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TEACHING REMEDIES FROM THEORY TO PRACTICE

CAPRICE L. ROBERTS*

I. THE VALUE OF REMEDIES

Remedies is about the intersection of things. Intellectual curiosity has always drawn me to wonder how different, disparate things fit together. The Remedies course provides an analytical framework to explore the varied goals of substantive doctrinal courses. It shows how bodies of law connect. Tensions among competing goals allow for deep pedagogical treatment. At the same time, Remedies presents its own doctrines and goals, which may run parallel or in contrast to the goals of underlying doctrinal bodies of law. The Remedies course thus naturally lends itself to rich discussion regarding where and why there is commonality or contrast among the substantive doctrinal causes of action as well as the law of Remedies.

The points of overlap, and often collision of competing interests, present fertile territory for legal scholarship. Further, writing in an area one teaches inures to the benefit of one's students. Teaching Remedies raises a host of provocative legal issues ripe for scholarly contribution. I have spent time on the restitution revival from a Remedies perspective.¹ The revival ties to the *Restatement (Third) of Restitution and Unjust Enrichment*, which streamlines this complex body of law and speaks in a language the modern lawyer can

* Professor of Law, Savannah Law School. Washington & Lee University School of Law, J.D.; Rhodes College, B.A. Thank you to the law review editors of the *Saint Louis University Law Journal* for the invitation to contribute to this meaningful dialogue on Teaching Remedies. This dialogue will continue at two upcoming conferences: the Southeastern Law Schools Association (SEALS), *Discussion Group: Pedagogical Choices and Challenges in Remedies*, August 4, 2013 (Palm Beach, Florida) and the Remedies Forum, December 5–6, 2013 (University of Louisville Brandeis School of Law). The author also thanks her research assistant Cameron C. Kuhlman for helpful revisions.

1. See Caprice L. Roberts, *A Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract*, 65 WASH. & LEE L. REV. 945 (2008); Caprice L. Roberts, *Restitutionary Disgorgement as a Moral Compass for Breach of Contract*, 77 U. CIN. L. REV. 991 (2009) [hereinafter Roberts, *Restitutionary Disgorgement as a Moral Compass*]; Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. 131 (2008); Caprice L. Roberts, *The Case for Restitution and Unjust Enrichment Remedies in Patent Law*, 14 LEWIS & CLARK L. REV. 653 (2010), reprinted in 43 INTEL. PROP. L. REV. 201 (2011); Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027 (2011).

understand.² I am particularly intrigued by the way in which restitutionary remedies such as disgorgement serve or disserve the substantive goals of contract law. To be clear, the law of restitution contains its own substantive doctrinal subject matter. Restitution is associated with the Remedies course because most law schools teach restitution as a part of the Remedies course. Restitution has otherwise largely vanished from the American law school experience.³ Restitution is similarly an important, yet underserved topic.⁴ Institutions need to throw their academic weight behind the teaching of both Remedies and Restitution.

Remedies also demonstrates how law intersects with real life. When are the goals of substantive law frustrated by the theoretical and practical shortcomings of the law of remedies? The Remedies course addresses how to fix legal problems as best we can. It is democracy at work. It is about justice. It is about fairness. It is also about injustice and unfairness. Remedies shows the philosophical shortcomings of the law when a proven right fails to yield a remedy. Rights without remedies while tragic, are hopefully rare.

It is common, however, that a lawyer's choices lead to a less effective remedy than possible and desired. For that reason, Remedies needs the attention of professors passionate about teaching it. "*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.*"⁵ Fortunately, Remedies professors can impress upon students the importance of the strategic decisions they make regarding causes of action, remedies, and defenses.

II. REMEDIES AS DISTINCT AND INDISPENSABLE

Remedies should be institutionally central in the modern law school curriculum. Remedies is an indispensable law school course that has too often

2. Much credit for this clarity goes to Professor Andrew Kull, the Reporter of the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011).

3. See Gordon Smith, *Should Law Schools Teach Restitution?*, THE CONGLOMERATE (May 17, 2011), <http://www.theconglomerate.org/2011/05/should-law-schools-teach-restitution.html> (lamenting that "[u]nfortunately, we don't teach restitution systematically anymore" and imploring that "[i]t's time to bring restitution back to the classroom"). Some institutions have supported the teaching of restitution, although rarely as a freestanding course, as opposed to within a Remedies course. In the modern era, Professors Andrew Kull and Doug Laycock have taught distinct Restitution courses. For a thoughtful contribution on teaching restitution within a Remedies course, see Candace Saari Kovacic-Fleischer, *Teaching Restitution*, 39 BRANDEIS L.J. 657 (2001).

4. See Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 930 (2012) ("By the later stages of Dawson's and Palmer's careers, restitution and unjust enrichment was becoming a neglected field. But restitution's importance to the law is greatly disproportionate to the amount of systematic attention it has received over the last generation.").

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

been marginalized. It is a distinct, integral law school subject.⁶ It harkens back to the original staples of a law degree, and it needs to return to that status. My course typically includes a comparative discussion of remedial goals, modern damages, equitable remedies (injunctions and contempt), unjust enrichment—restitution, remedial divergence and convergence between contract and tort, employer's remedies, and a sample of property remedial measurements.⁷

Many of the doctrines explored are unique to the Remedies course. Even those concepts that piggyback on first-year doctrinal courses may be new for the students. Increasingly, students are unfamiliar with concepts that ordinarily might have been covered but have been excised due to a shrinking number of hours in the first-year course doctrinal offerings. Students must grapple with cases—real and hypothetical problems—in which the facts pose multiple causes of action with a range of remedies. They must exercise judgment and make a realistic assessment about how a judge or jury is most likely to resolve the open remedy questions. This analysis includes suggesting appropriate settlement ranges or predicting outstanding liabilities for a corporate client.

Many aspects of the Remedies course make it stimulating and challenging for the professor and student alike. Interesting Remedies class discussions involve the effects of race, class, gender, and sexual orientation; the realities of limited defense resources; the effectiveness of aggregate litigation; the pitfalls of quantifying the value of life; constitutional arguments involved in modern tort reform litigation; and constitutional constraints on remedies like punitive damages. The course covers an array of distinct remedies that involve torts, contracts (common law and the *Uniform Commercial Code*), property, unjust enrichment, environmental regulations, labor law, employment law, securities statutes, sports and entertainment law, maritime law, family law, public nuisance law, constitutional law, insurance law, libel law, landlord tenant law, real estate law, and intellectual property law. The beauty of this cross-section is that students in the second year may be exposed to an area and decide to add the specialized, underlying subject matter to their curricular plan. For third-year students, it helps brace them for the rigors of the cumulative nature of the bar exam and the realities of the breadth of practice. Countless law students no doubt end up finding their practice shift in unexpected directions over time. Remedies can help lay a foundation for how to handle the unexpected.

6. See Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008) (detailing the origins of the modern Remedies law school course, which combines previously separate courses in damages, equity, and restitution).

7. My course generally tracks Chapters 1, 2, 3, 4, and 6 with portions of Chapters 8 and 9 of DOUG RENDLEMAN & CAPRICE L. ROBERTS, *REMEDIES: CASES AND MATERIALS* (8th ed. 2011). In an ideal world, I would prefer to teach two Remedies courses or one Remedies course and one Restitution course to cover the remaining chapters.

The Remedies course has enduring international salience.⁸ For example, it is increasingly a core course for schools in the Commonwealth.⁹ It is ripe for a more robust revival in American law schools. The revival is warranted because it provides countless teaching moments across disciplines while unveiling new material. For this reason, the Remedies course provides a capstone opportunity¹⁰ to synthesize numerous doctrinal bar courses while learning new material on the subject of Remedies itself—also a bar exam subject.

A Remedies revival makes sense given the current law curriculum reform debate and the challenging economic climate. The intrinsic practical value of Remedies lends the course special salience in the current debate. The concomitant pressures of rising debt and fewer jobs translate into a greater premium being placed on a new lawyer's ability to exercise independent judgment and apply tangible skills. Remedies presents an opportunity to teach theory and demonstrate practice. It bridges multiple courses, and it bridges two worlds. While Remedies has potential for deep theoretical inquiry, it also easily dovetails into a practice-ready or clinical curriculum.¹¹ My course begins with how to synthesize a client's remedial goals—what the client wants—with what the law can achieve by crafting the ideal cause of action to attain the optimum remedy, or assess and defeat it, depending on your representational starting position.¹² I teach the course as a traditional doctrinal

8. Remedies generates greater reverence and buzz among legal scholars in the Commonwealth and beyond. Professor Chaim Saiman has a wonderful treatment of this disconnect phenomenon between the Commonwealth and the United States on the topic of restitution, and his reasoning warrants attention regarding the Remedies course more broadly. *See generally* Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99 (2008) (positing that the United States will continue to resist restitution's lure due to restitution's global foundations in pre-realist notions rather than governing American jurisprudential principles).

9. *See, e.g.*, Jeff Berryman, *Teaching Remedies in Canada*, 39 BRANDEIS L.J. 565, 565 (2001) ("Within common law Canada there are sixteen law schools. In all schools Remedies is taught as a distinct subject in the upper year curriculum."); Jeffrey Berryman, *The Law of Remedies: A Prospectus for Teaching and Scholarship*, 10 OXFORD U. COMMONWEALTH L.J. 123, 123–24 (2010) (describing the growth of the Remedies course in Canada, England, and Australia: "Clearly, throughout the Commonwealth the systematic study of the law of remedies has come of age . . ."); *see also* Gary Davis & Michael Tilbury, *The Law of Remedies in the Second Half of the Twentieth Century: An Australian Perspective*, 41 SAN DIEGO L. REV. 1711, 1722 (2004) ("[T]here is increasing treatment of remedies as a legal subject in its own right in law schools across Australia.").

10. *See, e.g.*, Russell L. Weaver & David F. Partlett, *Remedies as a "Capstone" Course*, 27 REV. LITIG. 269 (2008).

11. Washington & Lee School of Law's third year curricular reform is one example where Remedies is a natural complement to real-world legal immersion. *See The Third Year in Detail*, WASH. & LEE U. SCH. LAW, <http://law.wlu.edu/thirdyear/page.asp?pageid=651> (last visited Jan. 17, 2013).

12. For similar reasons, I continue to treat my Contracts course as a remedy-centered study.

and theoretical course, but I frequently incorporate a clinical student's real-world experience or remedy problem into our discussion.

III. THE TEMPTATION TO NEGLECT REMEDIES

Remedies should not be an afterthought. It is not just a bar review course. It has too often been relegated to the margins and not treated as indispensable. Like any doctrinal course and bar exam subject, there are teachable moments that rest on tangible concepts. But also like other traditional law school courses, the answer is often "it depends." The Remedies course can teach the close calls and the competing rationales for consideration. To shrink the course solely to memorization of bar-preferred, seemingly black-and-white rules misrepresents the complexity of the material in theory and practice. Law schools would also be wise to make a conscious decision about whether they prefer the course be taught by a member of their tenure-track faculty or by an adjunct. There are advantages and disadvantages to both, but often schools have let Remedies (and Restitution) disappear from the curriculum or from an appointments' priority slate. Colleagues at other institutions have lamented to me: "We used to have a lion of the Remedies field teaching the course, but I'm not sure what happened since." In contrast, some law schools have placed a priority on offering multiple sections, which offers the added benefits of different teaching methods and a variety of instructor backgrounds, including practitioner-adjuncts, tenure-track professors, and scholars in the field.

Professors should be vigilant about utilizing Remedies' capacity for teaching practical skills. Its practical values coupled with its philosophical underpinnings make it an important and rewarding course for students. While our respective professional backgrounds may naturally tilt toward one frame, the beauty of the course is that we may challenge ourselves as teachers to incorporate both theory and practice in creative ways. To sharpen analytical depth, choose a Remedies topic for an upcoming scholarly project. Remedies poses a host of academically fascinating issues for scholars and law review students. Hire a Remedies research assistant and connect the topic to another substantive area of research interest. Such academic inquiry will yield benefits to all. To sharpen practical components, engage clinicians and practitioners (including former students) to help generate ideas for mini-exercises that showcase the import of Remedies training. It is also a course where the professor may choose to emphasize advanced procedural lessons and missteps.¹³ Even if the size and nature of your Remedies course does not lend itself to active skills development, consultation with professors who teach

13. See, e.g., *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005) (ruling plaintiff's securities fraud complaint failed adequately to allege pursuant Federal Rule of Civil Procedure 8(a)(2) the proximate causation and economic loss elements of the action), as reprinted in RENDLEMAN & ROBERTS, *supra* note 7, at 28–33.

advanced skills courses will enable them to tackle more exercises if their students are learning the substance of Remedies in your course. At minimum, the Remedies course contains ample moments to incorporate real-world examples available for teacher-led or student-initiated exploration on the internet and TWEN.

Remedies should continue to attract talented teachers, especially if law school hiring committees revive the demand. Remedies teaching provides incredible opportunities for academic growth. “[I]t is also a blockbuster of a course to teach.”¹⁴ Of course, the meaning and shape of a Remedies course may be tailored to cover curricular gaps, expose new doctrine, and stretch a student’s ability to think across disciplines toward a coherent, tangible theory of relief.

Regardless of the ideal credentials or status preferred for teaching the Remedies course, the key ingredient is a passion for its relevance in the law school’s curriculum and in practice. With increased scholarly expertise in niche areas and student demand for the same, American law schools may be tempted to replace—consciously or by accident—traditional, doctrinal courses in the upper-level curriculum with more specialized courses.¹⁵ The approach need not be so binary. A realist way of approaching the law does not require eliminating base subjects lawyers confront every day. It need only alter the lens through which we teach the material rather than whether we teach the material at all. American law schools should rejoin the international legal

14. Norman Otto Stockmeyer, *An Open Letter to a Colleague Preparing to Teach Remedies*, 12 T.M. COOLEY J. PRAC. & CLINICAL L. 115, 120 (2010) (advancing a problem-based method of teaching Remedies).

15. See AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010, at 15–16 (Catherine L. Carpenter ed., 2012) (noting the increase in specialized course offerings and that tested bar examination subjects do not appear to play a key role in a law school’s decision-making regarding required courses). *But cf. id.* at 16 (“The upper division elective curriculum remained healthy with little decrease in any particular areas of law.”). Law schools may offer curriculum guides with specialized tracks (sometimes certifications), and courses that are from a generalist vein, like Remedies, may be forgotten, offered less frequently, or taught by adjuncts rather than tenure-track faculty. For example, Fordham University School of Law utilizes such guides and includes Remedies in its guide, although the course is not taught by a tenure-track faculty member. See *Curricular Guidance for Upper Class Students from Associate Dean Foster*, FORDHAM U. SCH. OF LAW, <http://law.fordham.edu/registrar/18255.htm> (last visited Jan. 17, 2013) (highlighting many specialized courses); *Litigation and the Judicial Process*, FORDHAM U. SCH. OF LAW, <http://law.fordham.edu/registrar/4705.htm> (last visited Jan. 17, 2013) (including Remedies in the Curriculum Guide for Litigation and the Judicial Process); *Remedies*, FORDHAM U. SCH. OF LAW, <http://law.fordham.edu/registrar/16092.htm> (last visited Jan. 17, 2013) (noting the Remedies course description and listing one adjunct professor in the list of all who teach or have taught Remedies). Adjunct professors, no doubt, enrich course offerings at every American law school, but each law school should strive to make conscious determinations regarding its priorities, resource allocations, and commitments to certain bodies of law over others.

community with recognition of the centrality of the Remedies course to a balanced legal education.

IV. REMEDIES AS BIOGRAPHY

This Article presents a wonderful opportunity to share my passion for teaching Remedies. For student readers, the answer is “yes,” you should strongly consider adding Remedies to your upper-level course plan. In the event that you are new to law teaching or your institution has added Remedies to your teaching plate, this Article seeks to allay your fears and suggest a few theories about why this course is such a promising and worthwhile enterprise.¹⁶

Remedies has served as a wonderful foundation for my career as a law teacher and scholar. Because the Remedies course is at the intersection of things, it maintains lasting interest. Its hybrid content merits serious consideration for its reinstatement as a staple course at schools where it may have lost its champion. Regardless of the level of prominence a faculty chooses for the Remedies course, it should not be eliminated lightly or treated in an overly simplistic manner. You should join the Remedies revival if you haven’t already.

A. *The Road to Remedies*

As a law student, I reluctantly enrolled in Remedies on a classmate’s recommendation. It was one of the best curricular choices I made. The professor was Doug Rendleman, to whom I owe much of my inspiration for law teaching and for Remedies scholarship in particular. We used Professor Rendleman’s Remedies casebook then coauthored with Professors Bauman and York.¹⁷

The experience had such a profound effect on me that I enrolled in a follow-up Remedies course titled Advanced Contracts, which covered the remainder of our Remedies casebook. Both courses resonated profoundly during my federal clerkship experiences on the district and appellate level and again in litigation practice at Skadden Arps. My focus in law school had been in preparation for my intended white-collar crime practice at Skadden. By the time I arrived at Skadden, the cycles of litigation trends had shifted such that my caseload tended to not be criminal at all: civil *qui tam* litigation, commercial litigation, tort litigation, securities fraud, intellectual property, federal banking regulation and litigation, antitrust, bankruptcy litigation, and landlord-tenant disputes. And yes, eventually, the cycle returned to white-

16. I encourage you to join the AALS Remedies Section and contact me at croberts@savannahlawschool.org if you would like to be linked to a Remedies professor mentor for teaching and scholarship.

17. KENNETH H. YORK, JOHN A. BAUMAN & DOUG RENDLEMAN, *CASES AND MATERIALS ON REMEDIES* (5th ed. 1992). We also used draft chapters from the sixth edition.

collar crime litigation just before I left for academia. Whether we were conducting an internal investigation or preparing for civil trial, the analytical judgment, synthesis skills, and substantive law I learned from Remedies aided my practice. I didn't foresee then—at Washington and Lee or in practice—that I would teach the Remedies course for more than a decade at several law schools and ultimately from Professor Rendleman's Remedies casebook, which I now have the honor of coauthoring.¹⁸

Remedies has also provided rich, fruitful terrain for scholarship.¹⁹ All of these projects have led to my current Remedies project—revising Professor Dan Dobbs's Remedies treatise.²⁰ I write in additional areas including Federal Courts, but it has been the topic of Remedies that has generated the most interest and ongoing international dialogue.²¹

My passion for teaching Remedies extends from my experience as a student and continues each time I teach the course. The course fundamentally altered my understanding and appreciation of the holistic picture of legal study. It unveiled the connections across traditional doctrinal courses. It raised compelling philosophical questions. It taught me how to exercise independent, critical judgment with an ethos of care for the client. It married substance with practical realities. It deepened my layers of analysis and ability to comprehend all sides of myriad issues. It demonstrated the power of narrative and the art of

18. RENDLEMAN & ROBERTS, *supra* note 7. I am grateful for the opportunities I have had and continue to have to teach Remedies (and related courses) to wonderful, dynamic law students at West Virginia University, Florida State University, University of North Carolina, Washington and Lee University, Gertúlio Vargas Foundation (Rio de Janeiro, Brazil), University of Vila Velha (Vitória, Brazil), and soon to the founding students of Savannah Law School.

19. For my Remedies work that focuses on restitution, see *supra* note 1. Other Remedies projects span from Civil Rights punitive damage awards to habeas corpus remedies. Compare Caprice L. Roberts, *Ratios, (Ir)rationality & Civil Rights Punitive Awards*, 39 AKRON L. REV. 1019 (2006), with Caprice L. Roberts, *Rights, Remedies, and Habeas Corpus—The Uighurs, Legally Free While Actually Imprisoned*, 24 GEO. IMMIGR. L.J. 1 (2009) [hereinafter Roberts, *Rights, Remedies, and Habeas Corpus*], reprinted in RECOGNITION AND ENFORCEMENT OF JUDGMENTS: COMPARATIVE AND INTERNATIONAL PERSPECTIVE 466–531 (Russell Weaver & François Lichère eds., 2010).

20. DAN B. DOBBS & CAPRICE L. ROBERTS, *DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* (3d ed. forthcoming). I welcome any suggestions or tips regarding useful citations for inclusion in the new edition: croberts@savannahlawschool.org.

21. See, e.g., David Campbell, *A Relational Critique of the Third Restatement of Restitution* § 39, 68 WASH. & LEE L. REV. 1063 *passim* (2011) (critiquing my series of articles regarding how the restitutionary disgorgement remedy values promise keeping over efficient breach to deter opportunistic breaches of contract). Much of the international dialogue stems from the Commonwealth's commitment to the scholarly topics of Remedies and Restitution as two distinct and worthwhile academic fields. Another helpful facilitator has been the Remedies Forum's efforts to stimulate a more comparative dialogue at conferences held in Aix-en-Provence, France, and corresponding law review symposium volumes. Thanks to prior Remedies Forum sponsors: Professors Russel Weaver, David Partlett, and Doug Rendleman.

advocacy. It instilled in me a passion for showing how remedies can shape substantive rights as well as affect real people every day. These two pillars form the basis for bridging theory and practice in my Remedies course.

B. Teaching Remedies from Theory to Practice

Each Remedies class presents a moment for philosophical reflection coupled with sometimes harsh, practical realities when the rubber meets the road at the close of a case. Even a victory can be hollow. Nominal damages—in name only—are a ready example of a tough phone call that a lawyer must make to her client.²² On the other hand, a punitive award, while helping to defray plaintiff's litigation costs, may still leave a seriously injured plaintiff *unwhole*—not to mention plaintiffs with latent injuries who may sue after defendant's funds are depleted.²³ What federal constitutional defenses might a defendant raise to challenge a state-based punitive award?²⁴ Can a monetary judgment ever accurately measure the value of the harm caused? What happens when money will not suffice and irreparable harm is ongoing? Are reparations appropriate legal remedies for ancient wrongs? These issues are just the tip of a Remedies discussion on any given day.

The following vignettes how theory and practice intersect and illuminate the study of Remedies law as well as the underlying substantive rights at issue. These examples come from our Remedies casebook, my Remedies scholarship, or both.

22. See, e.g., *Gavcus v. Potts*, 808 F.2d 596 (7th Cir. 1986) (affirming an award of nominal damages for trespass but denying other monetary relief including costs of installing a security system after the unlawful removal of coins), as reprinted in RENDLEMAN & ROBERTS, *supra* note 7, at 942–45.

23. Complex issues surround the appropriateness, timing, scope, and nature of remedies in cases of asbestos exposure or discharged chemicals and toxins that have already caused or may later result in cancer or other related diseases. See, e.g., *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003) (upholding plaintiff's ability to sue for damages for fear of cancer as part of his pain and suffering damages where plaintiff's asbestosis was caused by his job exposing him to asbestos), discussed in RENDLEMAN & ROBERTS, *supra* note 7, at 40; *Rhodes v. E.I. Du Pont de Nemours & Co.*, 657 F. Supp. 2d 751 (S.D. W. Va. 2009) (denying defendant's summary judgment motion with respect to plaintiffs' medical monitoring claims), as reprinted in RENDLEMAN & ROBERTS, *supra* note 7, at 42–47; *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005) (rejecting medical monitoring awards where plaintiffs lacked physical injury).

24. See, e.g., *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), as reprinted in RENDLEMAN & ROBERTS, *supra* note 7, at 170–77; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), discussed in RENDLEMAN & ROBERTS, *supra* note 7, at 169–70; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), as reprinted in RENDLEMAN & ROBERTS, *supra* note 7, at 155–65. For additional guidance on the federalism score, see Michael P. Allen, *Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of Philip Morris v. Williams*, 63 N.Y.U. ANN. SURV. AM. L. 343 (2008), and Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1 (2004).

1. The Theory: Remedies Shape Substantive Rights

The heart of my Remedies scholarly work explores the ways that remedies shape substantive rights. An expansion of remedies at the margins may broaden the scope of the underlying right. For example, the restitutionary disgorgement remedy sanctioned in the new *Restatement (Third) of Restitution and Unjust Enrichment*²⁵ demonstrates how the remedy's goals will enhance, if not create, the right to be free from opportunistic contractual behavior despite the nonexistence of tortious behavior.²⁶ The existence and use of the remedy will also honor promise-keeping and may do so at the expense of other arguable contract right goals such as efficient breach.²⁷

By the same token, the contours of a right may shrink if the remedy is narrowed or illusive. I argue remedies that appear available, but in fact are not, are illusive. To the extent that remedies remain illusive despite a proven right, the lack of remedy eviscerates the underlying right. Such incoherence between right and remedy causes the rule of law to devolve into a charade.²⁸ Regrettable facets of the Guantánamo detainee litigation illustrate this point. *Kiyemba v. Obama*²⁹ is an example of judicial abdication of the federal court's power to issue a remedy to relieve an ongoing, proven violation of the constitutional habeas corpus right.³⁰ A subset of Guantánamo detainees known as the Uighurs were held for more than ten years despite early concessions by two presidential administrations that they were not enemy combatants.³¹ A federal district court held the Uighurs proved the ongoing violation of their

25. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (2011).

26. Roberts, *Restitutionary Disgorgement as a Moral Compass*, *supra* note 1, at 993.

27. *Id.* at 993–94.

28. See *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) (“[I]f it turns out that regardless of our decisions the executive branch does not release winning petitioners because no other country will accept them and they will not be released into the United States, then the whole process leads to virtual advisory opinions. It becomes a charade prompted by the Supreme Court’s defiant—if only theoretical—assertion of judicial supremacy sustained by posturing on the part of the Justice Department, and providing litigation exercise for the detainee bar.” (internal citations omitted)).

29. 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011).

30. See Roberts, *Rights, Remedies, and Habeas Corpus*, *supra* note 19, at 32. I continued the exploration of these themes as part of the Constitutional Remedies Discussion Group at the Southeastern Association of Law Schools (Amelia Island, Florida, July 31, 2012).

31. See *In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 34–35 (D.D.C. 2008) (noting that “the government determined that it would treat all Uighur petitioners ‘as if they are no longer enemy combatants’”), *rev’d sub nom.* *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011); Brief for the Respondents in Opposition at 2, 11, *Kiyemba v. Obama*, 130 S. Ct. 458 (2009) (No. 08-1234).

habeas corpus rights and ordered their release into the United States.³² The D.C. Circuit Court disagreed and held that the federal court lacked the power to intervene into presidential prerogatives regarding what amounted to an immigration issue.³³ A series of procedural machinations unfolded,³⁴ and, as the years elapsed, most of the Uighurs were released as part of political diplomatic resettlement agreements.³⁵ A few Uighurs still remain detained at Guantánamo,³⁶ but their lawyers did not contest that the executive has continued efforts at resettlement on their behalf.³⁷ The Supreme Court then denied certiorari with an intriguing clarification drafted by Justice Breyer on behalf of himself and Justices Kennedy, Ginsburg, and Sotomayor.³⁸ The slow political unwinding of custody does not eliminate the right-remedy problem.

Executive solutions to a thorny problem were no doubt exacerbated by Congress's constraints on relocation of the detainees. Further, the factual developments coupled with the lawyer's lack of objection to the government's resettlement offers may show that denial of certiorari was appropriate. Unfortunately, this leaves the central issue raised by the D.C. Circuit Court's denial of any remedy for a then-ongoing habeas violation unanswered. This is regrettable. In order to maintain the scope of the basic liberty right to be free from unlawful restraint, a court must maintain the power to remedy that violation in some fashion. The district court did not need to order the detainees into the United States. It needed to order their release from Guantánamo. The court could have ordered the executive to act within a set timeframe and let the executive handle the tailoring of the remedy. Another option would have been conditional release, again leaving the compliance with immigration requirements to the executive branch. When core constitutional rights are at stake, it is imperative that the court maintains its power to issue a remedy. Otherwise the right itself begins to evaporate.

32. *In re Guantánamo Bay*, 581 F. Supp. 2d at 34 (“[B]ecause separation-of-powers concerns do not trump the very principle upon which this nation was founded—the unalienable right to liberty—the court orders the government to release the petitioners into the United States.”).

33. *Kiyemba*, 555 F.3d at 1028 (“Whatever may be the content of common law habeas corpus, we are certain that no habeas court since the time of Edward I ever ordered such an extraordinary remedy.”).

34. The Supreme Court granted certiorari to resolve the important issues raised but then remanded for further consideration. *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam). The D.C. Circuit Court reaffirmed its ruling denying any remedy. *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam).

35. Successful diplomacy efforts resulted in resettlement to other countries including Palau, El Salvador, and Bermuda. See Charlie Savage, *Pair of Guantánamo Detainees Freed, the First in 15 Months*, N.Y. TIMES, Apr. 20, 2012, at A8.

36. *Id.* (reporting that three Uighurs remain in custody at Guantánamo).

37. See *Kiyemba v. Obama*, 131 S. Ct. 1631, 1631 (2011).

38. *Id.* at 1631–32.

Another example is *Weinberger v. Romero-Barcelo*,³⁹ in which the Court acknowledged a technical violation of environmental regulations, but determined that a judge's equitable discretion includes the power to deny injunctive relief despite the proven violation of a right.⁴⁰ Outright denial of an injunction to stop ongoing pollution that violates the governing environmental statute erodes the shape of the underlying environmental right to be free from un-permitted discharge of pollutants.

2. The Practice: Remedies Litigation Strategy Affects Real Clients Every Day

Remedies provides ample opportunities to explore litigation strategy, judicial discretion, and jury attitudes. If a lawyer underestimates a jury's likely reaction to its client's posture and thus asserts the defendant's right to a jury trial, it will demonstrate the be-careful-what-you-wish-for category of cases. *Feltner v. Columbia Pictures Television, Inc.*⁴¹ demonstrates this hubris: after Justice Thomas held that the Seventh Amendment protects a right to a jury trial to determine the amount of statutory damages due under the Copyright Act,⁴² the jury on remand set the defendant's statutory damages at \$70,000 per episode violation for a total of \$31,680,000—well above the prior judge-based verdict of \$8,800,000 total (\$20,000 per violation).⁴³ This case also shows the continued importance of the distinction between law and equity as the jury trial right hinges on that issue.⁴⁴

On rare occasion, a lawyer will secure a remedy for a client despite failing to show that a sufficient ground for the right exists. Plaintiffs will not always be so fortunate, and defendants will rightly appeal. Accordingly, students are wise to learn to tailor remedies to the appropriate cause of action and to prove both the right and the grounds for the corresponding remedy. *Navajo Academy, Inc. v. Navajo United Methodist Mission School, Inc.*⁴⁵ illustrates this

39. 456 U.S. 305 (1982), as reprinted in RENDLEMAN & ROBERTS, *supra* note 7, at 373–81. Interestingly, the Supreme Court has reanimated this case by citing it in the Court's recent treatment of the equitable analysis required for the judicial grant of injunctions in intellectual property cases and beyond. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), as reprinted in RENDLEMAN & ROBERTS, *supra* note 7, 269–73.

40. We explore the consequences of such discretion in RENDLEMAN & ROBERTS, *supra* note 7, at 381.

41. 523 U.S. 340 (1998), as reprinted in RENDLEMAN & ROBERTS, *supra* note 7, at 347–51.

42. *Id.* at 342.

43. RENDLEMAN & ROBERTS, *supra* note 7, at 352.

44. See U.S. CONST. amend. VII (providing that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”).

45. 785 P.2d 235 (N.M. 1990), as reprinted in RENDLEMAN & ROBERTS, *supra* note 7, at 369–73.

phenomenon of right-remedy disjoint. In *Navajo Academy*, the court affirmed a creative, equitable remedy in the absence of a proven right.

The *Navajo Academy* case involved an educational arrangement that failed to rise to the level of an enforceable contract. Navajo Academy operated a preparatory school for Navajo college-bound youth, and, on invitation, moved its campus onto the Navajo United Methodist Mission School (“Mission School”) grounds.⁴⁶ Navajo Academy provided the education promised and made substantial improvements to the grounds via successful application to the Bureau of Indian Affairs for renovation funds.⁴⁷ Under this oral arrangement, Navajo Academy did not pay rent.⁴⁸ Ten years into the relationship, the Mission School demanded substantial rent or eviction.⁴⁹ The trial court crafted a remedy permitting the Academy to continue to function as a school for up to three years as it searched for a new home.⁵⁰ The New Mexico Supreme Court affirmed the remedy as within the bounds of reason.⁵¹ Yet no *enforceable* contract existed.⁵² The property rights ran in favor of the Mission School’s lessor, as owner of the property.⁵³ A skeptic might shrug dismissively regarding the lack of right-remedy coherence on the basis that justice was served. Might justice have been better served, however, by plaintiff’s counsel establishing a different right upon which to ground the remedy? Would an unjust enrichment theory have helped or did the enrichment come at the expense of the Bureau of Indian Affairs? Alternatively, if the court had acknowledged the conundrum, then law reform could take place to fill the gap in substantive doctrine and then tailor the remedy to match its goals rather than crafting a half-remedy from whole cloth.

V. CHALLENGES TO REMEDIES—A VERY BRIEF RESPONSE TO SKEPTICS

During my experiences teaching and writing about Remedies, I often field foundational questions from academic skeptics. This phenomenon unsurprisingly was absent during practice because litigators *get* the import of remedies. They live it every day. They predict remedies to counsel clients and

46. *Id.* at 236.

47. *Id.* at 237.

48. *Id.* at 236.

49. *Id.* at 237.

50. *Navajo Academy*, 785 P.2d at 240.

51. *Id.* at 241.

52. *See id.* at 239 (“All three of the [appellants’] sub-arguments are predicated on the same erroneous proposition—that the trial court in effect specifically enforced the promise to give a long-term lease, when in actuality it recognized that the tenancy between the parties was terminated and, in order to reach an equitable result, permitted the Academy to remain on the premises for a period of time.”).

53. *See id.* at 236–37 (explaining the Mission School’s lease relationship with its lessor, the Women’s Division of the Board of Global Ministries of the United Methodist Church).

negotiate settlements, they strategize about which causes of action to bring based on remedial distinctions, and they live with the consequences of remedial choices at the close of every case when the judge, jury, or settlement renders the ultimate remedy for or against a given client. Their fault, if forced to note one, is a desire for all to be black and white. Alas, the law remains gray even with forecasting the consequences of remedies precedent. Sometimes it seems that there is an inverse correlation between practitioner and professorial import in that a topic of evident practitioner import—Remedies—lacks intrigue to conventional American legal scholars and teachers⁵⁴ in comparison to provocative public law topics for example.⁵⁵

The questions of skeptics, which include some misperceptions, have arisen with prevalence over the years:

- Is Remedies really a distinct course?⁵⁶
- Do intellectually interesting issues exist in the private law of Remedies?
- Is it possible to teach and write in the public law of Remedies?⁵⁷
- Can there be any unifying themes for the topic of Remedies?⁵⁸
- Can you teach Remedies from a transsubstantive, remedy-by-remedy approach, or a wrong-by-wrong approach?

54. See *supra* note 8 and accompanying text.

55. Without doubt, there are exceptions to this generalization. Note all the participants in this law journal issue. Also note that Remedies connects with public law, which has also generated compelling Remedies scholarship for decades. See, e.g., OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); Paul Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585 (1983); Alfred Hill, *Constitutional Remedies*, 69 *COLUM. L. REV.* 1109 (1969); David I. Levine, *Thoughts on Teaching Remedies from a Public Law Perspective*, 39 *BRANDEIS L.J.* 557 (2001); Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 *WASH. & LEE L. REV.* 67 (1992); 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 (2004).

56. See, e.g., Laycock, *supra* note 6.

57. See *supra* note 55.

58. The 2013 Remedies Forum is slated for Prato, Italy, and will explore two topics: "Equitable Decrees and Supervision Problems" and "Unity in the Law of Remedies." See also Yehuda Adar & Gabriela Shalev, *The Law of Remedies in a Mixed Jurisdiction: The Israeli Experience*, 23 *TUL. EUR. & CIV. L.F.* 111, 111, 141 (2008) (commending the Israeli Draft Civil Code section, "Remedies for Breach of an Obligation," for its effort "to bring unity, coherence and simplicity to the law of remedies" through the creation of "a unified and comprehensive statutory scheme for awarding remedies in all branches of private law (civil and commercial)"); Jeffrey Berryman, *The Compensation Principle in Private Law*, 42 *LOY. L.A. L. REV.* 91 (2008) (advocating a rehabilitation of the compensation principle); Marco Jimenez, *Remedial Consilience*, 62 *EMORY L.J.* (forthcoming 2013) (offering a unifying theory of remedies by organizing and justifying remedies into four distinct yet related principles: restoration, retribution, coercion, and protection), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039444; Michael Tilbury, *Reconstructing Damages*, 27 *MELB. U. L. REV.* 697 (2003) (advancing a functional approach to damages).

- Can Remedies be taught from a traditional Socratic method or a problem method rather than simply black letter bar review?
- Can a legal realist teach Remedies?
- Is it possible to teach and write about Remedies with an eye towards racial, gender, and economic justice?⁵⁹
- Does statutory tort reform leave any relevance for Remedies common law?
- Does the modern lawyer need to know anything about equity given the formal merger of law and equity as a matter of civil procedure?
- Can the topic of Remedies sustain intellectual interest?

I answer a resounding yes to all these questions. The body of this Article generally speaks to all these and other lines of critique, but I prefer to come from an optimist angle and make the positive case for Remedies instead. I do teach and write in Remedies after all.

CONCLUSION

Whether you are a student, law professor, practitioner, or judge, I encourage you to join the Remedies revival and sharpen your knowledge of this complex, far-reaching subject. You will continue to reap the benefits of what you sow with Remedies throughout your professional life.⁶⁰

59. Remedies cases mirror societies' best and worst traits. For an interesting discussion of social justice themes, explore the allocation of victim funds. See RENDLEMAN & ROBERTS, *supra* note 7, at 63–74 (exploring thorny issues related to Special Master Kenneth Feinberg's distribution of the 9/11 victims fund).

60. See *Kistler v. Stoddard*, 688 S.W.2d 746, 747 (Ark. Ct. App. 1985) (affirming a restitution award for an unjust enrichment claim in order to prevent the defendant from reaping without justification the benefits that another had sowed), as reprinted in RENDLEMAN & ROBERTS, *supra* note 7, at 470–71.

