Remedies in the Legal System and in the Curriculum

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I. Remedy is an ancient concept.

A. *Ubi jus, ibi remedium* -- where there's a right, there's a remedy -- is a maxim old enough to be rendered in Latin.

B. Blackstone says it in English, and the idea of remedy is pervasive in Book 3 of the *Commentaries*.

C. John Marshall says it in *Marbury v. Madison*.

D. Of course the maxim isn't true unless understood as a tautology; immunities and many other rules often deny remedies for violations of undoubted legal rights. But it remains a useful aspiration.

E. The idea of remedy also appears in another maxim that is also ancient and also misleading: that equity will not act if there could be an adequate remedy at law.

II. But Remedies is a young field.

A. These early discussions of remedy had an idea that was overlapping with, but distinct from, the modern usage.

1. They had the modern idea of correcting the violation of legal right.

2 .But they did not have the modern idea of remedy as a distinct phase of the lawsuit, logically subsequent to the liability determination, focused on what the court would do to correct the violation.

3. That distinction could not emerge in a writ system, in which jurisdiction, procedure, cause of action, substantive law, and remedy were all tied together in each writ.

4. Equity offered distinctive remedies, but it also offered distinctive bodies of substantive law, and it justified both in terms of the inadequacy of legal remedies.

5. Maitland's lectures on *Equity*, at Cambridge in 1906, were mostly devoted to substantive law; only the last two addressed what we would now call equity's distinctive remedies.

B. Emergence of damages, equity, and restitution as separate fields.

1. Writ system abolished, and law and equity merged, over roughly a century from 1848 (the Field Code) to 1937 (the Federal Rules of Civil Procedure).

2. In the nineteenth century, we get treatises on damages, which treat damages for many causes of action, and treat some general principles for measuring damages.

3. We also get nineteenth-century treatises on equity, and on quasi-contract, but these are mostly substantive, not at all confined to remedies.

4. In the twentieth century, we get casebooks on damages, on equity, and on restitution.

III. Emergence of the Remedies course after World War II.

A. I have not been able to identify the precipitating event, but something -- perhaps the realists, perhaps the Federal Rules, perhaps just growing experience with the merger of law and equity -- led a few law teachers to begin to think of remedies as the range of possibilities for what a court could do to remedy a substantive wrong.

1. Charles Clark at Yale, in the preface to his 1934 casebook on Pleading and Procedure, wrote that "the equitable remedies should be studied along with the legal remedies," instead of in separate courses.

2. Marshman Sharp Wattson, at Indiana in 1947, changed his AALS bio to list Remedies as one of his courses. He had been listing Equity. George Edward Osborne at Stanford made the same change in 1948.

3. In 1950, Minnesota combined its separate courses on Damages, Equity, and Advanced Equity into a required eight-hour sequence on Judicial Remedies. (Now that's proper respect for the field.)

4. I can't swear these were the first, but they were the earliest I have found.

B. Remedies first appears as a field in the AALS Directory of Law Teachers in 1952.

1. 21 teachers of Remedies listed, but only 6 of those listed Remedies, or Judicial Remedies, as a course title.

2. The others listed Equity, Equitable Remedies, Damages, Restitution, Equitable Relief Against Torts, or Special Legal Remedies.

3. No one from Minnesota is listed, so the list must not be complete.

4. Equity, Damages, and Restitution still listed as separate fields.

C. The work of Charles Alan Wright.

1. Charles Alan Wright, who had clerked for Charles Clark on the Second Circuit, began teaching the Remedies course at Minnesota in 1950.

2. In 1955, he published an article, *The Law of Remedies as a Social Institution*, in the University of Detroit Law Journal.

a. He argued that compensation was only one remedial principle; there are also specific relief, restitution, punishment, and scheduled benefits.

b. And that "damages, equity, restitution, and the other incidental judicial devices must be viewed as part of an integrated law of remedies."

3. Also in 1955, he published the first casebook, *Remedies*, with West Publishing Co., based on his teaching materials at Minnesota. The book was organized by substantive law categories.

IV. The Modern Era

A. Long period of slowly accelerating growth: AALS Directory lists 30 Remedies teachers in 1955, 53 in 1965, and 110 in 1970.

B. Kenneth York published the first casebook after Wright's, *Cases and Materials on Remedies*, in 1965. This became York & Bauman, and then York, Bauman, & Rendleman in later editions.

C. The work of Dan B. Dobbs.

1. Dan Dobbs at Arizona published the first treatise, *A Handbook on Remedies*, in 1973. It is organized partly in terms of remedies categories -- damages, injunctions, declaratory judgments, restitution, etc. -- and partly in terms of substantive law categories and causes of action.

2. He also published teaching materials -- *Problems in Remedies: Damages-Equity-Restitution*, in 1974.

3. Dobbs's books partly responded to, and certainly helped accelerate, rapid growth in the number of Remedies teachers. The AALS Directory listed about 200 in 1975.

D. The first Gilbert's outline on Remedies appears in 1974, suggesting a field large enough to be worth commercial exploitation.

E. Judge Edward Re's casebook on *Remedies*, based in part on Zechariah Chafee's old casebook on *Equity*, first appears in 1975.

F. 1975 was the last year that AALS published a list of teachers of Damages, or of Restitution. Surviving courses under those names were folded into Remedies beginning in 1976. But Equity retained its separate listing.

G. Numerous new teaching materials in the 1980s.

1. Maurice Van Hecke's 1959 book on *Equitable Remedies* became *Equitable Remedies and Restitution* in the 2d edition (1973), and *Equitable Remedies, Restitution, and Damages* in the 4th edition (1986), by Leavell, Love, & Nelson.

2. Mary Kay Kane publishes a *Sum and Substance of Remedies* in 1981.

3. Thompson & Sebert, *Remedies: Damages, Equity, and Restitution*, appears in 1983.

4. Douglas Laycock's *Modern American Remedies*, in 1985, was the first book to attempt an organization entirely in terms of remedial categories, with no chapters based on substantive law categories.

6. Shoben & Tabb, *Cases and Problems on Remedies*, appears in 1989.

H. In the late 1980s, the American Law Institute considers a *Restatement of Remedies*, but finds no reporter willing to take on that task.

I. The second edition of Dan Dobbs's treatise on *Remedies*, now expanded to three volumes, appears in 1993.

J. More new casebooks continue to appear. David Schoenbrod and his co-authors in 1990; Russell Weaver and his co-authors in 1997. Plus, of course, new editions of most of the older books.

K. The new 2006-07 AALS Directory lists about 385 teachers of Remedies, including someone at most of the top-ten schools. It also lists 69 teachers of Equity.

V. Remedies as a field: what it is and why it matters.

A. Remedies covers everything a court can do for you if you win, and everything it can do to you if you lose. It covers everything a court can do for a plaintiff who has been wronged or is about to be wronged.

B. Remedies is trans-substantive, and universal within the scope of civil litigation.

C. Remedies must be adjusted as necessary to take account of substantive policy goals, but remedies scholars start from a base of broadly applicable remedial principles. There is no reason to have a different law of damages, or a different law of injunctions, for each cause of action. That is, after all, why we abandoned the writ system.

D. There is no better illustration of the need for remedies specialists than *E-Bay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006), a case litigated by patent lawyers.

1. Court announces a "familiar" and "well-established" four-part test for permanent injunctions that has never existed anywhere except a couple of district court patent cases.

2. Court cites for its test Supreme Court cases on preliminary injunctions, without recognizing or understanding the difference.

3. Court completely misses the defense of undue hardship (or balancing the equities), which *is* familiar and well-established, and would have directly addressed the problem it was trying to solve, without collateral damage in cases not presenting that problem.

4. We never had a four-part test for permanent injunctions before, but we do now, and it's a mess.