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Of Carts and Horses: Organizing Remedies for the Classroom

Elaine W. Shoben
elaine.shoben@gmail.com

OF CARTS AND HORSES: ORGANIZING REMEDIES FOR THE CLASSROOM

ELAINE W. SHOBEN*

INTRODUCTION

Consider the situation of the Remedies professor two weeks before classes start, when it is time to prepare a syllabus for the course. It is an emotional time for a variety of reasons, mostly because the summer or winter break is almost over, and it is frustrating how many things that the professor planned to accomplish were not done. The reality of the upcoming classes hits hard when the syllabus is due. The dull thud in the professor's brain at that moment does not promote much thought or creativity. Easy options at this point are to use the syllabus from last year if there is one, or simply to follow a casebook's order of presentation to make a fast syllabus. A professor's failure to give much thought to the issue of organizing Remedies on the syllabus means the loss of a significant opportunity to frame the subject meaningfully for the students and to pique their interest in it.

The syllabus—or, more precisely, the order of presenting major groups of remedies—is where the students' approach to the subject is formed. Does one start with damages, injunctions, restitution, or one of the miscellaneous subjects in the course, such as contempt, attorneys' fees, jury trials, or declaratory judgments? The first remedy studied is likely to be perceived as the most important and/or the most complex. It also sets the tone for the course as one that either continues where earlier courses such as Contracts and Torts left off, or as one that presents new concepts.

The casebooks taken as a whole do not help to answer the question because they are split on the issue of how to organize Remedies for study. This Essay poses some questions designed to promote thought about the order of presentation because the issue affects student perception of the subject, and its exploration helps professors to understand their own approach to Remedies. This Essay also modestly proposes an answer or two about how to make a sensible syllabus.

* Judge Jack and Lulu Lehman Professor, Boyd School of Law, University of Nevada, Las Vegas; Edward W. Cleary Professor Emerita, University of Illinois, College of Law.

I. DAMAGES FIRST?

The first question is: Why not be conventional and start the course with damages? Notably, some prominent texts begin with damages.[1] This approach is easily justified on the premise that because damages are at the top of the "hierarchy of remedies," they must be addressed first. Under the inadequacy rule,[2] an equitable remedy is not permissible unless the legal remedy is inadequate, so it makes sense to study this favored remedy first.

There are two reasons why damages may not make the best starting place for a Remedies course. First, modern scholarship has challenged the underlying premise of the remedial hierarchy.[3] Why perpetuate it by making damages the part of the course that comes first? Second, damages is one of the few topics to which students have typically had some exposure in other courses prior to arriving at Remedies. First-year classes in Contracts, Torts, and Property often address some aspect of damages related to those subjects. The students usually have had exposure to expectancy in Contracts, often in some depth. In Torts, most students receive at least passing exposure to personal injury damages, and sometimes even to concepts like reduction of future losses to present value. Torts classes almost always give some introduction to punitive damages as well. In Property, students may have learned about diminution in value of the land as a measure of damages and cost of restoration as another.

This limited exposure is not to say that the students have actually studied these concepts in the depth that they will study them in Remedies. The point is that they have enough of a background to understand what a damages award

1. *See, e.g.*, DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS (4th ed. 2010); EMILY SHERWIN, THEODORE EISENBERG & JOSEPH R. RE, AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS (2012).

2. *See* RUSSELL L. WEAVER, ELAINE W. SHOBEN & MICHAEL B. KELLY, PRINCIPLES OF REMEDIES LAW 8–9 (2d ed. 2011).

3. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 39 (1978) (inadequacy rule reflects an unjustified remedial hierarchy subordinating injunctions to damages); R. Grant Hammond, *Interlocutory Injunctions: Time for a New Model?*, 30 U. TORONTO L.J. 240, 276 (1980) (inadequacy rule is grossly overstated and is a contemporary shibboleth of the law); Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065, 1071 (1979) (book review) (inadequacy rule is best understood as a "tie-breaker"); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 692 (1990) (irreparable injury rule functionally gone); Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 358 (1981) (pliable inadequacy rule allows changes in response to policy but grants excessive discretion); Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U. L. REV. 623, 650 (1990) (inadequacy rule does not meet modern needs). *But see* 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, 215–16 (2012) (effect of Supreme Court's *eBay* decision is to favor damages in more than just patent cases).

might be and thus can understand the concept of the inadequacy requirement for equitable remedies if the instruction starts there.

One could argue that it is precisely because students have learned a little bit about damages that one must start the Remedies class with that topic in order to demonstrate how little they actually know. That is a fair point, and illustrated by an informal experiment that I accidentally conducted at the University of Illinois College of Law a number of years ago.

This accidental experiment revealed the gap between what the students thought they had studied in other courses and what the professors thought that they had taught them. This difference between what professors think they are teaching and what students think they are learning can be called the "gap." This gap is usually noted in faculty lounges in the context of students denying that they have ever heard of some concept when the professors of the prerequisite course swear they spent weeks on it. But I uncovered quite a different aspect of the gap—when students believe they have studied something that the professors say was mentioned only in passing. One might even call this a "reverse gap."

I discovered this reverse gap one year when, in a fit of enthusiasm, I was determined to tailor the syllabus of my Remedies course to address previous omissions in the students' education. On the first day of class, I distributed to the class a detailed questionnaire listing all the possible topics that we might cover during the semester and asked them to assess the depth of their existing knowledge on each topic. Students could indicate, for example, whether "punitive damages" was something they had studied "extensively" in a prior class, only "moderately" studied, or "never" studied. If they marked "extensively," the form asked them to indicate the class where the study had occurred.

To be completely honest, my survey was the result not only of my enthusiasm for designing a good course collaboratively with the students, but also in part because I needed the students to tell me what was going on in the curriculum. There had been changes in the curriculum that affected the Remedies course without my knowledge. This development was the result of a well-meaning approach by an associate dean who let professors avoid the cumbersome process of faculty approval for new courses by using a catchall course known as "Recent Topics in the Law" for which endless new sections were made in the name of a new class. This practice meant that new classes were not vetted by the curriculum committee and the faculty, and thus, their existence was a surprise to most people when the schedule appeared. As a result, I learned by accident that a new course on Econometrics in the Courtroom was using material taken directly from my Remedies class. Other courses like Advanced Civil Procedure had also developed to include material that I had previously covered in my class. Remedies is a huge subject, and one cannot begin to cover everything possible in a three-unit course, so it is good to

know where the curriculum is strong and weak on these topics. Because the associate dean was trying to save faculty time (always a laudable goal) by streamlining the development of new courses, there was no coordination of coverage.

Returning to the story of the survey, I gathered the information about the students' prior exposure to topics that I could cover in Remedies and tailored my syllabus to give greater coverage to those topics that were not covered extensively elsewhere in the curriculum. I was surprised, however, at some of the topics that students said they had studied "extensively." Although it was not surprising that the class on Products Liability had a large unit on punitive damages, it was surprising that Land Use had an extensive study of injunctions. When I asked the professor of that class about it, he expressed great surprise. "We didn't study injunctions, except that a few cases involved injunctions. I didn't say much about it except to explain the procedural context." I explored further and received similar responses from other professors whose students thought they had learned more than the professors thought they had taught. One is reminded once again that a little knowledge is a dangerous thing.

After this experience, which was quite a few years ago, I abandoned the survey approach. At least, I quit surveying the students. Sometimes I asked my colleagues about the coverage in their courses. It was useful to know, for example, that the Civil Procedure courses covered federal topics with respect to jury trials, but no state jury trial issues. I could then tailor the study of jury trials in Remedies to focus on the state issues and simply to remind the students of the famous federal cases. In fairness to the students, it did not make sense for my survey to ask them how much they had studied "jury trials" because they would not know that there were more issues than the Seventh Amendment ones they had studied.

This account raises a different issue: Should we have a final session in law school that tells students at length what they have NOT studied? One hopes that by graduation, each new lawyer has the skills to research the unknown, but have we equipped students to know what is unknown?

Returning more squarely to the topic of whether to begin a Remedies course with damages, another question is whether students have already become jaded on that topic and need a fresh topic to generate excitement. For example, it is in the first year that students typically become very animated on the damages issue in the Contracts case *Peevyhouse v. Garland Coal & Mining Co.*,[4] but by the time they get to Remedies, it is usually hard to get any discussion of it. The issue in this case is whether the defendant contractor should be compelled to keep its promise to the plaintiff farmers to restore the

4. 382 P.2d 109 (Okla. 1962).

land to its prior conditions after the strip-mining operation was complete. The defendant entered and mined the land under contract and then abandoned the ravaged earth contrary to the promise to restore it. The question before the court was whether the measure of damages in the landowners' claim for breach of contract should be the diminution in the value of the land (very little) or the cost of restoration in fulfillment of the promise (several times larger than the value of the entire farm even if restored).[5]

Peevyhouse held that the breaching defendant would not be required to pay the cost of restoration because the cost would be greater than the diminution in the value of the land.[6] Although professors typically try to focus students on the principle of avoiding economic waste, first-year students are often adamant that *Peevyhouse* was wrongly decided. That passion subsides by the time they study Remedies—or perhaps law school simply pounds the passion out of students. One possibility for rekindling interest is to try to shift student thought in the direction of different remedies—other than damages—in this fact situation. What about a restitutionary claim to recoup their savings from the breach or an injunction to require the mining company to restore the land as promised? Once students have studied those topics, they will learn that such claims are unlikely to succeed,[7] but the fresh questions can renew interest in the problem.[8] That moves our discussion of the syllabus forward to consideration of restitution or injunctions as opening topics.

II. RESTITUTION FIRST?

Under the theory that one should start with the material to which students have had little or no exposure in other courses before Remedies, the next question is whether Remedies should start with restitution. To answer that question, one needs to consider another: Is it desirable to reduce class size dramatically during the first week?

Restitution has an ill-deserved reputation as a dull and difficult topic. It is, in fact, quite engaging—at least to scholars on the topic. For most students (and a remarkable number of faculty) the topic holds little appeal. This attitude is only furthered by any study of restitution that has occurred in first-year Contracts. It is usually part of the excess of material that is crammed into the last two weeks of that first-year class, and students typically find that the topic only adds to the stress of that period of time.

5. *Id.* at 111.

6. *Id.* at 114.

7. *See* 3 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 12.19(2)–(3) (2d ed. 1993).

8. This fact situation can make a good theme throughout the study of Remedies, and can even make a good final exam question.

Although restitution is not as dull as its reputation, it is nonetheless a challenging subject upon first exposure. The best argument for beginning the Remedies course with restitution is that it gives the students ample time to absorb the material before the final exam.

I once chatted with a colleague who had taken a class in restitution many years before from the late, great Professor Palmer. My colleague told me that this noteworthy scholar of restitution[9] devoted the entire first day of class to *Felder v. Reeth*.[10] This 1929 case involved a dispute between a gold miner and a supply store in Alaska.[11] The case was tried at roughly the same time as Charlie Chaplin's famous movie *The Gold Rush*,[12] invoking the image of the starving gold miner in the snowy wilderness of Alaska. The romance of the case goes no further than that coincidence.

This famous old case explains the nature of claims involving waiver of tort and suit in assumpsit. Procedurally, the defendant gold miner needed a restitutionary device in order to counterclaim against the contract claim that the supply store brought against him. This procedural problem is no longer relevant in modern pleading, but it explains the history of the case. The miner wanted to counterclaim with a tort claim because the supply store had wrongfully seized his property. He had bought some hydraulic mining equipment in San Francisco and intended to take it to mining camp, but left it by the banks of the river below camp because the water was too low to move it.[13] Meanwhile, the miner incurred a large debt from the local supply store, prompting that store to seize the hydraulic equipment and sell it for $550.[14] Later the store sued the miner for his large debt. The miner tried to counterclaim for the conversion of the equipment. He prayed for $10,000 as the special value of the equipment to him at the camp.[15] Although the usual measure of damages for conversion is the fair market value at the time and place of conversion, the miner argued here that there was no such market. The trial court accepted this theory, but awarded only $8000 as the special value of the equipment to the miner.[16]

The conversion action failed on appeal because the miner had to plead a contract counterclaim for the antiquated procedural reason previously noted. Therefore, to achieve a contract claim, the miner waived the tort and sued in assumpsit. The court found this restitutionary claim valid and next considered

9. *See* GEORGE E. PALMER, THE LAW OF RESTITUTION (1978).
10. 34 F.2d 744 (9th Cir. 1929).
11. *Id.* at 745.
12. THE GOLD RUSH (Charles Chaplin Production 1925).
13. *Felder*, 34 F.2d at 745.
14. *Id.* at 746.
15. *Id.* at 745.
16. *Id.* at 746.

the measure of recovery under the assumpsit claim. The opinion traces the history of claims in assumpsit when the tort is waived, and noted that they are generally based upon the old writ for "money had and received" when conversion is waived in favor of the implied contract claim. This writ was used to create the fiction that the wrongdoer was acting as the agent of the owner when converted property was resold. The wrongdoer was thus obliged to pass along the money from the resale, which in this case would be the $550 obtained by the store by the sale of the equipment.[17]

The court further held, however, that restitutionary claimants in this context may sue under another writ that would change the measure of recovery—the writ of "goods sold and delivered."[18] Under the theory of this fiction, at the moment the wrongdoer converted the equipment, the law implied a contract to pay the owner the fair market value of the goods.[19] Given this election, the miner could obtain greater recovery with the sales fiction. But, given that there was no fair market value for this equipment at the time and place of conversion, what is the fair market value of the goods? The court allowed the value at the nearest market, which presumably is San Francisco, minus the cost of transportation to that market.[20]

A final point of interest (at least to a restitution scholar) about this case is why the cost of transportation subtracted rather than added. The key is that the focus of restitution is on the gain to the wrongdoer, not the loss to the claimant.[21] Because the gain was the possession of property that could be sold at the nearest market, the transportation to that market would be a transaction cost that must be subtracted. It was irrelevant under this theory of recovery that the store actually made a resale to someone who was in a remote place outside a "market" for the goods. That is how this famous old case concludes.

I realize that I have told too much about this case and have thus risked losing readers of this modest Essay along the way. The reason for the details is to illustrate poignantly what it would be like to be in a class that studied this case on the first day. I asked my colleague how the students in Professor Palmer's class on restitution reacted to beginning the course with this complex and rather arcane case. Predictably, enrollment (or, at least, attendance) was smaller after that introduction. In fairness to Professor Palmer, the class had to start with a case in restitution because the entire subject of the course was restitution. Courses exclusively in restitution were common in the law school curriculum at one point, and they created special challenges for professors. I began my teaching career by being assigned to teach a course in restitution,

17. *Id.*
18. *Felder*, 34 F.2d at 746–47.
19. *Id.* at 747.
20. *Id.* at 748.
21. *See id.*

and I have offered my advice elsewhere[22] on how to entice students to appreciate the subject.

In the modern law school, the course that covers restitution is typically the course in Remedies, and I do not recommend that one starts a Remedies course with *Felder v. Reeth*, or any restitution case, unless the object is to reduce the size of one's class. The benefits of class reduction are not to be ignored—notably including fewer exams to grade—but this Essay proceeds on the assumption that Remedies professors entered into law teaching because they like teaching and want students to enjoy their classes.

Restitution, therefore, does not appear to be the best starting place for a course on Remedies. Having eliminated both damages and restitution, there are two remaining candidates for the beginning of a syllabus—injunctions and miscellaneous topics.

III. INJUNCTIONS FIRST?

This Essay has rejected damages and restitution as appropriate ways to start a Remedies course, so the next question is: Should the course start with injunctions? This approach does not suffer from the drawbacks of the other approaches—familiarity or fatigue—but it does have its own drawback, specifically that it feels like one is putting the cart before the horse.

The sequence conundrum is that the inadequacy rule says that equity does not grant relief if the remedy at law is adequate, so how can one teach injunctions (an equitable remedy subject to the rule) before teaching damages (the legal remedy that is most commonly the "adequate" one)? Despite the scholarly complaint about the remedial hierarchy,[23] the inadequacy rule persists.[24] Therefore, the disadvantage of studying injunctions first is that it is difficult to discuss the adequacy of the legal remedy before studying damages.

This problem is not insurmountable in any school where students have gotten basic exposure to damages issues in Torts, Property, and, most likely, Contracts. My own experience is that students in Remedies already have had exposure to some of the basic issues with damages. For that reason, I have not found that it is hard to teach injunctions first, and my own co-authored casebook[25] follows that approach, as do several other excellent texts.[26]

22. Elaine W. Shoben, *Spinning Restitution: From Cauliflower to Coconut*, 36 LOY. L.A. L. REV. 1027 (2003).

23. *See supra* note 3 and accompanying text.

24. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

25. ELAINE W. SHOBEN, WILLIAM MURRAY TABB & RACHEL M. JANUTIS, REMEDIES: CASES AND PROBLEMS (5th ed. 2012).

26. *See* CANDACE S. KOVACIC-FLEISCHER, JEAN C. LOVE & GRANT S. NELSON, EQUITABLE REMEDIES, RESTITUTION AND DAMAGES: CASES AND MATERIALS (8th ed. 2011); DAVID I. LEVINE, DAVID J. JUNG & TRACY A. THOMAS, REMEDIES: PUBLIC AND PRIVATE (5th ed. 2009);

It was suggested earlier in this Essay that one could revisit the *Peevyhouse* fact situation and pose the question whether the court should order an injunction.[27] This approach has the advantage of approaching the inadequacy rule in a familiar and inherently interesting context. If the students did not study this case in Contracts, one can assign the case and work from there. The key question is whether an injunction would be appropriate under the facts of *Peevyhouse*, and in my experience the conversation on this question can be quite lively.

In class discussion on this question, some students are likely to articulate the belief that an injunction is an appropriate kind of "sanction" here because the defendants did not keep their promise to restore the land after strip mining it. Such comments provide the professor with a good opportunity to discuss the difference between civil remedies designed for the benefit of the plaintiff versus the state's interest in "sanctions" in criminal or civil form. The purpose of the private civil action is not to punish wrongdoers except when it is appropriate to award punitive damages. The goal is to provide an appropriate remedy to satisfy the legitimate interests of the private plaintiff.

Other students may argue that the remedy at law is inadequate in *Peevyhouse* because the damages for diminution in the value of the land were low. Such comments provide a good opportunity to explore the concept of "inadequate" as something other than objecting to the measure or amount of damages. The plaintiff landowners would be happy with money damages here, and the fact that they wanted more money does not make the remedy inadequate in the sense of the inadequacy rule. Damages are inadequate under the rule when, for example, money cannot replace what might be lost, or when recurring conduct would require a multiplicity of actions for damages.[28] There is nothing special about the *Peevyhouse* situation that would make damages an inadequate remedy. To the contrary, it is only the measure of those damages that is at issue in the case.[29]

A good injunction case to compare to the *Peevyhouse* fact situation is *Thurston Enterprises, Inc. v. Baldi*.[30] The *Baldi* case arose from an abuse of an easement when the defendant drove heavy trucks through the plaintiff's drive-in theater and did significant damage to the speaker aisles. During the off-season for the theater, the owner Baldi gave permission for Thurston to drive the trucks across the theater in order to access a construction project in an adjoining lot. The easement specified the route for the construction vehicles to

RUSSELL L. WEAVER, DAVID F. PARTLETT, MICHAEL B. KELLY & W. JONATHAN CARDI, REMEDIES: CASES, PRACTICAL PROBLEMS AND EXERCISES (2d ed. 2010).

27. *See supra* text accompanying notes 4–8.

28. *See, e.g.*, Thomas v. Weller, 281 N.W.2d 790, 793 (Neb. 1979) (repeated trespasses).

29. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 111 (Okla. 1962).

30. 519 A.2d 297 (N.H. 1986).

follow, but many trucks deviated from the route and damaged the aisles.[31] The district court originally ordered the contractor to repair the damage, but this injunction was reversed on appeal because the plaintiff had an adequate remedy at law—damages for the cost of repair.[32]

In class discussion, some students usually perceive the defendant as a "bad guy" and express sympathy with the district court's order requiring him to fix the plaintiff's speaker aisles ("He broke it, so he should fix it."). To reply simply that the injunction was a violation of the inadequacy rule is not a satisfactory answer, although the opinion does not say much more. The injunction here is best understood as an inappropriate remedy because it would be impractical and difficult to supervise. Moreover, this cost to judicial efficiency is not offset by any great societal gain—the kind of gain one sees from ordering the removal of an unconstitutional institutional condition or even from ordering child support for one child, even though these orders are also difficult orders to supervise.

Why would an injunction be difficult to supervise for a case like *Baldi* (and, by extension, *Peevyhouse*)? It is useful to explore the practical effect of enforcing an injunction as opposed to giving Baldi the money to repair the damage to the drive-in himself. If Baldi receives money, he will arrange for the repairs and get them done exactly as he wants them. In contrast, if Thurston is responsible for assuring that the repairs are done, his interest would be to cut costs wherever possible. Moreover, he would have no incentive to make sure that the work is done quickly and well. If Baldi has any complaints about the speed or quality of the repairs that Thurston undertakes, Baldi would address them to the court. If Thurston is recalcitrant, the court would have to continue supervision and may have to use the contempt power. The potential cost in terms of judicial resources is high. From a societal point of view, the advantage of a money judgment in such a situation is its simplicity and easier enforceability.

The efficient disposition—with damages rather than an injunction—of cases such as *Baldi* makes it possible to spend judicial resources on other matters, such as the supervision of injunctions addressing unconstitutional conditions like racially segregated schools or prisons with unconstitutionally cruel conditions. The most common kind of case on which our society spends judicial resources is ongoing supervision in child custody and support.[33] The

31. *Id.* at 299.

32. *Id.* at 300, 302.

33. *See* Nat'l Ctr. For State Courts, *Domestic Relations Caseloads Prove Difficult to Dispose*, CT. STAT. PROJECT, http://www.courtstatistics.org/Domestic-Relations/DomesticDispose.aspx (last visited Jan. 25, 2013); *see also* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 17:01 (1997) (stating that custody modification requests are more numerous than initial filings); J. Thomas Oldham, *New Methods to Update Child Support*, *in* CHILD SUPPORT:

supervision of such cases is inefficient, but it expresses our society's value on the subject of the case. In contrast, the abuse of an easement, as in *Baldi*, or the violation of a contract, as in *Peevyhouse*, receive damages rather than an injunction because these disputes are relatively less compelling. Although as a society we could choose different values, our current values are reflected in the law of remedies as fully as they are reflected in the substantive law.

Finally, it is useful at this point to foreshadow future issues in the study of damages by noting that recovery of the cost of repair puts Baldi in the same position financially as the award of an injunction to repair. He could have been awarded the diminution in the value of the land, like the *Peevyhouse* award. If there is commercial growth in the surrounding area (as suggested by the construction on the adjoining property), it is entirely possible that there was no diminution in the value of the land at all. If the fair market value of the land reflects that its "best use" is for new stores rather than a drive-in theater, should the damages be limited to reflect that fact? Should the measure of damages reflect Baldi's intended use (or the *Peeveyhouse* farmers' intentions)? If so, then what happens when the case concludes and the landowners change their minds to do the economically wiser course of action? Is the solution to change remedies law to permit injunctions in such a situation solely for the purpose of encouraging the parties to negotiate a settlement that will account for these factors in a way that a damages rule cannot?[34]

This discussion of the inadequacy rule as a prerequisite to an injunction permits a rich exploration of the interplay of remedies. It is possible to have this discussion at the beginning of the course because of the students' previous introduction to damages in Contracts. The advantage of beginning with injunctions is that the two topics—damages and injunctive relief—can be discussed together immediately.

IV. MISCELLANEOUS TOPICS FIRST?

The third-year Remedies course is likely to be the only place in the curriculum where students encounter a variety of miscellaneous topics that greatly enrich a legal education, including attorneys' fees, contempt, and declaratory judgments. Also in this list is the topic of jury trials, although students often learn about federal jury trial rights in Civil Procedure, but that course rarely covers state jury trial rights.

THE NEXT FRONTIER 128, 128–29 (J. Thomas Oldham & Marygold S. Melli eds., 2000) (describing requests for cost of living adjustments to child support).

34. *See generally* Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341 (1984) (concluding that "specific performance is more likely than any form of money damages to achieve efficiency in the exchange and breach of reciprocal promises").

These topics are all worthy of starting a course in Remedies, and contempt in particular often captures the students' attention as a topic worthy of learning in law school because it can sometimes appear quickly as a problem in a courtroom when an attorney does not have the luxury of researching it back in the office.

Attorneys' fees is another topic that has become complex and is worthy of study in a Remedies course because the availability of attorneys' fees as a remedy can effect whether cases are brought at all in areas such as civil rights, employment discrimination, environmental challenges, and privacy claims. These cases often have low monetary recoveries, such that it is not economically viable to bring such a claim unless an organization funds the suit or unless a victorious claimant receives attorneys' fees as part of the remedy.

Similarly, the declaratory judgment is a very useful tool for many clients, and there is no other place in the curriculum that is likely to cover it. This remedy has limited availability in both federal and state courts, but when it is used correctly, it can prevent further litigation at an early stage of a dispute.

These topics are all good ones, and could start a course on Remedies, except for the fact that it seems odd to start a subject by studying its miscellaneous parts. The three main categories of remedies—damages, injunctions, and restitution, in alphabetical order—are more important, and therefore, need to be featured more centrally in the organization of the class. Miscellaneous topics such as the ones listed here can be interspersed in logical places, or grouped at the end of the course. One advantage of putting them at the end of the course is that it is good not to put restitution at the very end of study. It takes a while to absorb the concepts in restitution, so it makes sense not to cram it into the end of the semester when students have little time to digest the topic and when they are already overwhelmed with the proximity of final exams. The miscellaneous topics ably serve this function. Moreover, these topics can be expanded or contracted as necessary to accommodate the amount of time left in the semester, and thus, it works extremely well to put them at the end of the syllabus.

CONCLUSION

All previous sections of this Essay have been characterized by question marks, and this section—Conclusion—should probably have a question mark with it too because it is difficult to draw a firm conclusion. There is no perfect solution to the question of how to organize a class on Remedies. On the one hand, it is logical to begin with damages because that is the "horse" that still draws the remedial cart, but many professors have found that the advantages in starting with injunctions overcome the horse/cart issue.

The one thing that casebooks all agree is to put restitution after the study of both damages and injunctions, regardless of the order of those two. Such

universality should be a caution to any new professor who is tempted to go rogue by trying restitution first.

Regardless of where one starts, when all three major categories of remedies are finally covered, the students can get the "big picture"[35] of the subject. Choosing a starting place sets the tone for the class, and may have a subtle effect on how students perceive the relative importance of various remedies, but at the end of the semester it may not matter where one started—as long as it was not with restitution.

35. The law school community owes to the late former Chancellor and Dean John E. Cribbet, of the University of Illinois College of Law, the perfection of this expression with respect to studying law. *See* Ronald R. Volkmer, *The Complicated World of the Electing Spouse:* In re Estate of Myers *and Recent Statutory Developments*, 33 CREIGHTON L. REV. 121, 131 n.69 (1999).