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Remedies - The Law School Course

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People who teach and write about Remedies, most of whom are optimists and pragmatists, deal with a world where broken dreams leave only second best solutions. My remarks will substantiate what I think the preceding sentence means for our law school courses in Remedies.

The polity articulates its view of "the good" in its substantive law, comprised of constitutions, statutes, and common law. When a wrongdoer breaches the substantive law, leaving a victim in its wake, a court will rearticulate the substantive law's public value. For our present inquiry, however, the court's more significant role occurs after that substantive decision. When, because of a defendants' violation, the victim's life diverges from "the good," the court's duty is to forge a remedy for the wrongdoer to restore, as far as possible, a condition where the victim's situation matches the public aspiration of "the good." A remedy is what a court, after finding a substantive violation, will do—simultaneously—*for* the victim, *through* the wrongdoer.

This group has been assembled on a premise that we all hold to be self-evidently incontrovertible, that a law of judicial remedies exists that is related to but distinct from the underlying substantive law.[1]

Because the wrongdoer's substantive violation has changed the victim's world for the worse, students of Remedies share with C. Van Woodward, the historian of Reconstruction after the Civil War, "a special awareness of the ironic incongruities between moral purpose and pragmatic result." If Remedies is a science, it is a science of choice between responsible solutions in a world of limited possibilities.

Most judicial remedies require the decisionmaker to select between alternative possible remedial solutions in that world of limits. Some litigated solutions are as straightforward as adding up a column of figures. Most are

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[1] *But see* Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1, 36-37 (2000) (suggesting that remedies be assimilated into substantive rights).

not. What is the difference between a personal injury victim's pain and suffering worth $10,000 or $11,000—between a twenty-foot or a twenty-five-foot buffer zone around an abortion clinic?

Choosing between the alternatives requires the decisionmaker to exercise human and professional judgment. According to Robert Bellah:

> Judgment is the most intellectual of the practical virtues and the most practical of the intellectual virtues. In other words, it is the place they come together. Judgment in this use of the term involves a sense of proportion, of larger meaning, of what a situation requires, at once cognitively and ethically.[2]

I will now state the overarching goal of a law school course in Remedies: to nurture and foster students' professional judgment to choose wisely between alternative remedial solutions within the range permitted by the wrongdoer's substantive violation and the victim's injury.

The instructor's duty is both formidable and awesome; since most disputes are settled after negotiation between lawyers, recent law graduates develop and impose remedial solutions—learning by doing. Settlements will be bargained in the shadow of the law, filtered through their classroom experience.

Judicial remedies are defaults, alternatives to negotiated settlements. Remedies instructors play a large role in teaching and writing about the way courts select and impose remedies.

The authors of our laws have accorded the initial decisionmaker, judge or jury, wide freedom to select a particular solution. The judge or jury is closer to the scene and possesses a sense of the discrete dispute. Moreover most rules that select and measure a remedy after liability has been found, unlike many substantive rules, play a small role in shaping peoples' primary conduct.

The decisionmaker exercises ample discretion, however, within limits. Broad standards like "equity" and "natural justice" are imperfect ways to translate ethical standards into concrete solutions. Many of the decisions these broad standards produce are idiosyncratic, and perhaps mischievous, for they invite a judge or a jury to abandon reasoned consideration and articulation. The result is often a solution based on stated or unstated personal values

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[2] *The True Scholar*, ACADEME, Jan.-Feb. 2000, at 18, 20.

instead of the rules of substantive and remedial law. These solutions provide no guidance for people to use to structure primary conduct or for lawyers to use to settle disputes. Decisionmakers need an intermediate structure of rules, more specific than platitudes, more general than particular solutions.

One reason to curb decisionmakers' discretion is that judicial remedies, distinct from private settlements, are not ivory tower theorizing, but impose concrete solutions on concrete disputes. Legal remedies implement power, not power in some indirect sense of influence or persuasion, but the real force of governmental power. The judge may jail a woman until she reveals where her child is hidden. The government may take a worker's wages or sell a debtor's home to collect a judgment debt. The public ought to be assured that principles to confine the decisionmaker's discretion were available before this government power was exercised.

Theoretical perspectives, although often helpful, are alone unsatisfactory. Can judges create wise professional solutions by theorizing about hypothetical individuals' rational choices to maximize their economic goals? Can courts or legislatures devise constructive remedies premised on a depiction of the law as a buttress for existing power based on class, gender, and race? Economic and identity politics theories are not wrong because they lack explanatory strength. Much of the behavior that ends up in court can be untangled and many disputes resolved by examining rational maximizing factors. Similarly many legal institutions and rules do reflect class, gender, and racial premises.

But single-factor theories fail to explain all human behavior. For example, a judge's application of game theory to the incentives involved in the coercive contempt confinement mentioned above will be based on the premise of a rational adversary. This premise flounders in the face of a contemnor's absolute commitment to a value that is absent from the rational-adversary vocabulary.

Nevertheless an observer of trends in scholarship related to Remedies, particularly in the underlying substantive fields of Contracts, Torts and Property, cannot but agree with the late Christopher Lasch's observation,

> [W]e have writing in which theory, so called, is allowed to set the questions and determine the answers in advance. Theory, so called, has become the latest panacea, the latest source of ready-made answers, the latest substitute for thought. Thinking is hard work and often very frustrating, since it only seems to yield provisional conclusions and to leave one in a greater muddle than ever, and so intellectuals yearn to be released from the burden, to find

some secret formula that will give them definitive, comforting answers and make it unnecessary for them to go through this terrible labor of thought.[3]

To theory as a substitute for thinking, I will add theory as a substitute for the research. For research in primary sources is sometimes dull and often frustrating and often leads to the muddle of "provisional conclusions" Lasch mentioned. But research is indispensable to responsible scholarship and advice.

Putting to one side the nonfunctional distinctions between law and chancery, between contract, tort and property, and between common law, statute and constitution, the decisionmaker must choose the remedy, and measure the remedy chosen. The choice is often between, on the one hand, substitutionary relief, money either to compensate or to prevent unjust enrichment, and, on the other, specific relief, an injunction or specific performance. Here the teacher of Remedies has formidable responsibilities to law students and to the profession.

Remedies teachers and students study money—not fiscal policy, markets, or accounting—but nevertheless money. Money is what successful lawyers chiefly achieve for winning claimants. Money in the form of income is a major reason most of our students are in law school. In this materialistic culture, however, many Remedies instructors resist the urge to convert almost all interests into money.

The debate, which has taken several forms, has focused recently on efficient breach of contracts, specific performance of contracts, and the irreparable injury rule for an injunction. Some scholars' ethical commitment to the substantive right and others' pragmatic sense of the administrative limits on the remedial enterprise affects the choice between specific and substitutionary relief.

The classroom debate about efficient or opportunistic breach of contract is an important one, not because efficient breach happens frequently, but because efficient breach tests ethical commitment to the substantive right against market theory in the crucible of selecting and measuring remedy. One of my most successful class sessions this semester examined Judge Posner's well-known widget example of efficient breach against a) an alternative measure of compensatory damages that would recapture the opportunistic

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[3] Casey Blake & Christopher Phelps, *History as Social Criticism: Conversations with Christopher Lasch*, J. AM. HIST., Mar. 1994, 1310, at 1324-25.

breaching party's surplus profit from the substitute exchange, b) restitution, to prevent unjust enrichment, measured by the breaching party's "improper" gain in the substitute transaction, and c) specific performance or an injunction against breach to prevent the opportunistic breach in the first place.

Our responsibility does not end at the classroom door. A cramped and regressive view of the irreparable injury rule surfaced in 1999 in Judge Tjoflat's special concurrence in *Chandler v. James*.[4] A plaintiff, the judge maintained, has an adequate remedy at law, usually damages, if the judge cannot enforce the injunction plaintiff requests through coercive contempt. If this view were adopted, a judge's ability to vindicate constitutional and other substantive rights would be severely circumscribed. Despite a persuasive amicus brief from Douglas Laycock, the whole court of appeals apparently did not definitively reject Judge Tjoflat's view in *Adler v. Duval County School Board*.[5]

Contemporary classroom discussions of law and chancery cannot avoid the basic issues in the remedial choice between a money substitute and an injunction, which brings me back to the goal of the law school course in Remedies. Remedies is a crucial course where optimists and pragmatists confront the ethical dimension of judgment while they strive to improve students' professional decisionmaking about substantive values within the plaintiff's limited world set awry by defendant's substantive violation.

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[4] 180 F.3d 1254, 1266-74 (11th Cir. 1999).

[5] 206 F.3d 1070 (11th Cir. 2000).