14. See THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 177–216 (2010); Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 353 (2012); Spencer, *supra* note 13, at 1951–52.

I turn to my three major topics, Coverage of Remedies, Remedies in the Classroom, and Teaching Remedies Outside the Classroom.

I. COVERAGE OF REMEDIES

To begin with, what topics ought to be included in a course in Remedies?

The modern law school course in Remedies emerged only in the 1950s when legal realists created the modern Remedies course.¹⁵ Generally speaking, they exited from civil procedure and combined existing courses in Damages, Equity, and Restitution into one class on Remedies.¹⁶ A lot was gained by bringing the related subjects together. Some things were lost—substantive equity and substantive unjust enrichment restitution.¹⁷

What do we mean by a remedy? Neither an instructor's colleagues nor her Remedies students will have a firm grasp on that question, which gives an instructor freedom and flexibility in choosing what to cover.

There are some answers, beginning with negative ones. A remedy is neither substance nor procedure. The rules the judge or jury applies to determine whether the defendant is liable to the plaintiff comprise the substantive law. Procedure is the quadrille of steps that the court and the litigants take to process a lawsuit.

Is there a positive definition? In our Remedies vocabulary, a remedy is what the court does at the end of a lawsuit for the prevailing plaintiff. A remedy is what the court can and will do for the winning plaintiff—and to the losing defendant.

The court's remedies for a successful plaintiff fall under three major headings: damages, equitable remedies, and restitution. In the specialized vocabulary of Remedies, damages are compensatory damages. So far as money can, compensatory damages put the plaintiff where she would have been if the defendant hadn't violated her rights.¹⁸ Punitive damages and legal restitution spring from different policy bases; they are money recoveries that aren't compensatory. Punitive damages are taken from the defendant to punish and deter.¹⁹ Restitution is stripped from the defendant to prevent the defendant's unjust enrichment.²⁰ Other money relief includes attorneys' fees and interest. The Big Three Equitable remedies are the injunction, specific performance, and equitable restitution, in particular, the constructive trust. In a Remedies course, restitution usually includes a component for the students to grapple

15. Laycock, *supra* note 12, at 252.

16. *Id.* at 246.

17. *See id.*

18. 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.1, at 281 (2d ed. 1993).

19. *Id.* § 3.1, at 283.

20. *Id.* § 4.1(1), at 551–52.

with the core concepts of unjustness and enrichment; it also introduces legal and equitable restitution remedies and measurement.

To illustrate arranging the law under the plaintiff's relief, many Torts scholars organize their subject around theories of substantive liability: intent, negligence, and strict liability. A Remedies approach to Torts is organized under the different headings that stem from the plaintiff's relief: the preventive injunction, compensatory damages based on plaintiff's loss, disgorgement restitution based on defendant's gain, and punitive damages to punish and deter.

The litigants and the court have two remedies inquiries. First, to select or choose which remedy or remedies. For example, should the plaintiff receive compensatory damages, an injunction, or both? Second, to measure or define the chosen remedy. For example, will the injured plaintiff recover \$100,000 or \$150,000 for her pain and suffering damages? The Remedies course should prepare a future lawyer to be alert to the range of remedial options to decide which will be most advantageous for a client.

Remedies is a court-developed common law field like Contract, Tort, Property, and Restitution. A statute will govern the successful plaintiff's remedy because courts administer the common law at the sufferance of the legislature. Having said that, legislatures often leave courts on their own in determining plaintiffs' remedies, although sometimes the legislature even misdirects courts and undermines sound solutions.²¹ Remedies vary between common law, statutory law, and constitutional law; for example, a court will be more willing to supervise an injunction that implements the plaintiffs' constitutional right to an education than an injunction or specific performance order that enforces a covenant in a shopping-center lease.²²

Two available approaches to a Remedies course are, first, transsubstantive, examining each of the remedial categories, and, second, studying remedies in substantive categories, wrong-by-wrong—tort, contract, and property. My own approach is some of both. This is because I think that, although a common core exists and should be studied, the “forms of action” survive in the sense that remedies rules in contract, tort, and property differ enough to warrant separate analysis. Also, studying remedies in substantive categories requires the students to compare and choose remedies. Otto Stockmeyer advised the beginner that “a more practice-oriented approach is the study of Remedies wrong-by-wrong.”²³

21. See, e.g., Craig Robert Senn, *Ending Discriminatory Damages*, 64 ALA. L. REV. 187 (2012).

22. See DOUG RENDLEMAN & CAPRICE L. ROBERTS, *REMEDIES: CASES AND MATERIALS* 383 (8th ed. 2011).

23. Stockmeyer, *supra* note 10, at 116.

Having identified the basics, I will add that the Remedies course can be eclectic. I have taught Remedies out of ten different books, most of them, however, my own; but I have never taught Remedies the same way twice. Student interest and emphasis changes. Trying out new decisions varies coverage. Last spring I started my Remedies course with restitution because the prior year I had ended with a forced march through restitution that my students thought was both too fast and not enough. The change was, I thought, successful.

Other principal issues about the Remedies course are global. What role should history play? Knowing where we were then helps us to understand where we are now. Chief Justice Roberts quoted Justice Holmes's famous epigram that "a page of history is worth a volume of logic."²⁴ In restitution, *Moses v. Macferlan* is obsolete as a teaching case because of the procedure the court followed; but a quotation from Lord Mansfield succeeds as an early example of broad restitution leading to a quest for limiting principles.²⁵ Remedies includes what may be the students' only careful examination of law, chancery, merger, and the modern issue of jury trial. In states like Virginia and Delaware where equity is examined on the bar exam,²⁶ Remedies is the law school course in equity.

The puzzle of discretion that runs through Remedies grows out of history. Before reformers merged the law and chancery courts, law courts were said to apply rigid rules to facts, chancery to deemphasize mechanical decisions in favor of contextual decisions based on discretion.²⁷ Although we still hear paeans to equitable discretion, the modern Remedies course may productively ask its students whether, after merger, the "Chancellor's" discretion exceeds a jury's measurement of, for example, a personal-injury plaintiff's pain-and-suffering damages.

Distinguishing right and remedy is crucial to the study of Remedies. "[T]he creation of a right," the Supreme Court wrote, "is distinct from the provision of remedies for violations of that right."²⁸ Remedies scholars would be more pleased if the distinction between right and remedy did not introduce a remedy that is narrower than the right. For although a plaintiff's remedy is

24. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

25. See RENDLEMAN & ROBERTS, *supra* note 22, at 475 ("[T]he gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." (quoting *Moses v. Macferlan*, 97 Eng. Rep. 676, 681 (K.B. 1760))).

26. See VA. BD. OF BAR EXAMINERS, RULES 1 (2012), available at <http://www.vbbe.state.va.us/pdf/VBBERules.pdf>; BD. OF BAR EXAMINERS OF THE SUPREME COURT OF DEL., Board RULES 3 (2012), available at <http://courts.delaware.gov/BBE/docs/BBERulesv6.pdf>.

27. See Dobbs, *supra* note 18, § 2.2, at 67.

28. *eBay*, 547 U.S. at 392.

separate from her substantive right, her remedy should advance the substantive goal, or at least not frustrate it.

Working backward, courts and legislatures should develop the substantive law rule around the available remedies. After the initial decision choosing the plaintiff's remedy, the judge's or jury's measurement and definition of that remedy can be contextual and discretionary.

What role does legal theory play in Remedies? Remedies casebooks examine market-economic theory.²⁹ A basic economic insight is that, in measuring and shaping a plaintiff's remedy, a court should avoid an obviously wasteful solution.

Market economics is helpful in Remedies up to a point. The economist's search for the most efficient result is based on seeking the lowest-cost avoider and deterrence, signaling incentives to prevent future casualties.³⁰ Deterrence is not really connected to the parties' present litigation or to the plaintiff's actual or potential loss; it is prospective in looking to the future, not retrospective, not compensatory for the plaintiff, and not really remedial in the sense defined above.³¹ Finally, economic jargon is inaccessible to lawyers and courts that prefer legal reasoning based on values and legal rules.

Another "school" of legal theory is corrective justice and its variations, as opposed to distributive justice. Corrective justice theory maintains that the court should deal with the normative imbalance between rights of the wrongdoer and rights of the victim.³² I confess that, in Remedies, I haven't been able to make much of corrective justice. Jeffrey Berryman has written to my approbation that private law theory has neglected compensation for substantive theories like corrective justice. The study and teaching of Remedies, he maintains, could restore an imbalance by considering compensation in context.³³

In the conventional division between private law and public law, much of Remedies as studied falls on what some think of as the private law side. Remarking on a personal injury lawsuit, one court wrote that "[o]f course, the State does not have any interest in the question of who wins this lawsuit, or the extent to which one party prevails over the other."³⁴ That court's narrow approach should be rejected. A court's personal injury damages decision affects the distribution of wealth, the government's social welfare budget, the

29. See, e.g., RENDLEMAN & ROBERTS, *supra* note 22, at 702–03.

30. See Jeffrey Berryman, *The Compensation Principle in Private Law*, 42 LOY. L.A. L. REV. 91, 97 (2008).

31. *Id.* Fortunately, Ted White told us that Torts scholars' "consensus" is that compensation prevailed. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 152 (1980).

32. See Berryman, *supra* note 30, at 100.

33. *Id.* at 127–29.

34. *Williams v. Bright*, 658 N.Y.S.2d 910, 913 (N.Y. App. Div. 1997).

deterrence value of potential defendants' standard of care, and the jurisdiction's business climate. A decision reprobating misconduct and setting a tortfeasor's payment to its victim affects its moral climate. "'We the People,'" the late Leon Green wrote, "are a party to every lawsuit and it is our interest that weighs most heavily in its determination."³⁵

In addition, courts used remedies in the most obvious public law areas. The courts in the United States used complex and protracted injunctions to desegregate formerly segregated public schools.³⁶ In states with official race segregation, the substantive issues were simple, leaving sweeping remedies issues.³⁷

Let's move from planning the course into the classroom.

II. REMEDIES IN THE CLASSROOM

Remedies, what a winning plaintiff gets, is among the most practice-ready and practical courses in a student's law school experience. A lawyer's client is interested in results, not the procedural and substantive dance to reach those results. Remedies is client-centered and outcome-oriented. Remedies make a difference in peoples' lives. In addition, Remedies reviews a student's first-year courses, brings them together, and focuses on results. Remedies is a capstone course because it brings other courses together around the idea of relief.

The literary movement known as the New Criticism emphasized a close reading of fiction and poetry, focus on a self-contained text, and careful scrutiny with a dictionary close at hand.³⁸ My English professor a few years ago was a New Critic. I think that a law student needs to know what the court said before they know what to think about it. A student will learn most of what he needs to know from a careful reading of what the court says. I don't think that students learn to read and analyze a court's remedies decision in their first-year classes. At some point in the Remedies course, students begin to think about, discuss, and argue for alternative remedial solutions that reach different results—a crossover has occurred, the remedial lights have come on.

Law is not a self-contained science. Understanding the solution to a client's problem is larger than the substance in court decisions. A Remedies

35. Leon Green, *Tort Law Public Law in Disguise I*, 38 TEX. L. REV. 1, 1 (1959); see also John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 581 (2005) (describing the "tort-law-as-public-law movement").

36. See Doug Rendleman, Brown II's "All Deliberate Speed" at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?, 41 SAN DIEGO L. REV. 1575, 1595 (2004).

37. See *id.* at 1579–80.

38. See Michael Delahoyde, *New Criticism*, INTRODUCTION TO LITERATURE, <http://public.wsu.edu/~delahoyd/new.crit.html> (last visited Feb. 13, 2013).

course ought to move beyond doctrine to add a historical and contextual dimension. Remedies has ethical, social, and political dimensions. And it's as pragmatic as whether the court can define, measure, and administer a particular remedy.

Remedies can be emotionally draining. Teaching wrongful death has always been difficult for me, especially because my casebook combines wrongful death with race, social class, gender, and sexual orientation.³⁹ To say that these subjects are excruciatingly difficult for law students in their early twenties to discuss openly in a class is an understatement. The issues are difficult for their instructor as well because I am a parent and I sympathize with society's underdogs, both of which affect my class presentation.

My Remedies classes are almost all discussion. I regard a lecture by the "sage on the stage" as an inefficient method of transferring facts, rules, and information.⁴⁰ Active learning has not always been easy to sell or conduct because passivity is easier for many students. I ameliorate my discussion class sessions a little by taking volunteers and usually not cold-calling on students. This practice has the unfortunate side effect of allowing a passive student to remain on the sideline where he doesn't obtain the self-educating benefit of mixing it up with classmates and his professor.

Classroom discussion of decisions, questions, and problems develops alternative solutions and the arguments for each. A Remedies student learns the lawyer's skill of choosing and advocating a client's "best" solution and predicting the result. Discussion classes develop oral communication skills because students sharpen their advocacy skills and learn to appreciate the human dimension in decision-making.

In discussion classes, students acquire and rehearse analytical and practical skills that they will actually use in law practice and in all other employment settings. Their verbal facility will be evaluated from the beginning by more senior lawyers, their peers, their judges, and their opponents. The classroom provides a low-risk forum for students to cultivate these skills.

A computer-based lecture can be part of the information transfer that occurs before class because a student can remember the content.⁴¹ However, exclusively online learning, even if "interactive," will diminish the synergistic classroom community of law school learning. It lacks the personal, face-to-face conversation and interaction that encourages active learning. Coming face-to-face to test the information against contradictory ideas occurs in class

39. RENDLEMAN & ROBERTS, *supra* note 22, at 52–76.

40. See Dan Berrett, *How 'Flipping' the Classroom Can Improve the Traditional Lecture*, CHRON. HIGHER EDUC., Feb. 24, 2012, at A16.

41. See Pamela Hieronymi, *Don't Confuse Technology with College Teaching*, CHRON. HIGHER EDUC., Aug. 17, 2012, at A19.

and conversation. Only then can mature evaluation, reflection, synthesis, and organization proceed.

Students' use of laptop computers in class has two opposing risks: that a student will become a stenographer and be so busy capturing everything that he won't use his mind or, on the other hand, that a student will disengage, tune out, and play games or gamble on the stock market. I am willing to assume those risks. My students use their laptops in the classroom, a technique that will continue in law practice or other employment. I encourage students to use their word processor to brief cases, take notes, develop an outline, and write their exam. The computer also increases interactivity in class, as students will look up cases, Jett Williams's website,⁴² and Betty Nestlehutt's YouTube video.⁴³ Handheld electronic devices and gadgets probably moot the laptop banners' case anyway.

Powerpoint can be overused and overload students with lectures in spoken and written forms. Washington and Lee classrooms' Powerpoint screen is in the middle of the classroom with a small stand for the maestro on the far side. Although everyone who knows me is aware that I have virtually no ego, I haven't been willing to abandon the middle of my classroom to a Powerpoint screen. Students' cellphones are almost always off, but if a phone rings, I say "You answer it; I'm busy trying to teach a class." It's usually not a student's phone anyway, but rather, the classroom's media staff phone.

Two other skills emerge from Remedies students' classroom crucible. One skill students don't learn as passive recipients of rule-transfer lectures is the ability to use the knowledge about legal rules to solve a problem, to resolve a dispute.⁴⁴ As a first-year Civil Procedure teacher on my days off from Remedies, I found that many first-year law students cannot read a statute or procedure rule and solve a simple problem. In the upper-level Remedies class, actual remedies solutions are specific, and they force students to put the rules in operation. Discussion of remedies helps students learn to apply their abstract knowledge.

A student's routine legal reasoning moves from rule to result. More sophisticated reasoning moves from policy justification, to rule, to result.⁴⁵ The

42. JETT WILLIAMS, <http://www.jettwilliams.com> (last visited Jan. 11, 2013). Students may choose to visit the site when we cover *Stone v. Williams*, 970 F.2d 1043 (2d Cir. 1992).

43. *We the People—Challenging Georgia's Malpractice Caps*, YOUTUBE (Mar. 10, 2010), <http://www.youtube.com/watch?v=FFKS3FrUe4>. Students become familiar with Ms. Nestlehutt's story when they read *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010).

44. See Elizabeth J. Samuels, *Stories Out of School: Teaching the Case of Brown v. Voss*, 16 CARDOZO L. REV. 1445, 1504–08 (1995); Spencer, *supra* note 13, at 2033 n.357.

45. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 104–05 (1988) (referring to what the text calls "policy justification" as "social congruence."); FREDERICK

best problems to discuss in class, or to put on an exam, involve policy or rules that produce unsatisfactory results. A student's developing judgment in identifying a remedy and arguing for it helps to reconcile incongruities in policy, rule, and result.

Another skill that Remedies fosters is characterization between substantive categories of law.⁴⁶ A centaur is a mythical creature with a human torso mounted on a horse's body. Should the hypothetical ticket agent sell the centaur a passenger ticket or load him in the large-animal car? For a more realistic example, Remedies students have had both Torts and Contracts in their first year. A plaintiff will usually argue that "this is a tort" because a tort may yield punitive damages and emotional distress damages, while the defendant will argue for contract and lower exposure. "The tort action," Milsom wrote, "was now being consciously manipulated to do the contract job."⁴⁷ A student will also learn this important skill along with its argumentative and analytical technique in Conflicts of Laws.

A Remedies student's most obvious benefit from the Remedies course is its application in the profession after law school. Less obvious are the skills of self-education and judgment, for Remedies people often know how things will work out and how to get there. The principal benefit of classroom teaching for the teacher is to be paid for learning, for curiosity.

What do you do after Remedies class is over?

III. TEACHING REMEDIES OUTSIDE THE CLASSROOM

The classroom is the law professor's basic bailiwick. I reject the canard that the only faculty time devoted to instruction occurs in the classroom. Teaching versus scholarship is a false opposition. Teaching feeds on research, research grows out of teaching. Developing and disseminating new knowledge is built into a professor's job. In addition to preparing before class and reviewing after, research-driven teaching includes scholarship, pro bono, and perhaps consulting.

I cannot separate my Remedies classroom teaching from developing a Remedies casebook and teacher's manual.⁴⁸ I combine my daily teaching cycle with my several-year casebook-revision cycles. When a new edition of the casebook is published, the publisher sends me a word-processing version to download. I develop the next edition of the casebook and the teacher's manual together. I may read my assignment on the computer screen or in the physical

SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 93–100 (1991) (referring to "substantive justifications").

46. See, e.g., RENDLEMAN & ROBERTS, *supra* note 22, at 644–72 (explaining the difference between tort and contract remedies).

47. S. F. C. MILSOM, *A NATURAL HISTORY OF THE COMMON LAW* 45 (2003).

48. The latest version is RENDLEMAN & ROBERTS, *supra* note 22.

book. After each class, I turn to my computer to correct any errors and suppress any infelicities in the “rough draft” of the next edition. Then I polish and improve it and make notes to return to later. I print the teacher’s manual, mark it up while preparing for class, use it for class notes in class, and revise the computer version of it after class. If I have a potential new principal case, I print and photocopy it to try out on my class.

The subject matter of Remedies is as varied as it is difficult. Beginning and experienced Remedies teachers often mention uncertainty about the related substantive subjects that give rise to the various remedies.⁴⁹ The Remedies smorgasbord’s other side is that one of the concealed benefits of teaching Remedies is being curious and interested in learning about everything.

This leads me to mention some of my ideas about a scholarly agenda for Remedies. Many topics in Remedies are intrinsically difficult and don’t yield clear answers. This difficulty is apparent in basic distinctions like civil contempt versus criminal contempt and law versus equity. Misreadings of the Supreme Court’s contempt decisions, as in *International Union, United Mine Workers of America v. Bagwell*,⁵⁰ for example, are palpable.⁵¹

The nadir of the United States Supreme Court’s law-equity confusion may be *Mertens v. Hewitt Associates*.⁵² The Court read “equitable relief” in the ERISA statute to “refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).”⁵³ One of the Court’s “typical” examples is simply incorrect, for mandamus is legal relief.⁵⁴ A second is half-incorrect and misleading, for restitution has both legal and equitable forms,⁵⁵ legal being the more important. Finally, the idea that compensatory damages were not “typically available in equity” may also be inaccurate since chancery courts frequently awarded a successful plaintiff compensatory damages.⁵⁶

Discretion in decision-making is a fertile field for inquiry. Careful scholars have published several well-researched and well-reasoned articles calling for

49. See Susan A. Channick, *Learning to Teach Remedies*, 39 BRANDEIS L.J. 685, 686 (2001); Gregory L. Ogden, *Challenges in Teaching Remedies*, 39 BRANDEIS L.J. 611, 611 (2001).

50. 512 U.S. 821 (1994).

51. See Livingston, *supra* note 2, at 390–99; Ressler, *supra* note 2, at 376.

52. 508 U.S. 248 (1993).

53. *Id.* at 256.

54. See John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error* in Russell, Mertens, and Great-West, 103 COLUM. L. REV. 1317, 1353 (2003); Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1614 (2002).

55. See Langbein, *supra* note 54, at 1354; Murphy, *supra* note 54, at 1614.

56. See Langbein, *supra* note 54, at 1350–51; Murphy, *supra* note 54, at 1615; Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063, 1067 (2003).

discretion in equity.⁵⁷ Their proposals are nevertheless sobering for realists about human nature like this one.⁵⁸

Following publication in 2011 of the *Restatement (Third) of Restitution and Unjust Enrichment*, many Remedies instructors turned their attention to disseminating the knowledge that the restatement process had developed. That turned out to be a vast open field for future effort. In 2012, for example, in *Georgia Malone & Co. v. Rieder*,⁵⁹ the Court of Appeals of New York decided a quantum meruit restitution case without mentioning either quantum meruit or restitution. The court mistakenly added a new element to the plaintiff's claim for restitution: a direct relationship between the plaintiff and the defendant.⁶⁰ The direct relationship prerequisite may stem from the court's borrowing a crypto-privity "awareness" concept from the law of contracts and adding it to restitution, where it doesn't belong. The court also randomly mingled legal restitution, quantum meruit, with equitable restitution, the constructive trust.⁶¹

We should expect better from the highest court in our principal commercial state. The New York court's troublesome *Georgia Malone* decision will be likely to obfuscate professional understanding of restitution for decades. A further example of the primitive level of professional understanding of basic restitution principles is that the summary of the decision in my daily email from the Association of Corporate Counsel referred to the blunder as a clarification.⁶²

57. See, e.g., T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L.J. 509 (2010); T. Leigh Anenson & Donald O. Mayer, "Clean Hands" and the CEO: Equity as an Antidote for Excessive Compensation, 12 U. PA. J. BUS. L. 947 (2010); T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63 (2010); T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455 (2008); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003).

58. My own treatment of discretion is in Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63 (2007).

59. 19 N.Y.3d 511 (N.Y. 2012).

60. See *id.* at 519.

61. See *id.* at 518–19. I examined the *Restatement (Third) of Restitution and Unjust Enrichment* sections one and two and found nothing to support the court's decision. Restitution needs some kind of remoteness/proximate cause cutoff, but an "awareness" relationship is not close to the right one. The 2011 *Restatement* grants unjust enrichment and the cause of action, but adjusts measurement of restitution if profits are remote. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51cmt. f (2011). Other cutoff possibilities are defendant's intent, causation, and foreseeability, all usually bearing on measurement of restitution, not the defendant's initial liability. See generally Mark P. Gergen, *Causation in Disgorgement*, 92 B.U. L. REV. 827 (2012).

62. Thomas Michael & Rena Andoh, *Court of Appeals Clarifies Standard for Unjust Enrichment*, LEXOLOGY (Ass'n of Corporate Counsel, Washington DC), July 16, 2012, available at <http://www.lexology.com/library/detail.aspx?g=4957bc4a-a60c-4d42-8732-f23aed96c4bb>.

A beginning Remedies instructor might scan the gap between the 2011 *Restatement of Restitution* and *Georgia Malone*, as well as decisions like it, and decide that explaining and criticizing the *Restatement* and bridging the professional gap might comprise an interesting and productive scholarly agenda.⁶³

The transitions between compensating the plaintiff with damages, disgorgement restitution based on the defendant's unjust enrichment, and punishment through punitive damages could also profit from further examination. Not thinking that my 2011 Washington and Lee article should be the last word on this subject,⁶⁴ I commend the topic to others.

The grey areas between remedies could be better mapped than they are. In *eBay v. MercExchange*, the Supreme Court defined the injunction-damages border in ways that this Remedies scholar and others find wanting.⁶⁵ In addition, damages versus injunctions as remedies for a defendant's nuisance are the subject of a longstanding debate complete with an extensive literature, one that I am examining in another article.⁶⁶

Plaintiffs' personal injury litigation is financed by contingency fee contracts and fed by pain and suffering damages.⁶⁷ A plaintiff's recovery for nonpecuniary interests, pain and suffering, mental anguish, emotional distress, and lost dignity will remain a controversial topic on Remedies scholars' damages agenda. A judge or jury has difficulty measuring nonpecuniary damages and striking a "just" balance between penury and excess (windfall, if you like). Since a plaintiff does not encounter these injuries in money, the judge or jury has difficulty translating them into money. Accordingly, defendants fear unpredictable and potentially crushing damages verdicts. Most

63. In his indispensable review of the *Restatement (Third) of Restitution and Unjust Enrichment*, Doug Laycock recommended that law schools add a course in Restitution. Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 951–52 (2012); see also Caprice L. Roberts, *Teaching Remedies from Theory to Practice*, 57 ST. LOUIS U. L.J. 713, 714 (2013) (advocating for institutions to support the teaching of both Remedies and Restitution).

64. Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 WASH. & LEE L. REV. 973 (2011).

65. See, e.g., DOUG RENDLEMAN, *COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT* 86 (2010); Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203 (2012); Douglas Laycock, *Introduction to Remedies: Justice and the Bottom Line*, 27 REV. LITIG. 1, 4 (2007).

66. Doug Rendleman, *Rejecting Property Rules-Liability Rules for Boomer's Nuisance Remedy: The Last Tour You Need of Calabresi and Melamed's Cathedral* (Washington & Lee Pub. Legal Studies Research Paper Series, Paper No. 2013-02, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2212384.

67. See Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DEPAUL L. REV. 399, 401 (2006).

tort reform is personal injury damages reform.⁶⁸ The best examples are caps on plaintiffs' "noneconomic" or pain and suffering damages. Remedies professors' responsible scholarship will play a constructive role in these legal developments.

Another developing area of damages law is a plaintiff's recovery of nonpecuniary damages for a defendant's negligent injury to the plaintiff's personal property. One example, a plaintiff's recovery for her lost pet, involves a variation on the characterization discussed above. For if the court characterizes a plaintiff's pet as property, it will bar her from recovering emotional distress damages. Because of the changing role of domestic animals from a working dog, such as a cattle- or sheep-herding collie, to a pet, the city-suburban dweller's adorable companion animal, this rule is unstable. Below are two recent examples.

First, the Supreme Court of New Jersey, classifying a dog as property, rejected recovery of emotional distress damages by a pet owner who had watched her pet being killed by the defendant's dog.⁶⁹ Second, though a Michigan court allowed a homeowner to recover mental anguish damages from the defendant's negligent destruction of her home, the court, not very convincingly, distinguished a no-recovery rule for personal property, a pet, from a recovery rule for real property.⁷⁰ These are articles waiting to be written.

Remedies scholars might profitably examine remedies beyond damages, injunctions, and restitution. May the court order a defendant to apologize?⁷¹ A forced apology is probably a form of injunction. Professor Sam Bray has written useful articles on declaratory judgment and predetermined remedies.⁷²

Only law professors specialize in Remedies as an overarching topic. Lawyers specialize in substantive areas along with the remedies in that area. A lawyer, high in her specialized silo, often doesn't understand the law outside. When lawyers wander out of their specialties, they are frequently lost in a remedial wilderness. One consequence is that "[l]itigators," as Laycock wrote, "would benefit from consulting remedies specialists more often than they do."⁷³

68. Julie Davies, *Reforming the Tort Reform Agenda*, 25 WASH. U. J.L. & POL'Y 119, 131 (2007).

69. *McDougall v. Lamm*, 48 A.3d 312, 314 (N.J. 2012).

70. *See Price v. High Pointe Oil Co.*, 817 N.W.2d 583, 590–91 (Mich. Ct. App. 2011).

71. *See generally* Robyn Carroll, *Beyond Compensation: Apology as a Private Law Remedy*, in *THE LAW OF REMEDIES: NEW DIRECTIONS IN THE COMMON LAW* 323 (Jeff Berryman & Rick Bigwood eds., 2010); Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006).

72. *See* Samuel L. Bray, *Announcing Remedies*, 97 CORNELL L. REV. 753 (2012); Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275 (2010).

73. Laycock, *supra* note 12, at 167.

The statutory penalty, which is a common remedy in consumer protection and other statutes, provides me with a transition from scholarship to pro bono service. In *Edwards v. First American Corp.*,⁷⁴ defendants argued that plaintiffs who sued them for statutory penalties but who lacked compensatory damages had no “injury in fact,” a prerequisite for Article III standing to sue in United States court.⁷⁵ On the final day of its term, after receiving briefs, including over twenty-five amicus briefs, and hearing oral argument, the Supreme Court dismissed certiorari as improvidently granted.⁷⁶ One of those amicus briefs was a pro bono brief on behalf of restitution scholars who had concluded that the self-interested litigants lacked a sophisticated understanding of restitution. The brief explained the adverse effect on restitution of a decision that accepted defendant’s argument.⁷⁷ Watching legal developments and putting in a pro bono oar where remedies-related subjects are at issue might lead to more widespread professional knowledge of remedies and prevent judicial blunders like *eBay v. MercExchange*.⁷⁸

I am usually engaged in one or more consulting relationships on issues directly related to Remedies. Most of these are pro bono, some aren’t. Consulting in moderation reminds a professor what is actually happening in law practice. One thing I have learned over and over is that knowledge and research in Remedies subjects is sometimes remarkably thin. This is particularly true in restitution. Almost every article written about restitution by a Remedies professor includes a variation on the *Restatement (Third)* Reporter Andrew Kull’s lament:

Confusion over the content of restitution carries significant adverse consequences. To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is The technical competence of published opinions in straightforward restitution cases has noticeably declined; judges and lawyers sometimes fail to grasp the rudiments of the doctrine even when they know where to find it.⁷⁹

74. 610 F.3d 514 (9th Cir. 2010).

75. *Id.* at 516–17.

76. *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536, 2537 (2012).

77. Brief of Reporter & Advisers to Restatement (Third) of Restitution and Unjust Enrichment as Amici Curiae in Support of Respondent at 31–34, *First Am. Fin. Corp. v. Edwards* 132 S. Ct. 2536 (2012) (No. 10-708).

78. See *supra* note 65 and accompanying text.

79. Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191, 1195 (1995). John McCamus writes that restitution is also not known well enough in Canada. See John D. McCamus, *Unjust Enrichment, “Existing Categories” and Kerr v. Baranow: A Reply to Professor McInnes*, 52 CAN. BUS. L.J. 390, 393, 414 (2012).

Even non-restitution scholars recognize that Kull's arrow hits the bull's-eye.⁸⁰ The Court of Appeals of New York's lamentable decision in *Georgia Malone & Co. v. Rieder* is grim confirmation of the impression that repeating Restitution 101 is sometimes necessary.

CONCLUSION

I began by directing my attention to the charge that law school doesn't prepare its students for practice.

Even though I have taught practical litigation courses and have published a practice-oriented book for Virginia lawyers,⁸¹ I spent several of the formative years of my law-teaching career at William & Mary, home to the nation's first law school. In 1779, a tyro could learn the practice of law by apprenticeship with an experienced lawyer.⁸² Thomas Jefferson founded the law school at William & Mary in 1779 to educate political leaders to serve the new nation that he expected to emerge from the ongoing revolution.⁸³ I can't get over the idea that a law school should work with its eyes up.

A discussion- and problem-oriented course in Remedies prepares a student for the analysis, negotiation, litigation, and decision-making of law practice without abandoning the Jeffersonian ideal.

On another plane, the legal profession is diverse and specialized.⁸⁴ Change is rapid and unpredictable. When I graduated from law school a few years ago, no one would have predicted the rise of the computer, globalization, or the effect of both on the legal profession. One courthouse's culture doesn't carry over to another's. How much of our education was training in yesterday's practice?

I don't think of education for instantaneous practicality, for hitting the ground running on the first day on the job. Nor do I think of education merely to develop a student's "human capital." John Dewey noted in 1897 that "[g]iven the pace of change, it is impossible . . . to know what the world will be like in a couple of decades, so schools first and foremost should teach us habits of learning."⁸⁵

80. See, e.g., John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2117989>.

81. DOUG RENDLEMAN, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA (2d ed. 1994).

82. See Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L.J. 775, 780–81, 784 (2004).

83. See Davison M. Douglas, Opening Remarks: Symposium, *The Restyled Federal Rules of Evidence*, 53 WM. & MARY L. REV. 1435, 1437 (2012).

84. See MORGAN, *supra* note 14, at 208, 210–11.

85. See Michael S. Roth, *Learning as Freedom*, N.Y. TIMES, Sept. 6, 2012, at A23; see also Dan Berrett, *Habits of Mind: Lessons for the Long Term*, CHRON. HIGHER EDUC., Oct. 12, 2012,

My goals in writing these lines are more modest than Maimonides's in *The Guide for the Perplexed*, who wrote that "[m]y object in adopting this arrangement is that the truths should be at one time apparent, and at another time concealed."⁸⁶ Nevertheless, the "law" and practice of Remedies is complex, even messy. It cannot be captured in a unified account. Beyond the pragmatic operation of the adversary system in a federal government, anyone who seeks an overarching theory to explain or drive Remedies will seek in vain. Returning to Archilochus's observation in my introduction that "[t]he fox knows many things, but the hedgehog knows one big thing,"⁸⁷ I will close where I began: Remedies is the law of the fox. I commend it to you.

at A1 (presenting the argument that the real value of a college education is learning habits of mind).

86. MOSES MAIMONIDES, *THE GUIDE FOR THE PERPLEXED* 3 (M. Friedlander trans., 2d ed. 1947).

87. *See supra* note 1 and accompanying text.