How Remedies Became a Field: A History

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I. THE MODERN IDEA OF REMEDIES .................................................. 164
II. ANTECEDENTS .................................................................................. 168
III. TRANSITIONS .................................................................................. 175
   A. Remedies as the Forms of Action ................................................. 175
   B. Remedies as Procedure .............................................................. 181
      1. John Austin ................................................................. 181
      2. John Norton Pomeroy ...................................................... 183
      3. The Round Table on Remedies ........................................... 186
      4. Courses and Casebooks: Charles Clark,
         Austin Scott, and Sidney Simpson ....................................... 191
      5. John Cribbet ................................................................. 211
IV. THE EMERGENCE OF THE MODERN REMEDIES COURSE .......... 216
   A. John Norton Pomeroy (again) ................................................... 216
   B. The Inventors .............................................................................. 220
      1. Edgar Durfee and John Dawson .......................................... 220
      2. John Wilson ......................................................................... 230
      3. The Minnesota Curriculum Committee and
         Charles Alan Wright .......................................................... 243
   C. Proliferation and Takeover ....................................................... 249
      1. Proliferation ........................................................................... 249
      2. Takeover: Kenneth York and John Bauman ....................... 255
   D. Dan Dobbs ............................................................................... 261
   E. Remedies After Dobbs ............................................................. 263
V. CONCLUSION ................................................................................. 266

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This is a history of remedies as a field—of how and when legal scholars came to think of remedies as a distinct subject matter. It was not inevitable that there would come to be courses, casebooks, treatises, and all-day workshops on the law of remedies. Even today, lawyers do not necessarily think of remedies in the same ready way they think of fields such as torts or contracts, or corporate or environmental law.

There are multiple reasons for the field's slow emergence and for the lingering unfamiliarity. The largest obstacle was historical. The question that unifies the law of remedies—what should a court do to correct an actual or threatened violation of law—had to be distilled from tangled separate origins in the writ system and in separate courts of law and equity. When and how did lawyers come to see that unifying question? Or perhaps more precisely, when did they come to see that unifying question as the basis for unified treatment of a law of remedies? The short answer is slowly and recently. And some of the giants in the law led the way.

This article resulted from a request that I briefly review the history of remedies when I introduced the Workshop on Remedies at the 2007 Annual Meeting of the Association of American Law Schools. I thought the story was short and simple and that it would be easy to pull together. It has turned out to be long and complex, full of surprises and of mysteries that yielded only to careful investigation. The resulting article is much longer than I anticipated, but at least to me, it is also much more interesting than I anticipated.

Part I specifies the modern idea of remedies as distinct from both substance and procedure, focused on what a court can do to correct a violation of law. Part II, "Antecedents," reviews the quite different idea of remedies in Blackstone and the maxims of equity, and the evolution of early books on damages, equity, and quasi-contract. Part III, "Transitions," reviews two earlier conceptions of remedies that survived well into the twentieth century: remedies as the forms of action, and remedies as civil procedure. Remedies courses in the middle of the twentieth century dealt mostly with civil procedure, and for nearly half a century, the remedies section of the Association of American Law Schools was devoted to civil procedure and evidence. Much of the article tries to understand that usage, which seems so odd today. Part IV traces the emergence of the modern remedies course from John Norton Pomeroy's lectures in 1880, through Edgar Durfee and John Dawson at Michigan, to John Wilson at Baylor and Charles
Alan Wright at Minnesota, to the modern casebooks and the Dan Dobbs treatise. Readers who want to skip all the mysteries and go straight to the direct line of descent can go directly to Part IV.

My sources include archival material and personal interviews with founders of the field, and it will simplify the exposition to briefly describe these sources at the outset. In addition to casebooks, treatises, and articles, I have personally reviewed the Proceedings of the Association of American Law Schools year by year from the organization’s founding in 1901, and I have used the Directory of Law Teachers and its predecessor publications from their beginnings in 1922. I have reviewed the magnificent collection of law school catalogs separately compiled at Iowa and Michigan and later combined into a single collection in the University of Iowa Law Library. After using the casebooks and the Directory of Law Teachers to determine when professors first began reporting that they taught courses called Remedies, I personally examined the catalog of substantially every law school in the United States for at least three years—one year early in the 1940s, one early in the 1950s, and one early in the 1960s. Where I found a remedies course, or where I had some other reason to suspect that there might have been a remedies course, I worked backwards and forwards year by year or checked earlier and later decades. I probably missed some remedies courses that were offered for a year or two at mid-decade and then abandoned, but I should have found every remedies course that lasted.

I was able to interview Kenneth York, John Bauman, John Cribbet, and Dan Dobbs, four of the founders of the field, and John Reed and Angus McSwain, who were colleagues of Edgar Durfee and John Wilson, respectively. I corresponded with Leo Levin, who taught and wrote in civil procedure back when many law professors called it remedies. York was in his nineties when I talked to him, and all the rest except Dobbs were well into their eighties. Some of them were frail, but their minds were all sharp. I am not a particularly skilled interviewer, and I was not willing to aggressively cross-examine these senior figures, but I found them enormously helpful in making sense of materials written in a different era and under very different assumptions. I also interviewed several other senior scholars who said they remembered nothing relevant; Michael Vaughn, who briefly occupied a key position and remembered much that was helpful; and several of John Wilson’s former students.
I will generally cite one or a few illustrative entries in the *Proceedings*, the *Directory*, the catalogs, or the interviews, often in support of generalizations based on review of a series of entries over a period of several years or sometimes many years. I have not attempted the unmanageable task of citing every page from every year that supports such generalizations. And when I say that something did not happen or exist in certain years, I will not cite the sources that do not mention that thing that did not happen or exist. For anyone who wants to test or further investigate my conclusions, course descriptions are easy to find in catalogs, and the catalogs are on the shelf in Iowa City. The *Proceedings* and the *Directory* are available in major university law libraries and on HeinOnline. Any reader can readily find remedies programs in tables of contents and indexes in the *Proceedings*, and after 1952, remedies teachers in the *Directory of Law Teachers*. Before 1952, the *Directory* has no separate lists of remedies teachers; one has to look up individual teachers who appear potentially relevant based on some other source.

I. THE MODERN IDEA OF REMEDIES

This article will refer frequently to the modern idea of remedies, to who had the modern idea, and to who did not. I should be clear at the outset what I mean by the modern idea of remedies.

The choice of remedy and the measure and administration of the remedy chosen pose a distinctive set of questions—logically separate from the liability determination and usually considered subsequent to that determination—focused on what the court will do to correct or prevent the violation of legal rights that gives rise to liability. The law of remedies thus includes compensatory damages, injunctions, restitution of unjust enrichment, declaratory judgments, punitive damages, and a great variety of more specialized remedies ranging from replevin to *ne exeat*. These remedies originated in different parts of the legal system and have quite different histories, but they are united by the idea of remedying a violation of some underlying legal right.

By the modern idea of remedies, I mean a cluster of related propositions: that all these different ways of remedying a violation are remedies; that these remedies are united by the question of what to do about a completed or threatened violation of law; that that question is
distinct from the question of whether there has been or is about to be a violation; and that all these remedies should be studied together in a single course, where they may be compared and contrasted and any unifying principles may be identified.

The law of remedies is transsubstantive, meaning that it cuts across other areas of substantive law. 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, as though we had never abandoned the writ system.

The law of remedies is universal within the scope of civil litigation. The remedy is the bottom line of any civil litigation, in any area of the substantive law. The remedy is the practical payoff—what the court can do for you if you win, and what the court can do to you if you lose.1 Plaintiff litigates to obtain a remedy; defendant litigates to avoid providing one. Even when the parties are more interested in the precedent than in the stakes of the individual case, the point of the precedent is to control future litigation in which the practical payoff will once again be the grant or denial of a remedy.

A right with no effective remedy is unenforceable and largely illusory. Political actors are well aware that one can limit substantive rights by limiting remedies. Substantially all tort reform proposals actually enacted have been limitations on remedies,2 and many limitations on constitutional and statutory rights have taken the form of limitations on remedies.3

1. This is what I have told my students on the first day of class for many years. In the course of this research, I discovered that someone else had said nearly the same thing long ago. See John E. Cribbet, Cases and Materials on Judicial Remedies, at vii (1954) (“The remedy . . . constitutes what the court actually does for, or to the client in the particular case.”).


Part of the difficulty with conceptualizing remedies as a field has been that remedies fits uneasily between the categories of substance and procedure. Remedies are central to litigation, but except for details at the edges, like the procedural rules for preliminary relief, remedies in the modern idea are not part of the law of procedure. The Supreme Court has correctly held that the measure of damages is substantive for *Erie* purposes. The same should be true of the standards for granting injunctions, although that question appears not to have been litigated. What or how much a plaintiff recovers is part of plaintiff’s substantive entitlement and not simply a rule for processing disputes.

Even so, remedies are distinct from the underlying rules that regulate human conduct and impose liability. The rules of property and tort that protect my ownership and possession of property are equally violated whether the remedy is compensatory damages, disgorgement of defendant’s gains, restitution of the property in kind, an injunction to prevent the violation in the first place, punishment of defendant, or even no remedy at all because my claim is barred by

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5. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 437 n.22 (1996) (holding that state law supplies the standard for deciding whether a verdict on a state-law claim is excessive); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) (“In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.”); *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988) (“It has long been settled that ‘the proper measure of damages . . . is inseparably connected with the right of action,’ and therefore is an issue of substance . . . .” (quoting *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 491 (1916))).

6. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that neither Congress nor the federal courts have any power “to declare substantive rules of common law applicable in a State”).

limitations, immunity, defendant's bankruptcy, or some other defense that does not go to whether my property rights were violated.

We do not have a short and settled label for distinguishing the substantive law of remedies from the rest of the substantive law. John Norton Pomeroy, who will appear repeatedly in this history, called the rules that regulate behavior and impose liability "primary rights and duties." He took the phrase and the concept from John Austin's *Lectures on Jurisprudence*, where it was contrasted with a category much broader than remedies. As a way to distinguish the substantive law of remedies from the rest of the substantive law, the phrase never caught on. For lack of a better alternative, even remedies specialists find it convenient to refer to the substantive law other than remedies as simply the substantive law or the source of substantive rights. I will sometimes do so in this article. This usage is probably unavoidable, but it carries the risk of leaving remedies in conceptual limbo, implying that remedies are less than substantive, mere procedure, or merely adjunct to what is more properly substantive. I certainly do not intend such an implication, but the difference between remedies and other substantive law appears to be part of the reason that earlier generations of lawyers thought of remedies as part of procedure.

Another obstacle to thinking of remedies as a field is that practitioners do not specialize in remedies. Litigators must deal with the primary right and also with the remedy. Specialists in substantive fields other than remedies—in patents, personal injury, commercial litigation, etc.—deal with the application of remedies law to their specialty and think of the remedies most important to them as part of their substantive specialty. This lack of remedies specialists is as much a consequence as a cause of not perceiving remedies as a field. Litigators would benefit from consulting remedies specialists more often than they do. I have twice filed, in religious liberty cases, amicus

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9. 2 John Austin, *Lectures on Jurisprudence* 761–63 (Robert Campbell ed., 5th ed. 1885). There are many editions with different paginations; it helps to note that this passage appears in Lecture XLV.

10. See infra notes 89–100 and accompanying text.

briefs that were principally devoted to a remedies issue;\textsuperscript{12} in a very different context, the Supreme Court’s decision in eBay Inc. v. MercExchange, L.L.C.\textsuperscript{13} is a spectacular example of the confusion that can result from litigating a remedies issue without a remedies specialist. But the reality is that except for consulting opportunities for law professors, the practice of law does not support remedies specialists. It is only teachers and students who have the freedom to consider remedies apart from underlying questions about liability, and thus only law professors who can specialize in remedies.

II. ANTECEDENTS

Remedy is an ancient legal concept. \textit{Ubi jus, ibi remedium}—where there’s a right, there’s a remedy—is a maxim old enough to be rendered in Latin.\textsuperscript{14} Blackstone made the same point in English,\textsuperscript{15} and the idea of remedies for wrongs is pervasive in Book 3 of his \textit{Commentaries}. John Marshall adopted Blackstone’s formulation in \textit{Marbury v. Madison}.\textsuperscript{16} In many states, there is a constitutional right to a remedy for every wrong.\textsuperscript{17}


\textsuperscript{13} 547 U.S. 388 (2006) (confusing tests for permanent and preliminary injunctions and announcing a “familiar” four-part test that the Court had never before applied); \textit{see} DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 52–53 (Supp. 2007) (discussing the confusion in the opinion); Doug Rendleman, \textit{The Trial Judge’s Equitable Discretion Following eBay v. MercExchange}, 27 REV. LITIG. 63, 76 n.71 (2007) (“Remedies specialists had never heard of the four-point test. . . . [T]he Court appears to vindicate a ‘traditional’ standard for a \textit{final} injunction that never existed, except perhaps for a \textit{preliminary} injunction.”); \textit{id.} at 82–88 (explaining that the Court should have relied on undue hardship and public interest as affirmative defenses).

\textsuperscript{14} BLACK’S LAW DICTIONARY 1761 (8th ed. 2004).

\textsuperscript{15} 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1768) (“In all other cases it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law.”).

\textsuperscript{16} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 163 (1803).

\textsuperscript{17} \textit{See} 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW §6.02[1], at 6-3
But of course the maxim is not true. Marshall held that Marbury had a right to his commission, but he refused to give Marbury any remedy. Immunities and many other rules often deny remedies for violations of undoubted legal rights, and the state constitutional provisions do not preclude such remedy-denying rules. But a remedy for every wrong remains a useful aspiration; there is at least a rebuttable presumption of a right to a remedy for every wrong.

The idea of remedy appears in another misleading ancient maxim: that equity will not act if there could be an adequate remedy at law. That maxim is at best a shorthand for a wide range of more specific rules, and at worst a slogan that conceals those more specific rules and conceals what is really at stake. The adequate-remedy-at-law rule still matters to preliminary relief, but exhaustive research shows that it almost never matters to the choice of remedy at final judgment.

Blackstone, Marshall, and the equitable maxims had the idea of correcting the violation of a substantive legal right, which is part of the modern idea of remedies. But they did not have the modern idea of remedy as a distinct phase of the lawsuit focused on how and to what extent to correct the violation of law. That distinction could not easily

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n.11 (4th ed. 2006) ("Every person is entitled to a certain remedy in the law for all injuries or wrongs he may receive in his person, property or character ....") (quoting ARK. CONST. art. II, § 13)); id. app. 6, at 6-91 to -94 (tabulating minor variations in wording of 37 such provisions).

18. Marbury, 5 U.S. at 168 ("Having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.").

19. Id. at 175–76, 180 (holding that Supreme Court lacked jurisdiction and therefore discharging the rule to show cause why a writ of mandamus should not be granted).

20. See, e.g., Laycock, supra note 2, at 477–510, 1067–1102 (discussing governmental immunities); Schuck, supra note 3 (analyzing and criticizing the law of governmental immunities).

21. See 1 Friesen, supra note 17, at 6-1 to -89 (surveying the history and interpretation of such provisions).

22. See Douglas Laycock, The Death of the Irreparable Injury Rule 237–44 (1991) (summarizing how the irreparable injury rule is used to label conclusions based on a wide range of more specific considerations that, taken collectively, balance the costs and benefits of compensatory and specific relief).

23. Id. at 110–32.

24. See generally id. at 37–98 (showing that damage remedy is never adequate in any case where it matters to ultimate outcome).
emerge under the writ system, in which jurisdiction, procedure, cause of action, substantive law, and remedy were all tied together in each writ. 25 Blackstone implicitly equated remedies with writs; choosing what “remedy” to pursue meant choosing the appropriate writ. 26

Equity offered distinctive remedies, but it also offered distinctive bodies of law defining primary obligations, and it justified both in terms of the inadequacy of legal remedies. 27 Frederic Maitland’s lectures on equity, at the turn of the twentieth century, were mostly devoted to trusts, estates, and mortgages; 28 of twenty-one lectures, only two near the end addressed injunctions and specific performance, the two great and distinctive equitable remedies. 29 In Justice Story’s treatises, only nine chapters out of sixty-two were devoted to equitable remedies. 30

26. 3 Blackstone, supra note 15, at 272–73 (“When a person hath received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider with himself, or take advice, what redress the law has given for that injury; and thereupon is to make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. As, for money due on bond, an action of debt; for goods detained without force, an action of detinue or trover; or, if taken with force, an action of trespass vi et armis; or, to try the title of lands, a writ of entry or action of trespass in ejectment; or, for any consequential injury received, a special action on the case.”).
27. See Laycock, supra note 22, at 20 (explaining that the very existence of the equity court (and therefore both its remedies and its substantive law) was justified on the ground that equity would not take jurisdiction if a legal remedy would be adequate).
28. See F.W. Maitland, Equity 23–236, 266–92 (A.H. Chaytor & W.J. Whittaker eds., 1909) (summarizing the substantive law of equity). These lectures were given repeatedly, from about 1888 until 1906. The 1906 version was later published by his students, working from his detailed manuscripts, his marginal notes to those manuscripts, and a student’s notes. See id. at v–vi.
29. Id. at 237–65.
30. See Joseph Story, Commentaries on Equity Pleadings, and the Incidents Thereof, at xi–xii (2d ed. 1840) [hereinafter Story, Equity Pleadings] (listing 20 chapters with none devoted to remedies); 1 Joseph Story, Commentaries on Equity Jurisprudence, at ix–x (1836) [hereinafter Story, Equity Jurisprudence] (listing 16 chapters with none devoted to remedies); 2 id. at iii–v (listing 26 chapters; chapters 17 to 23 address “peculiar remedies in equity,” specific performance, “compensation and damages,” interpleader, bills quia timet, and injunctions, and chapters 40 and 41 address ne exeat and bills of discovery).
Anglo-American law abolished the writ system, and merged the courts of law and equity, over roughly a century from 1848 (the Field Code) to 1937 (the Federal Rules of Civil Procedure), with a few states lagging further behind.\textsuperscript{31} The world of legal scholarship and legal education changed as the legal system changed, but both changed slowly. In the nineteenth century, we begin to see transsubstantiative treatises on damages—treatises that addressed damages for many causes of action and proposed some general principles for measuring damages.\textsuperscript{32} Nineteenth-century treatises on injunctions also had a transsubstantive scope.\textsuperscript{33} There were nineteenth-century treatises on equity\textsuperscript{34} and on quasi-contract,\textsuperscript{35} but like Maitland, these emphasized primary rights. Some also dealt with procedure, some included remedies, but none were focused principally on remedies. In the first half of the twentieth century, we get more treatises on damages.\textsuperscript{36}

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31. JAMES, HAZARD & LEUBSDORF, supra note 25, at 22–25.
32. The best known of these today are THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (1847), and J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES (1882). Other treatises include WILLIAM B. EGGLESTON, A TREATISE ON THE LAW OF DAMAGES (1880), and GEORGE W. FIELD, A TREATISE ON THE LAW OF DAMAGES (1876).
33. JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS, AS ADMINISTERED IN THE COURTS OF THE UNITED STATES AND ENGLAND (1873); WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY, WITH NOTES AND REFERENCES TO AMERICAN CASES BY WILLIAM A. HERRICK (1871); ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS (1st Am. ed. 1822).
34. The best known of these today are JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE (1881); STORY, EQUITY PLEADINGS, supra note 30; and STORY, EQUITY JURISPRUDENCE, supra note 30. Other treatises include: CHARLES FISK BEACH, JR., A TREATISE ON THE MODERN PRACTICE IN EQUITY IN THE STATE AND FEDERAL COURTS OF THE UNITED STATES (1894); CHRISTOPHER G. TIEDEMAN, A TREATISE ON EQUITY JURISPRUDENCE (1893); ROGER FOSTER, A TREATISE ON PLEADING AND PRACTICE IN EQUITY IN THE COURTS OF THE UNITED STATES (1890); FRANKLIN FISKE HEARD, A CONCISE TREATISE ON THE PRINCIPLES OF EQUITY PLEADING, WITH PRECEDENTS (1882); GEORGE TUCKER BISPHAM, THE PRINCIPLES OF EQUITY (1874); JOHN WILLARD, A TREATISE ON EQUITY JURISPRUDENCE (1855); and HENRY BALLOW, A TREATISE OF EQUITY (2d Am. ed. 1820). I have not been able to find the first American edition of Ballow; the first English edition was HENRY BALLOW, A TREATISE OF EQUITY (1737).
35. WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS (1893).
36. The best known of these today is CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES (1935). Others include HUGH EVANDER WILLIS,
injunctions, equity, and quasi-contracts. There was no treatise on restitution until 1978, but of course there was the Restatement in 1937. The Restatement of Restitution addressed both the grounds of liability and the remedies when liability arose.

Collections of leading cases were marketed to nineteenth-century practitioners, and there were collections of this sort on both damages and equity, but I have found none on remedies. Professors at the Harvard Law School began publishing casebooks for students in the 1870s, and this new genre of casebook grew explosively in the 1890s. Equity, quasi-contracts, and damages were

PRINCIPLES OF THE LAW OF DAMAGES (1912), and JOSEPH A. JOYCE & HOWARD C. JOYCE, A TREATISE ON DAMAGES (1903).

37. THOMAS C. SPELLING & JAMES HAMILTON LEWIS, A TREATISE ON THE LAW GOVERNING INJUNCTIONS (1926); HOWARD C. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS (1909).

38. HENRY L. McCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY (1936); WILLIAM F. WALSH, A TREATISE ON EQUITY (1930); FRED F. LAWRENCE, A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE (1929); THOMAS ATKINS WICKEL, FEDERAL EQUITY PRACTICE (1909); PHILIP T. VAN ZEILE, A TREATISE ON EQUITY PLEADING AND PRACTICE (1904); WILLIAM MEADE FLETCHER, A TREATISE ON EQUITY PLEADING AND PRACTICE (1902); C.L. BATES, FEDERAL EQUITY PROCEDURE (1901).


41. RESTATEMENT OF RESTITUTION (1937).


43. HENRY DWIGHT SEDGWICK, A SELECTION OF AMERICAN AND ENGLISH CASES ON THE MEASURE OF DAMAGES (1878).

44. THOMAS BRETT, LEADING CASES IN MODERN EQUITY, WITH NOTES AND AMERICAN CASES BY FRANKLIN S. DICKSON (1888); JOHN D. LAWSON, LEADING CASES SIMPLIFIED: A COLLECTION OF THE LEADING CASES IN EQUITY AND CONSTITUTIONAL LAW (1883); FREDERICK THOMAS WHITE & OWEN DAVIES TUDE, A SELECTION OF LEADING CASES IN EQUITY, WITH ADDITIONAL ANNOTATIONS CONTAINING REFERENCES TO AMERICAN CASES BY JOHN INNIS CLARK HARE AND HORACE BINNEY WALLACE (1849).

45. For a listing of 171 casebooks published before 1908, see Lind, supra note 42, at 111–26. See also Rosamond Parma, The Origin, History and Compilation of the Casebook, 4 AM. L. SCH. REV. 741 (1922) (describing the introduction and early growth of casebooks).

46. See, e.g., NORMAN FETTER, ILLUSTRATIVE CASES UPON EQUITY JURISPRUDENCE (1895); HARRY B. HUTCHINS, CASES ON EQUITY JURISPRUDENCE (1895); WILLIAM A. KEENER, A SELECTION OF CASES ON EQUITY JURISDICTION (1895); SETH SHEPARD, CASES ON EQUITY JURISPRUDENCE (1895); WILLIAM S.
among the earliest subjects covered in these casebooks. The equity and quasi-contracts casebooks necessarily continued to emphasize primary rules of conduct and liability.

Some of these nineteenth-century casebooks were published only for a particular professor and his students, but West Publishing Company worked diligently and successfully to create a market for casebooks that could be sold to multiple schools. Casebooks on damages and on equity proliferated in the early twentieth century, although Oscar Hallam's *Selected Cases on Damages and Suretyship and Guaranty* suggests some uncertainty about how damages fit into the larger body of law. There were also more casebooks on quasi-contracts, and eventually, casebooks on restitution. As the century

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PATTEE, ILLUSTRATIVE CASES IN EQUITY (1893); CHRISTOPHER COLUMBUS LANGDELL, CASES ON EQUITY JURISDICTION (1879); CHRISTOPHER COLUMBUS LANGDELL, CASES IN EQUITY PLEADINGS (1875).

47. WILLIAM A. KEENER, A SELECTION OF CASES ON THE LAW OF QUASI-CONTRACTS (1888).

48. JOSEPH HENRY BEALE, A COLLECTION OF CASES ON THE MEASURE OF DAMAGES (1895); FLOYD R. MECHEN, CASES ON THE LAW OF DAMAGES (1895).

49. See Lind, supra note 42, at 106–10 (reviewing this transition).

50. The best known of these today is CHARLES T. MCCORMICK, CASES AND MATERIALS ON THE LAW OF DAMAGES (1935). Another book widely assigned in the mid-twentieth century was JUDSON A. CRANE, CASES ON DAMAGES (1928). See also RALPH STANLEY BAUER, CASES ON THE LAW OF DAMAGES (1923); OSCAR HALLAM, SELECTED CASES ON DAMAGES AND SURETYSHIP AND GUARANTY (1914); FLOYD R. MECHEN & BARRY GILBERT, CASES ON DAMAGES, SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS (1909); ISAAC FRANKLIN RUSSELL, CASES ON MEASURE OF DAMAGES (1909).

51. See, e.g., GARRARD GLENN & KENNETH REDDEN, CASES AND MATERIALS ON EQUITY (1946); WILLIAM F. WALSH, CASES ON EQUITY (1937); HENRY L. MCCINTOCK, CASES ON EQUITY, SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS (1936); ZECHARIAH CHAFEE, JR. & SIDNEY POST SIMPSON, CASES ON EQUITY, JURISDICTION AND SPECIFIC PERFORMANCE (1934); EDGAR N. DURFEE, CASES ON EQUITY (1928); WALTER WHEELER COOK, CASES AND OTHER AUTHORITIES ON EQUITY (1923); JAMES BARR AMES, A SELECTION OF CASES IN EQUITY JURISPRUDENCE (1904). For a complete list of equity casebooks, see DOUGLAS W. LIND, BIBLIOGRAPHY OF AMERICAN LAW SCHOOL CASEBOOKS, 1870–2004, at 372–92 (2006).

52. HALLAM, supra note 50.

53. WILLIAM S. PATTEE, CASES ON QUASI-CONTRACTS (1911); EDWIN H. WOODRUFF, SELECTED CASES ON THE LAW OF QUASI-CONTRACTS (1905); JAMES BROWN SCOTT, CASES ON QUASI-CONTRACTS (1905).

54. JOHN W. WADE, CASES AND MATERIALS ON RESTITUTION (1958); EDWARD W. PATTERSON, CASES ON RESTITUTION: INCLUDING RESSION,
wore on, equity casebooks focused more on equitable remedies and less on substantive equity.\textsuperscript{55} Casebooks on remedies, as we understand that word today, would be the last to appear.

Just as I was completing this history, Douglas Lind published a bibliography of casebooks, an ambitious attempt to list every casebook printed for use in an American law school since 1870, including those produced for students at a particular school and not generally published.\textsuperscript{56} Lind, the Head of Collection Development at the Georgetown University Law Library, lists casebooks by subject matter and chronologically within subjects. This is an invaluable resource that would have saved me much work if it had appeared a year earlier, but it is also frustrating. He has listings for damages\textsuperscript{57} and for restitution.\textsuperscript{58} But he lists the quasi-contracts books under contracts instead of restitution,\textsuperscript{59} and he combines equity and remedies into a single field.\textsuperscript{60} Plainly this important American law librarian has only the vaguest idea of how the components of the law of remedies fit together. He lists far more equity and remedies books than damages and restitution books. Within equity and remedies, equity books overwhelmingly predominate up to about 1965; remedies books overwhelmingly predominate after about 1975.

\textsuperscript{55} See, e.g., Walter Wheeler Cook, Cases and Materials on Equity: One Volume Edition (M.T. Van Hecke ed., 4th ed. 1948) (leading equity casebook addressing equitable remedies and restitution, but not the rest of substantive equity); Charles Alan Wright, Cases on Remedies, at ix (1955) (describing his book, which covers equitable remedies but not the rest of substantive equity, as covering "the essential parts" of the material traditionally taught in the Equity course).

\textsuperscript{56} Lind, supra note 51. This book was copyrighted in 2006, but it arrived in the Michigan library late in 2007.

\textsuperscript{57} Id. at 317–20.

\textsuperscript{58} Id. at 671–72.

\textsuperscript{59} See id. at 669.

\textsuperscript{60} Id. at 372–92.
III. TRANSITIONS

Remedies was not commonly thought of as a field of law in the late nineteenth and early twentieth centuries, and when the word was used, it appears to have had multiple meanings. Sometimes it retained Blackstone’s sense—a remedy was a writ or a cause of action. Sometimes it was used to refer to civil procedure, or at least to fundamental elements of procedure after the merger of law and equity. Sometimes it was used in something like the modern sense to describe what a court could do to remedy a violation of law. This usage seems to have emerged first with respect to equitable remedies and the extraordinary legal remedies; the profession was much slower to apply it to damages. All three usages persisted into the second half of the twentieth century, with little in the way of explanation. Occasionally, all three usages appear in the writings of the same person. It is reasonable to assume that these different meanings did not seem so different at the time.

A. Remedies as the Forms of Action

As already noted, Blackstone implicitly equated the choice of remedy with choice of the proper form of action. To obtain a remedy at law, one first had to obtain a writ. It must have seemed a natural verbal shortcut—probably not even recognized as a shortcut—to say that the remedy for dispossession from land was ejectment and the remedy for breach of contract was assumpsit. Each writ culminated in a remedy if plaintiff succeeded; each writ also entailed many other functions that we would not think of as remedial today.

Christopher Columbus Langdell, the Harvard dean who is generally credited with inventing the case method of instruction, noted this usage in 1887: “The term ‘remedy’ is applied either to the

action or suit by means of which a right is protected, or to the protection which the action or suit affords.”62 “Remedy” as applied “to the action or suit by means of which a right is protected” is Blackstone’s usage, remedy as a writ or a cause of action. But Langdell’s second usage, “the protection which the action or suit affords,” describes remedies in quite modern terms. Langdell thus distinguishes what his first alternative conflates: treating the forms of action as remedies equates the means of pursuing a remedy with the remedy itself.

Something like the forms-of-action usage is prominent in a 1910 casebook by Samuel Mordecai and Atwell McIntosh at Trinity Law School (now Duke), entitled Remedies by Selected Cases Annotated.63 Mordecai taught a course called Remedies from this book,64 but this was not a remedies book or course in anything like the modern sense. The book undoubtedly made sense to Mordecai and McIntosh, but from the perspective of 2008, its contents are so miscellaneous as to defy ready description. The bulk of the book, seven chapters organized principally in terms of the forms of action and including some equitable causes of action, often seems to use “remedies” in Blackstone’s sense,65 although there are also section headings recognizable as remedies in the modern sense.66 Two chapters on “Extraordinary Remedies” and “Ancillary Remedies,” including injunctions but omitting damages and most of restitution, are readily recognizable as remedies.67 There are three chapters on

62. Christopher Columbus Langdell, A Brief Survey of Equity Jurisdiction, 1 Harv. L. Rev. 111, 111 (1887).
63. SAMUEL F. MORDECAI & ATWELL C. MCINTOSH, REMEDIES BY SELECTED CASES ANNOTATED (1910).
64. ANNUAL CATALOG OF TRINITY COLLEGE 1918–1919, at 184 (1919) [hereinafter TRINITY 1918].
65. MORDECAI & MCINTOSH, supra note 63, at 119–782 (covering, for example, waste, nuisance, trespass quare clausum fregit, trespass vi et armis, cas, assault and battery, libel, husband and wife, parent and child, master and servant, covenant, debt, and assumpsit).
66. Id. (including, for example, removal of cloud on title, habeas corpus, and injunction against breach of contract).
67. Id. at 783–873 (covering habeas corpus, prohibition, mandamus, quo warranto, injunction, bills of peace and quia timet, interpleader, certiorari, recordari, scire facias, arrest and bail, claim and delivery, attachment, receivers, sequestration, and ne exeat).
procedure,\textsuperscript{68} one on “Remedies Without Judicial Proceedings,”\textsuperscript{69} and another on “Remedies by Judicial Proceedings,”\textsuperscript{70} which mostly addresses the relationship between civil and criminal law, including civil and criminal contempt of court. The book offers no explanation of what Mordecai and McIntosh were thinking when they used “Remedies” in the title. The course description says that the book “covers all branches of remedial law, both with and without judicial proceedings,” and offers an unusual footnote that details the book’s contents without clarifying anything to a modern reader.\textsuperscript{71} Whatever they were thinking, this book does not seem to be on the direct path to the modern idea of remedies, at least on brief inspection. And with those old casebooks, there is not much middle ground between a brief inspection and reading hundreds of pages with a substantial risk of still not understanding what the editors were thinking. They are a long procession of cases, with little or no text and few clues to what the instructor was expected to do with the cases. I confess that I did not read this book case by case to try to infer what all the cases had in common.

However reasonable these excuses, my inspection may have been too brief. When I interviewed Dan Dobbs, he brought up

\textsuperscript{68} Id. at 874–980 (organized in terms of jurisdiction, process, and parties).
\textsuperscript{69} Id. at 1–95 (covering self-help, settlements, arbitration, and remedies by operation of law).
\textsuperscript{70} Id. at 96–118.
\textsuperscript{71} TRINITY 1918, supra note 64, at 184 & n.* (“Remedies by Selected Cases: This is a case-book which covers very fully remedies both with and without judicial proceedings; all remedies concerning real estate; the forms of common law and code actions; remedies for all injuries to personal security, liberty and privileges, relative rights, tangible personal property, and to rights growing out of contract; remedies in special cases, to wit: bills for advice, caveat proceedings, partition, sale of real estate and chattel of infants, proceedings to make real estate assets, creditors’ bills, and remedies of creditors under 13 Eliz., the extraordinary remedies of habeas corpus, prohibition, mandamus, quo warranto, injunction, bills of peace, quia timet, interpleader, and writs of certiorari, recordari, and sci. fa.; the ancillary remedies of arrest and bail, claim and delivery, injunction, attachment, and receivers and sequestration; also the subjects of jurisdiction, process, and parties.”). More of this description may be devoted to categories that are still recognizable as remedial, but vastly more of the book is described in the more substantive categories in the description’s opening lines, down through “rights growing out of contract.”
Mordecai and McIntosh, referring to it as “the McIntosh book.” Dobbs knew a little about the book through the intellectual tradition at North Carolina, where he and McIntosh both taught and where they each overlapped with Maurice Van Hecke, a prominent equity scholar. When I asked Dobbs if he understood what Mordecai and McIntosh meant by Remedies, he said simply, “Remedies meant a lot of different things in those days.” That certainly appears to be true. But he thought that “they deserve some credit.”

Around 1924, Hessel Yntema produced a set of typewritten teaching materials entitled *Cases and Materials on the Development of Remedies*. These are entirely about the forms of action, and principally about the development of trespass and ejectment.

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74. Dobbs Interview, supra note 72.

75. HESSEL E. YNTEMA, CASES AND MATERIALS ON THE DEVELOPMENT OF REMEDIES (undated). The fragile copy I obtained from the Harvard Law Library is undated, and there is no date in the manuscript’s entry in Harvard’s online catalog. Douglas Lind somehow dated it to 1924, LIND, supra note 51, at 379, when Yntema was a young professor at Columbia. He went on to become a major figure in conflicts and comparative law, spending most of his career at Michigan. See REPORT OF THE COMMITTEE ON MEMORIALS, in ASSOCIATION OF AMERICAN LAW SCHOOLS, PROCEEDINGS: PART ONE, REPORTS OF COMMITTEES AND PROJECTS, 1966 ANNUAL MEETING 116, 157–62 (1967) [hereinafter 1966 PROCEEDINGS].
References to the forms of action as "remedies" persisted. In 1954, John Cribbet's otherwise modern remedies book devoted three chapters to the forms of action, and West Publishing found it worthwhile to reprint that book as late as 1974. West Virginia and Suffolk taught the forms of action, under remedies labels, into the early 1970s. Alabama briefly converted its Forms of Action course to Judicial Remedies and then back again. Judicial Remedies appears to have been a broader course, but it prominently included the forms of action and both courses were taught in part from the same casebook. And Doug Rendleman, longtime remedies scholar and editor of a major casebook, remembers teaching a course called Remedies at Alabama in 1970, with a book assigned by his senior colleagues that began with the forms of action.

Other survivors of the writ system—most notably mandamus, prohibition, habeas corpus, and quo warranto, collectively described as prerogative writs and more recently as extraordinary legal remedies—are remedies in the modern sense. They still appear

76. See Cribbet, supra note 1, at 39–246, discussed infra notes 262–298 and accompanying text.
77. See Lind, supra note 51, at 387.
78. See, e.g., Suffolk University Law School Catalogue 1972–1973, at 43 [hereinafter Suffolk 1972] (Remedies, with course description listing the principal forms of action plus civil procedure); West Virginia University Bulletin: 1972–1973 College of Law Catalog 24 (Judicial Remedies, described as "Introduction to civil procedure; common-law forms of action; extraordinary legal remedies; statutory remedies; abolition of the forms of action; fusion of law and equity"). Common Law Remedies was taught continuously at West Virginia from 1934, but the catalog contained no course description until 1959–1960.
80. Compare Alabama 1947, supra note 79, at 18 (listing McBaine's Cases on Common Law Pleading, as one of two books for Judicial Remedies), with Alabama 1945, supra note 79, at 6 (listing McBaine as the book for Forms of Action).
82. E-mail from Doug Rendleman to Douglas Laycock (Oct. 6, 2007) [hereinafter Rendleman E-mail] (on file with author).
briefly in remedies books; they appeared in older course descriptions and were occasionally taught in separate courses of their own.

Lawyers several generations removed from the writ system may reasonably wonder why these writs are remedies in the modern sense if the writs of the forms of action are not. The answer is that these were a different kind of writ, issued at a different stage of the proceedings. "Writ" was a quite generic term; "the primary function of a writ was merely to convey the King's commands to his officers and servants, of whatever nature those commands might be." The writs we now think of as remedial were issued after full or partial adjudication and granted relief; we see the same usage in a more familiar context in surviving references to a "writ of injunction." The writs of the forms of action were different. They issued at the beginning of the case to initiate litigation and get defendant into court; known as original writs, they were more like a complaint and summons than a grant of relief. Some original writs, such as

83. E.g., 1 DOBBS, supra note 11, § 2.9(1), at 223–26; LAYCOCK, supra note 2, at 257–60, 562–63.


85. E.g., LOYOLA UNIVERSITY COLLEGE OF LAW CATALOGUE 1933–1934, ANNOUNCEMENTS 1934–1935, at 22 (Loyola Los Angeles, describing a two-hour course called Special Remedies); ST. LOUIS UNIVERSITY BULLETIN: THE SCHOOL OF LAW, DAY AND EVENING DIVISIONS, 1950–51, at 22 (describing a one-hour course); WASHINGTON COLLEGE OF LAW: ANNOUNCEMENT FOR THIRTY-FOURTH YEAR 1930–31, at 17 (describing a six-hour(!) course in the third year). The Loyola catalog cited here is available in the Loyola Law Library; the Iowa catalog collection does not go back that far for Loyola.


87. E.g., Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 177 n.3 (1968) ("The text of the Writ of Injunction is as follows . . ."); Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) ("What the applicant would require in order to achieve the substantive relief that it seeks is an original writ of injunction . . .").

88. See 1 DOBBS, supra note 11, § 2.9(1), at 226 n.17 (briefly explaining the distinction); PLUCKNETT, supra note 86, at 384 ("Plaintiff began the proceedings
replevin and ejectment, were original writs that led to distinctive relief; when we think of them as remedies today, we are thinking of the relief granted at the end of the case and not of the earlier proceedings pursuant to the original writ. The distinctions among different kinds of writs were more continuaums than bright lines, and the actual history is no doubt fuzzier than the modern perception, but the basic picture is clear enough.

B. Remedies as Procedure

Early in my career as a remedies teacher, I would occasionally hear older professors—usually much older professors—refer to remedies as part of the procedure curriculum. I always found such references puzzling, but I mistakenly assumed that they were just confused, and that it would lead to an awkward conversation if I pressed them on why they would say such a thing. In fact, their seemingly odd usage had a very long history. “Remedies” was commonly used to refer to civil procedure, both before and after the abolition of the forms of action and the merger of law and equity.

1. John Austin

John Austin famously defined law as a command issued by a sovereign and backed by a sanction. In a later lecture, he distinguished primary rights and duties from secondary rights and duties. Primary rights and duties are those that do not arise from violations of other rights or duties. Secondary rights and duties, which he sometimes called “sanctioning” rights and duties, do arise from the violation of other rights and duties. These secondary

by purchasing an original writ suited to his case . . . ”). Justice Scalia’s use of the word “original” in the quotation in footnote 87 is therefore probably mistaken. A suit in equity was begun by plaintiff filing a “bill.” Maitland, supra note 28, at 5 (contrasting the bill and the procedure that followed with “the old writs whereby actions are begun in the courts of law”). The writ of injunction issued later, if and when relief was granted.

89. 1 Austin, supra note 9, at 89 (Lecture I).
90. 2 id. at 761–65 (Lecture XLV).
91. 2 id. at 763 (emphasis added).
92. 2 id. at 761, 763.
rights have two purposes: “first, to prevent violations of [primary] rights and duties . . . ; secondly to cure the evils or repair the mischief which such violations engender.”

In modern terms, these secondary rights are remedies, and he occasionally used forms of that word. These secondary rights and duties “are sanctioning (or preventive) and remedial (or reparative).” And again, in explaining that primary rights and their accompanying secondary rights are often created together:

[The legislature often says] that such or such an act, or such and such a forbearance or omission, shall amount to an injury: And that the party sustaining the injury shall have such or such a remedy against the party injuring; or that the party injuring shall be punished in a certain manner.

Despite this close link in the promulgation of rights, Austin thought it useful to distinguish primary and secondary rights “because of the clearness and compactness which results from the separation.”

The cause of the great compactness is that the same remedial process is often applicable, not merely to this particular right, but to a great variety of classes of rights; and, therefore, if it be separated from the rights to which it is applicable, it may be disposed of at once; otherwise it must be frequently repeated.

Here is a key part of the reason for studying remedies as a separate field—although he does not seem to think it will require much study—and here too is a key part of the argument for organizing that study by remedies categories instead of by the categories of primary rights and duties.

Austin’s category of secondary rights and duties thus includes remedies, but it is not limited to remedies. It also includes

93. 2 id. at 761.
94. 2 id.
95. 2 id. at 767.
96. 2 id.
97. 2 id. at 767–68.
criminal punishment, as indicated at the end of the first block quote just above, and it includes civil and criminal procedure. Austin seems to have been aware of the differences among civil remedies, criminal punishment, and civil and criminal procedure, but he did not pursue the distinctions and he lumped them all together under the label of secondary or sanctioning rights and duties. His distinction between primary and secondary rights and duties was sound, but his conception of secondary rights was multifarious.

Austin’s jurisprudence was influential for a century, from its first complete publication by his widow in 1863 until H.L.A. Hart attacked his sovereign-command theory, with devastating effect, in 1961. Austin’s brief references to remedies were not a prominent part of his work, but his distinction between primary and secondary rights was. Secondary rights put remedies and procedure together in a single larger class, and this surely contributed to the later conflation of the two categories.

2. John Norton Pomeroy

In 1876, John Norton Pomeroy (pronounced “Pum-roy”) published an influential treatise on the procedural codes that had merged law and equity and abolished the forms of action. The centerpiece of this reform had been the “one form of action . . . which

98. 2 id. at 764–65.

99. Austin’s lectures were given only once, in 1832. He published the first six lectures in that year, but they drew little attention. His widow republished that volume in 1861, and reconstructed the remaining lectures from his notes and published those in 1863. See 1 Austin, supra note 9, at 23–26; Neil Duxbury, English Jurisprudence Between Austin and Hart, 91 VA. L. REV. 1, 16–17 (2005).

100. See H.L.A. Hart, The Concept of Law 1–78 (1961) (arguing that many rules that are clearly law cannot be understood as commands and that no single sovereign can be located in a modern democracy); Duxbury, supra note 99, at 3 (“Not until the appearance of Hart’s seminal writings on legal positivism did anything appear in England that would cause legal philosophers to reassess their assumptions and outlooks.”).


102. Pomeroy, supra note 8.
shall be denominated a civil action." Pomeroy said that "[t]he Civil Action is therefore the special subject of the present volume." He addressed the nature of this new civil action, and pleading and joinder of parties under its new rules.

Pomeroy opened this treatise with a summary of Austin’s jurisprudential scheme. Austin is not cited, but Austin’s Lecture XLV is the unmistakable source of Pomeroy’s Section 1. However, for the word “sanctioning” to describe secondary rights, Pomeroy substituted “remedial,” “since it more nearly accords with the nomenclature customary among lawyers in England and in America.” He titled this treatise Remedies and Remedial Rights by the Civil Action, According to the Reformed American Procedure, and his editors added the additional title Code Remedies in the fourth and fifth editions. This highly visible treatise may have greatly aggravated whatever confusion Austin had already caused.

Pomeroy understood the modern idea of remedies; he distinguished it from the rest of the substantive law at the outset:

Remedies, in their widest sense, are either the final means by which to maintain and defend primary rights and enforce primary duties, or they are the final equivalents given to an injured person in the place of his original primary rights which have been broken, and of the original primary duties towards him which have been unperformed.

103. Id. § 28, at 27–28 (quoting N.Y. Code of Procedure § 69 as it then stood).
104. Id. § 33, at 32.
105. Id. at xix–xxviii (table of contents). The introductory chapter promised to address these topics plus the nature of judgments under the civil action, id. § 42, at 44–45, but the chapter on judgments was apparently never completed.
106. Id. § 1, at 1.
107. Id. at 1–2.
He illustrated the first category with specific performance of a contract to sell a farm, and the second with damages for breach of a contract to sell goods. 110

But he gave a different definition to a closely related phrase: "Remedial rights, or rights of remedy, are rights which an injured person has to avail himself of some one or more of these final means, or to obtain some one or more of these final equivalents." 111 This parallels Langdell’s comment, a decade later, that "remedy" might refer either to the remedy itself or to the procedure for obtaining the remedy. 112 Just as the forms of action had been the means of obtaining a remedy, and came themselves to be referred to as remedies, so the new civil action was the means of obtaining a remedy, and might be referred to as a remedy or as a set of remedial rights. The parallel can be put even more closely. The forms of action were remedies; the one civil action substituted for the forms of action; therefore, by a sort of transitive law, the one civil action was also a remedy. Alternatively, drawing on Austin, remedies and procedure were part of the single larger category of secondary rights; Pomeroy could label that category “remedies” and write about the category’s procedural component.

Pomeroy unambiguously distinguished remedy from procedure in a later passage explaining that the reforms had completely changed procedure without changing substance or remedies:

While the change does not extend to the groups of rights and duties themselves which are collectively called “law” and “equity,” nor to the remedies which have been used in maintaining such rights and duties, but is entirely confined to the judicial instrument by means of which the remedies are sought after and obtained, in its operation and effect upon that instrument it is complete. 113

So Pomeroy understood the difference between remedy and procedure and understood that he was writing about procedure, yet the book’s

110. Id. at 2–3.
111. Id. at 2.
112. Langdell, supra note 62, at 111.
113. POMEROY, supra note 8, § 36, at 36.
title began Remedies and Remedial Rights. He lamented this choice in the preface to the second edition, but the book had become famous and the damage had been done:

The abbreviated title by which my book is commonly known—"Remedies,"—and which it is now too late to change, is in some respects misleading; for it fails to indicate the real subject-matter of the work. In the full title given to it, the words "by the civil action" were meant to be the most emphatic and important.114

The new civil action might have provided an opportunity to clarify the distinction between the remedy and the means of obtaining the remedy, but Pomeroy's title appears to have cemented the dual usage. Pomeroy was not confused, and probably Austin and Langdell were not confused either, but many of their readers probably were.

3. The Round Table on Remedies

Today the Association of American Law Schools has "sections" based on subject matter. Before 1973, AALS sections were called "round tables." The last chair of the Round Table on Remedies presided at the organizational meeting of the Section on Remedies;115 the existing section is thus the direct successor to the old round table, which first met in 1920.116 But the Round Table on Remedies, so called, was really the round table on procedure and evidence.

114. JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION, ACCORDING TO THE REFORMED AMERICAN PROCEDURE, at v (2d ed. 1883).

115. Compare Report of the Section on Remedies, in ASSOCIATION OF AMERICAN LAW SCHOOLS, 1973 ANNUAL MEETING PROCEEDINGS: PART ONE, REPORTS OF COMMITTEES, PROJECTS, AND SECTIONS 151 ("Dean Howard L. Oleck presided at the organizational meeting of the Remedies Section . . . ."), with Round Table Councils for 1972, in ASSOCIATION OF AMERICAN LAW SCHOOLS, PROGRAM AND COMMITTEE MEMBERSHIPS 1972 ANNUAL MEETING 23, 29 (listing Howard Oleck as Chairman of the Round Table on Remedies).

116. See Former Round Table Conferences, in HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE SUMMER MEETING AND OF THE EIGHTEENTH ANNUAL MEETING 14 (1920) [hereinafter 1920 PROCEEDINGS] (listing all Round Table Conferences up to that time).
A Round Table on Procedure met in 1915, 1916, and 1919;\textsuperscript{117} the Association did not meet in 1917 or 1918.\textsuperscript{118} There is no unambiguous indication that the Round Table on Remedies was the successor to the Round Table on Procedure, but Remedies appeared precisely when Procedure disappeared, and no Round Table on Procedure ever met again.\textsuperscript{119} A Section on Civil Procedure was finally organized at the 1974 annual meeting,\textsuperscript{120} after the modern remedies teachers had taken over the Section on Remedies.

At that first Round Table on Remedies in 1920, seven disparate "topics for discussion" were arranged in four categories: evidence, pleading, practice, and remedies.\textsuperscript{121} "Remedies" was thus a subdivision of "Remedies." It is hard to be sure, because this structure was neither explained nor repeated, but the program's organizers seem to have quite consciously used "remedies" in two different senses. "Remedies" as the name of the Round Table included evidence and procedure as well as remedies—thus including Austin's whole category of secondary rights and duties—but "remedies" as one subdivision of topics must have meant remedies in something like the modern sense. The single paper under the subheading of remedies, on "The place in a Curriculum [sic] for the subject of Extraordinary Legal Remedies," was the only paper on a topic that would be included in remedies today.\textsuperscript{122}

In 1921 and 1922, the "subjects" of the Round Table on Remedies were said to be "Civil Procedure, Code Procedure, Equity

\begin{flushright}
\textsuperscript{117} Id.
\textsuperscript{118} Dates and Places of Previous Meetings, in 1939 PROCEEDINGS, supra note 73, at 279.
\textsuperscript{119} Former Round Table Councils, in HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE THIRTY-SIXTH ANNUAL MEETING 385 (c. 1939) [hereinafter 1938 PROCEEDINGS] (listing all Round Tables up to that time). I have examined the list of programs presented for every year between 1938 and 1975.
\textsuperscript{121} Round Table Conferences, in 1920 PROCEEDINGS, supra note 116, at 63, 64.
\textsuperscript{122} Id.
\end{flushright}
Procedure, Evidence."  Remedies as a subtopic of itself had disappeared. This clarification first appeared in the listing of the Round Table and its officers, not merely in the listing of its program for the particular year. Thereafter, for decades, the papers presented to the Round Table on Remedies were on procedure topics. Examples include: "Why Teach Pleading?" in 1923, \textsuperscript{124} "The Making of the New Federal Rules of Procedure under the Act of 1934" in 1935, \textsuperscript{125} "Teaching Experience under the Federal Rules of Civil Procedure" in 1940, \textsuperscript{126} and "The Deans Look at Procedure" in 1952. \textsuperscript{127} There were occasional papers on evidence topics, such as "Needed Reforms in the Law of Evidence" in 1921 \textsuperscript{128} and "Formal Analysis as a Technique in Teaching Evidence" in 1932. \textsuperscript{129} But remedies topics in the modern sense were rare to nonexistent. At the 1933 meeting, Abe Fortas spoke on "Administrative Remedies Under the Agricultural Adjustment Act," \textsuperscript{130} which might have been about remedies, substance, administrative law, or politics. I have examined the program for every year, and there is nothing else that even might have been a remedies topic in the modern sense until 1960, when Ferdinand Stone at Tulane

\textsuperscript{123} Round Table Councils for 1922, in \textsc{Handbook of the Association of American Law Schools and Proceedings of the Nineteenth Annual Meeting} 7, 7 (1921) [hereinafter \textsc{1921 Proceedings}; \textit{Round Table Conferences}, in \textsc{Handbook of the Association of American Law Schools and Proceedings of the Twentieth Annual Meeting} 28, 29 (1922).

\textsuperscript{124} Round Table Conferences, in \textsc{Handbook of the Association of American Law Schools and Proceedings of the Twenty-First Annual Meeting} 30, 31 (1923).

\textsuperscript{125} Round Table Conferences, in \textsc{Handbook of the Association of American Law Schools and Proceedings of the Thirty-Third Annual Meeting} 161, 165 (1935).

\textsuperscript{126} Round Table Conferences, in \textsc{Handbook of the Association of American Law Schools and Proceedings of the Thirty-Eighth Annual Meeting} 151, 151 (1940).

\textsuperscript{127} Round Table Meetings for 1952, in \textsc{Association of American Law Schools, 1952 Proceedings} 185, 189 (1952).

\textsuperscript{128} Round Table Conferences, in 1921 Proceedings, supra note 123, at 26, 29.

\textsuperscript{129} Round Table Conferences, in \textsc{Handbook of the Association of American Law Schools and Proceedings of the Thirtieth Annual Meeting} 123, 129 (1932).

\textsuperscript{130} Round Table Conferences, in \textsc{Handbook of the Association of American Law Schools and Proceedings of the Thirty-First Annual Meeting} 138, 147 (1933) [hereinafter 1933 Proceedings].
and Jack Weinstein at Columbia talked about “Civil Law Remedies and Their Availability in Common Law Jurisdictions.”

Consistently with its programming, the Round Table on Remedies was led by procedure and evidence scholars. Among the prominent procedure and evidence scholars who served on the Council of the Round Table on Remedies were Edmund Morgan at Yale (and later Harvard) in 1920–1921 and 1948; Edson Sunderland at Michigan in 1920–1922; Oliver McCaskill at Cornell (and later Illinois) in 1921 and 1923; Edward Hinton at Chicago in 1922, Austin Scott at Harvard in 1923; James McBaine at Missouri (and later Berkeley and Hastings) in 1924 and 1954; Charles Clark at Yale in 1925 and 1929; Roswell Magill at Columbia in 1925–1927,


132. See Former Round Table Councils, supra note 119, at 386–87; Round Table Councils, in Association of American Law Schools, 1947 Handbook 269, 270 (1948). For Morgan’s work, see, for example, Edmund M. Morgan & John M. Maguire, Cases and Materials on Evidence (3d ed. 1951).

133. See Former Round Table Councils, supra note 119, at 386–88. For Sunderland’s work, see, for example, Edson R. Sunderland, Cases and Materials on Code Pleading, Including the Federal Rules of Civil Procedure (3d ed. 1953). See also infra note 159 (identifying Sunderland as leading participant in debate on how to teach procedure).

134. See Former Round Table Councils, supra note 119, at 387, 389. For McCaskill’s work, see, for example, Illinois Civil Practice Act Annotated, with Forms (O.L. McCaskill, Editor in Chief, 1933). See also infra notes 159, 262–264 and accompanying text (describing McCaskill’s teaching materials and his position in debate on how to teach procedure).

135. See Former Round Table Councils, supra note 119, at 388. For Hinton’s work, see, for example, Edward W. Hinton, Cases on the Law of Pleading Under Modern Codes (3d ed. 1932). See also infra note 159 (identifying Hinton as leading participant in debate on how to teach procedure).

136. See Former Round Table Councils, supra note 119, at 389. For Scott’s work, see, for example, Austin Wakeman Scott, Cases on Civil Procedure (1914). See also infra notes 159, 190–261 (describing more of Scott’s work and his position in debate on how to teach procedure).

137. See Former Round Table Councils, supra note 119, at 390; Round Table Councils for 1954, in Association of American Law Schools, 1953 Proceedings 206, 207 (1953). For McBaine’s work, see, for example, James P. McBaine, Cases and Materials on Common Law Pleading (2d ed. 1941). See also infra note 497 (citing another procedure book by McBaine).

138. See Former Round Table Councils, supra note 119, at 391, 394. For Clark’s work, see, for example, Charles E. Clark (assisted by Charles Alan Wright), Cases on Modern Pleading (1952). See also infra notes 159, 163–
1936, and 1938;139 Robert Stayton at Texas in 1929–1931;140 Fleming James at Yale in 1936, 1938, and 1940;141 James Chadbourne at Pennsylvania in 1940;142 Leo Levin at Pennsylvania in 1957–1958;143 and Edward Cleary at Illinois in 1957–1958.144 Of course there were names I did not recognize; I checked those in the Directory of Law Teachers. Without exception, the council members of the Round Table on Remedies taught procedure or evidence, and most of them taught procedure. A few also taught damages or equity, some prominently. Charles McCormick, who taught at Texas, North Carolina, and Northwestern and published on damages, evidence, and federal courts, served on the Council in 1926–1928 and 1932–1935.145 But his service did not lead to a program on damages; it appears to have been his work on evidence and federal courts that was thought

177 (describing more of Clark’s work and his position in debate on how to teach procedure).

139. See Former Round Table Councils, supra note 119, at 391–93, 405, 407. For Magill’s work, see, for example, Roswell F. Magill, Cases on Civil Procedure (2d ed. 1932). See also infra note 187 and accompanying text (describing this book).

140. See Former Round Table Councils, supra note 119, at 394–97. For Stayton’s work, see, for example, Robert W. Stayton, Method of Practice in Texas Courts (1935). Stayton is best known as the principal draftsman of the Texas Rules of Civil Procedure.

141. See Former Round Table Councils, supra note 119, at 405, 407; Round Table Councils for 1940, in 1939 Proceedings, supra note 73, at 8. For James’s work, see, for example, James, Hazard & Leubsdorf, supra note 25.

142. See Round Table Councils for 1940, supra note 141, at 8. For Chadbourne’s work, see, for example, James H. Chadbourne, A. Leo Levin & Philip Schuchman, Cases and Materials on Civil Procedure (2d ed. 1974).


144. See Round Table Councils for 1957, supra note 143, at 228; Round Table Councils for 1958, supra note 143, at 289. For Cleary’s work, see, for example, Edward W. Cleary, Cases on Pleading (2d ed. 1958).

relevant. For decades in the AALS, "remedies" was a label for procedure.

4. Courses and Casebooks: Charles Clark, Austin Scott, and Sidney Simpson

I searched for remedies courses principally by reviewing law school catalogs. I am aware that catalog course descriptions sometimes bear only a loose relationship to what is actually taught, but they at least reveal what someone once planned to teach. And in the middle of the last century, with smaller faculties, smaller budgets, more prescriptive curricula, professors assigned to specific courses, and probably fewer degrees of freedom to vary the content of those assigned courses, the correspondence between course and course description might have been tighter than it is today. It also helped that catalog course descriptions in that era often listed the casebook that would be assigned. Sometimes individual professors were told which casebook to use.\footnote{See Rendleman E-mail, supra note 82 (describing this practice at Alabama as late as 1970).}

My search focused on the period after 1938; the AALS Committee on Curriculum had already surveyed the decade before that. The committee surveyed law schools and examined law school catalogs in 1930,\footnote{The Committee on Curriculum, in Handbook of the Association of American Law Schools and Proceedings of the Twenty-Eighth Annual Meeting 131 (1930) [hereinafter 1930 Curriculum Committee].} 1933,\footnote{The Committee on Curriculum, in 1933 Proceedings, supra note 130, at 148 [hereinafter 1933 Curriculum Committee].} and 1938.\footnote{The Committee on Curriculum, in 1938 Proceedings, supra note 119, at 312 [hereinafter 1938 Curriculum Committee].} The committee's 1933 report attempted to list the name of every course taught in any of the sixty-six law schools for which information was available;\footnote{See 1933 Curriculum Committee, supra note 148, at 148 (noting that survey was limited to 66 schools).} it did not report a remedies course.\footnote{Id. at 150-53.} Nor was there any hint that the committee saw any unity among the components that would become remedies. The lone course in Extraordinary Legal Remedies was listed under "Courses in Procedure;"\footnote{Id. at 150.} the sixty-six courses in Equity were listed
under "Courses in Property;" the twenty-seven courses in Damages and the thirty courses in Quasi-Contracts were listed under "Other Courses," along with Conflicts, Persons, Admiralty, Labor Law, Ethics, Local Law, Medical Jurisprudence, Legal Bibliography, and Psychology and the Law. Two prominent equity scholars—Edgar Durfee and Maurice Van Hecke—were members of this committee, and Durfee was already engaged in pedagogical experiments that would lead to the first integrated sequence of courses on remedies in the modern sense. If Durfee or Van Hecke took an active part in the committee’s work, they apparently saw no better way to classify the courses.

The 1930 and 1938 reports were less detailed, but neither mentioned a remedies course, and the 1938 report said that, as compared to 1933, "[t]he list of standard courses remains largely the same and the time allotments have not changed significantly except by reason of the increased number of elective courses, with their emphasis on public law."

The first substantial group of courses to be called Remedies appears to have grown out of ferment in the teaching of civil procedure. Teaching legal and equitable procedure in the same course would seem to follow naturally from the merger of law and equity and the resulting unification of procedure, but this curriculum reform came slowly and after a great debate. Moreover, procedure scholars seem

153. Id. at 151. These were listed as second- and third-year courses; there were also fifteen Equity courses listed in the first year. Id. at 148. The relationship between these two categories is not clarified. Perhaps some of the fifteen are also included in the sixty-six, but more likely, fifteen schools offered Equity I in the first year and Equity II in the second or third year.

154. Id. at 153.

155. Id. at 158. Both Durfee and Van Hecke had been teaching Equity for more than ten years at this point. ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 1933, at 158. Durfee had published an equity casebook, DURTEE, supra note 51, and Van Hecke would eventually take over Walter Wheeler Cook’s equity book, COOK, supra note 55.

156. See infra notes 352–359 and accompanying text.

157. 1930 Curriculum Committee, supra note 147, at 131–38; 1938 Curriculum Committee, supra note 149, at 312–31. The 1938 report noted but did not discuss the new Harvard curriculum, which had "been the subject of much recent comment." Id. at 313. That curriculum did include a course called Judicial Remedies, described infra at notes 190–216 and accompanying text.

158. 1938 Curriculum Committee, supra note 149, at 319.

159. See Alison Reppy, A Review of Scott and Simpson’s "Cases and Materials on Civil Procedure," 5 J. LEGAL EDUC. 46, 48–49 (1952) (summarizing
to have had difficulty determining the scope of a merged course. I infer from the books and courses that were taught that even the advocates of a unified procedure course were reluctant to stop teaching the old procedure or the forms of action. Perhaps the intuition was that one could not understand the merged procedure without understanding what had been merged. It seems to have been unclear how much of equity to include in a merged course with such a historical component, and to some editors of procedure casebooks, equity procedure included a lot more than just the mechanics of litigation in the equity court.

In addition, John Bauman told me that some of the older faculty simply loved to teach the forms of action; he particularly mentioned James Chadbourn, saying with a chuckle that Chadbourn taught the forms of action even after he left UCLA for Harvard. That move was in 1963. In a subsequent conversation, Bauman said that he had liked to teach them. "I grew to love them, but I guarantee you, the students never did."

Charles Clark, Dean of the Yale Law School, soon to be the reporter for the Federal Rules of Civil Procedure, and later a judge on the Second Circuit, published a two-volume Cases on Pleading and Procedure beginning in 1930. From a modern perspective, this book was an odd mixture of civil procedure and equitable remedies. Volume 1 dealt mostly with pleading issues, including some of the forms of action, but also offered a substantial unit on equity that included history, the merger, contempt, and the extraterritorial effect of equitable decrees. More than half of volume 2 was devoted to the

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161. See, e.g., ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 1973, at 162.
162. Telephone Interview with John A. Bauman (October 22, 2007) (interview notes on file with author).
163. CHARLES E. CLARK, CASES ON PLEADING AND PROCEDURE (vol. 1 1930, vol. 2 1933).
164. 1 id. at 1–481.
165. 1 id. at 261–86, 392–481.
166. 1 id. at 482–660.
substance and procedure of equitable remedies, principally specific performance and injunctions, with brief treatments of the lesser equitable remedies and specific relief at law. The rest of volume 2 dealt with parties, joinder issues, more pleading issues, and summary judgments. The AALS Curriculum Committee reported in 1933 that “[a] number of schools are using Dean Clark’s synthesis of common law and code pleading and the procedural parts of equity.”

That lone sentence may be a key to much of what followed: there were scholars who thought of specific performance and injunctions as “procedural parts of equity.” But there were others who did not and who resisted the combination of equitable remedies and procedure. In 1934, Clark published a one-volume edition that omitted most of the material on equitable remedies. This edition responded to market demand for a version of the original book that could be used in a procedure course at schools where the students would also take one of the “existing courses in Equity; that is, courses in Equitable Remedies, notably the injunction and specific performance.” In that 1934 edition, Clark wrote of his own preference that “the equitable remedies should be studied along with the legal remedies,” instead of in separate courses. But his conception of studying the equitable remedies with the legal remedies did not include damages, or much of restitution, and he still thought it sensible to entitle this package Pleading and Procedure.

167. 2 id. at 1–368.
168. 2 id. at 369–85 (introducing cancellation, reformation, bills of peace, interpleader, bills quia timet, removal of cloud on title, and declaratory judgments).
169. 2 id. at 386.
170. 2 id. at 387–425.
171. 2 id. at 426–602.
172. 2 id. at 603–55.
173. 2 id. at 656–74.
174. 1933 Curriculum Committee, supra note 148, at 154.
175. CHARLES E. CLARK, CASES ON PLEADING AND PROCEDURE: ONE VOLUME EDITION (1934). I have not found a copy of this book, but I have examined the 1940 second edition. The one-volume edition is considerably more than half the two-volume edition: there are 998 pages in the second one-volume edition, compared to 1,334 pages in the original two volumes combined.
176. This is from the Preface to the First Edition, reprinted in CHARLES E. CLARK, CASES ON PLEADING AND PROCEDURE: ONE VOLUME EDITION, at ix (2d ed. 1940).
177. Id. at xi.
In 1930, the same year as Clark's first edition, Northwestern added a parenthetical to the name of its first-year procedure course: "PROCEDURE I – (Common Law and Equitable Remedies)." The course description promised "A basic course in the double field of remedial law: Origin and development of the common law forms of action; development of equity jurisdiction; considerations relating to the fusion of law and equity in its effect upon remedial law." The course was taught from Keigwin's *Cases in Common Law Pleading" and material to be announced." Keigwin’s book covered all the forms of action and the multiple stages of pleading. The AALS Committee on Curriculum described this course as "dealing with common law and equitable remedies, and the effects thereon of the codes." By 1936, the words "remedies" and "remedial" had been dropped from the name and description of the course, although the core of the course description remained the same. The course disappeared from the curriculum after 1942. The idea seems to have been that the forms of action were remedies, that something from equity (whatever was in those supplemental materials) was also remedies, and that the whole could be discussed both as procedure and as remedies. That idea would reappear.

In 1936–1937, just as Northwestern was abandoning the word, Paul Sayre at Iowa changed the name of his first-year course from Civil Procedure to Remedies. The course was also reduced from

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179. Id.
180. Id.
181. See CHARLES A. KEIGWIN, CASES IN COMMON LAW PLEADING, at viii–xvii (1924) (table of contents).
182. See 1933 Curriculum Committee, supra note 148, at 154.
183. "Origin and development of the common law forms of action; development of equity jurisdiction; the fusion of law and equity." NORTHWESTERN UNIVERSITY BULLETIN: THE SCHOOL OF LAW FOR THE SESSION 1936–37, at 14 (1936). This appears to have been the second semester of a year-long course; the first semester was devoted to “Court Organization and Administration,” which had been offered in the second year in earlier permutations. See 1933 Curriculum Committee, supra note 148, at 154.
five hours to three, apparently to make room for a two-hour introduction to “Constitutional and public law” taught by Wiley Rutledge, the future Justice of the Supreme Court. Before and after the name change, the casebook for Sayre’s course was the second edition of Roswell Magill’s *Cases on Civil Procedure*, supplemented with “mimeographed materials” that apparently have not survived. We do not know whether the mimeographed materials changed, or what Sayre omitted when he shrunk the course. Magill’s *Civil Procedure* appears to have been a fairly conventional procedure book for the time: pleading (including the forms of action), demurrers, joinder of claims and of parties, jurisdiction, dispositive motions, and other methods of controlling juries. It did not include damages, injunctions, restitution, or anything else we would now think of as part of the remedies course. Magill had produced a mimeographed volume on equitable remedies for his own students, which he labeled as Volume 2 of his civil procedure book, and it is possible that this volume was Sayre’s “mimeographed materials.” With the caveat that we do not know what was in those mimeographed materials, Sayre’s course at Iowa appears to have been procedure under a remedies label. But like the earlier course at Northwestern, it included the forms of action and it included something about equity. In 1938, Austin Scott and Sidney Simpson at Harvard published *Cases and Other Materials on Judicial Remedies*. Scott is


186. Katherine Burkhart, of the Iowa class of 2008, went through Sayre’s surviving papers in the Iowa library and found nothing pertaining to the course.


188. *Roswell Magill, Cases on Civil Procedure: Volume 2—Equitable Remedies* (1934) (available in the Columbia University Law Library). This is a volume of 583 pages, divided into four chapters, on the History of Equity, Specific Performance of Contracts, Injunction Against Torts, and Equity Procedure.

189. The course description for Remedies was as follows: “Introduction to civil procedure at law and in equity. The forms of action at common law and the elements of the petition in equity. Civil remedies under the modern codes, and the statement of the litigant’s claim pursuant to these remedies. Magill, *Cases on Civil Procedure* and mimeographed materials.” *Iowa* 1936, *supra* note 184, at 19. “Civil remedies under the modern codes” most likely referred to procedure under the modern codes.

best known for his treatise on trusts\textsuperscript{191} and for the \textit{Restatement of Restitution}, but he also had a long career in civil procedure.\textsuperscript{192} Simpson had co-authored an important equity casebook with Zechariah Chafee.\textsuperscript{193} Scott and Simpson’s title, \textit{Judicial Remedies}, suggests that this was the first remedies casebook, but in fact, its contents were closer to Judge Clark’s \textit{Pleading and Procedure} than to a modern remedies book. Scott and Simpson covered procedure at common law (including the forms of action), procedure in equity, and the effects of merging the two.\textsuperscript{194} But it also included a chapter on substantive equity (uses and trusts; fraud, mistake and accident; mortgages and relief against forfeitures),\textsuperscript{195} a substantial chapter on specific performance and injunctions,\textsuperscript{196} and a chapter on extraordinary legal remedies.\textsuperscript{197} Like Judge Clark, Scott and Simpson did nothing with damages or the restitutionary remedies.

John Bauman pointed out to me that the two books were more different than I had initially realized.\textsuperscript{198} Bauman, who went on to become a very major figure in remedies in the modern sense,\textsuperscript{199} taught a Scott and Simpson remedies course at New Mexico in 1947 or 1948,\textsuperscript{200} and a similar course at Indiana beginning in 1956.\textsuperscript{201} When I

\begin{itemize}
  \item[191.] \textsc{Austin Wakeman Scott}, \textit{Scott on Trusts} (3d ed. 1967).
  \item[192.] \textit{E.g., Scott}, \textit{supra} note 136.
  \item[193.] \textsc{Chafee \& Simpson}, \textit{supra} note 51. Chafee had a long and distinguished career at Harvard, working on equity, freedom of speech, and other topics. \textit{See} Erwin N. Griswold, \textit{Zechariah Chafee, Jr., My Colleague}, 70 Harv. L. Rev. 1353 (1957).
  \item[194.] \textit{See Scott \& Simpson}, \textit{supra} note 190, at 1275–94 (detailed table of contents, which was placed at the back of the book).
  \item[195.] \textit{Id.} at 749–74.
  \item[196.] \textit{Id.} at 775–952.
  \item[197.] \textit{Id.} at 610–91.
  \item[198.] Bauman Interview, \textit{supra} note 160.
  \item[199.] \textit{See infra} notes 571–580, 602 and accompanying text.
  \item[200.] In 1949, in the \textit{Directory of Teachers in Member Schools}, Bauman listed Judicial Remedies as a course he had taught in the past. \textsc{Association of American Law Schools, Directory of Teachers in Member Schools 1949–1950}, at 45 (1949) [hereinafter 1949 \textit{Directory}]. Then as now, courses taught in the current year were italicized, and courses taught in the past were listed in roman type. \textit{See id.} at 33. The date of this course is uncertain because Bauman had been teaching at New Mexico since 1947, \textit{id.} at 45, but New Mexico did not join the AALS until 1948, \textit{2007 Directory}, \textit{supra} note 73, at 11, 109, and was not listed in the \textit{Directory} until 1949. And there is no course description in the New Mexico catalog. Bauman recalled that the course was remedies as procedure, not remedies in the modern sense,
talked to him by phone in 2007, he was about eighty-six, lively and alert. He said that Clark’s book was about code pleading, but Scott and Simpson’s book was a substitute for the course in common law actions—his phrase for what I have been calling the forms of action. On further review, there is much to what Bauman says. Both books address the forms of action and both address procedure after the merger, but the emphasis and allocation of space are rather different. Clark presents the forms of action interstitially: “modern law administration is stressed throughout, and, while history appears, it is presented only to explain general principles of present day utility.” In Scott and Simpson this emphasis is reversed. The forms of action are treated prominently and systematically, and the top level of organization is “Actions at Law,” “Suits in Equity,” and “Unified Civil Procedure.” Some of the cases on “Pleading in Actions at Law” appear to have been code cases, but here it is the codes that are presented interstitially; “Unified Civil Procedure” does not become an organizational category until page 1,145. I have no reason to doubt Bauman’s recollection that Clark was perceived as a code pleading book while Scott and Simpson was perceived as a replacement for the course in common law pleading or the forms of action.

Professor Simpson set out the Scott and Simpson book’s purposes in an article on the broader curricular innovations of which it was a part:

and that he taught it either from Scott and Simpson or from John Cribbet’s book. Bauman Interview, supra note 160. Cribbet, supra note 1, was not published until 1954, so Bauman must have taught his New Mexico course from Scott and Simpson.

201. ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 1956, at 57 (1955). This course might have been taught either from Scott & Simpson, supra note 190, or from Cribbet, supra note 1.


203. 1 Clark, supra note 163, at v.

204. Scott & Simpson, supra note 190, at v–vi (table of contents).

205. See, e.g., Moore v. Hobbs, 79 N.C. 535 (1878) (appearing in Scott & Simpson, supra note 190, at 174, and considering the sufficiency of the complaint under both the “new” and “old” forms of pleading). Compare Metzger v. Canadian & European Credit Sys. Co., 36 A. 661 (N.J. 1896) (appearing in Scott & Simpson, supra note 190, at 183, and involving a “declaration . . . in due form for covenant”). I have not attempted to count code cases and common law cases, and many are unclassifiable without further investigation into nineteenth-century pleading, but substantial numbers of code and common law cases appear to be collected together with little distinction between them.
A new course to be called Judicial Remedies will deal with the development of the court system; procedure in actions at law, including the forms of action, common-law pleading and trial, and the enforcement and effect of judgments; the extraordinary legal remedies; the history of equity, equity pleading and trial, equity jurisdiction in tort and contract cases, and the enforcement and effect of equitable decrees; and an introduction to modern procedure and the elements of code pleading. The course, which will be given for three hours a week in the first half-year and two hours a week in the second, is designed to introduce the entering student to the organization of the judicial machinery and to give such instruction in procedure at law and in equity as is essential to optimum progress in the substantive law courses of the first year. It will emphasize the historical development of the legal system on its adjective side. It is not intended to be a definitive and complete course on civil procedure, such more detailed study being reserved for the third year.\(^{206}\)

There was also a required course in Equity in the second year, which continued the first year’s treatment of both substantive equity and equitable remedies.\(^{207}\)

The Scott and Simpson first-year course was not a remedies course in anything like the modern understanding. Neither was it a pure procedure course. It appears to have been mostly a course in civil procedure, with a strong historical emphasis and with some remedies—mostly equitable remedies—thrown in. In the AALS Directory, Simpson said he was teaching Judicial Remedies;\(^{208}\) Scott said he was teaching Procedure.\(^{209}\) The second edition in 1946 was little changed, rushed out for returning veterans,\(^{210}\) and Simpson died before the third

\(^{207}\) Id. at 977.
\(^{208}\) 1938 DIRECTORY, supra note 73, at 160.
\(^{209}\) Id. at 156.
\(^{210}\) AUSTIN WAKEMAN SCOTT & SIDNEY POST SIMPSON, CASES AND OTHER MATERIALS ON JUDICIAL REMEDIES, at vii (2d ed. 1946).
edition was begun. Scott eventually published, under both their names, *Cases and Other Materials on Civil Procedure*, prominently described on the title page as "A Revision of Cases and Materials on Judicial Remedies by the Same Authors." The original 175-page chapter on specific performance and injunctions survived as a subchapter of only thirty pages.

It is not at all clear why the book or the course was originally called "Judicial Remedies." When I said to Ken York that Scott and Simpson looked like a civil procedure book to me, he promptly said, "That's what it looked like to me, too." York began teaching in the 1940s and later edited a leading remedies casebook. Perhaps Scott and Simpson—or maybe this was mostly Simpson—felt the need to emphatically distinguish their course from the traditional procedure course. They had some precedent in Austin’s jurisprudence, in the title of Pomeroy’s treatise, in the name of the AALS Round Table, and in the equation of the forms of action both with remedies and with the civil action. Even so, they apparently feared that the bare word "Remedies" required the modifier "Judicial" to be understood. This felt need for a modifier would persist; there would be courses and casebooks on Judicial Remedies as late as 1994, and occasional uses of the ambiguous title Legal Remedies for the same purpose.

Paul Sayre at Iowa enthusiastically reviewed Scott and Simpson’s first edition. With the Scott and Simpson book, “[a]t last, 

211. AUSTIN WAKEMAN SCOTT & SIDNEY POST SIMPSON, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE, at v (1950).
212. Id. at iii.
213. Id. at 200–31.
however, we do consider equity procedure and law procedure in an honest and sensible way in the course on Pleading itself.”218 But he was not sure he could teach in the first-year course “the parts of this new casebook that deal with Code Pleading, Extraordinary Remedies, and the great mass of material that is usually taught in courses on Trial Practice rather than in courses on Pleading or Civil Procedure.”219 He may have called his course Remedies, but plainly he still viewed it as fundamentally a course in pleading and procedure.

Sayre objected to Judge Clark’s Pleading and Procedure casebook220 on just this ground:

[H]is two volume casebook contained so much equity that it perhaps really amounted to a combination of law and equity on the substantive side as well. It amounted perhaps to an effort in combining law and equity generally so that the student considered both the legal and equitable solution of each particular situation, regardless of whether the aspect was significantly procedural or substantive in content.221

Clark’s chapters on equitable remedies were more than twice as long as Scott and Simpson’s, but they do not appear to me, after reviewing the tables of contents and the names of principal cases (some of which are old remedies cases that I remember teaching in my youth), to be any more substantive. But Sayre saw it differently. The complaint that Clark’s book was not “solely procedural”222 is a good clue to how Sayre envisioned his Remedies course and the casebook he was seeking. To have the student consider “both the legal and equitable solution of each particular situation” would be a central goal of the first modern remedies casebook when it finally appeared,223 but it was not Sayre’s understanding of remedies.

Despite his enthusiastic review of the Scott and Simpson book, Sayre appears to have taught it only once. Through 1944–1945, he

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218. Id. at 630.
219. Id. at 630–31.
220. CLARK, supra note 163.
222. Id. at 630.
223. See infra note 516 and accompanying text.
continued to list Magill’s Civil Procedure\textsuperscript{224} in the catalog, sometimes with additional mimeographed materials.\textsuperscript{225} In 1945–1946, he listed Scott and Simpson.\textsuperscript{226} In 1946–1947, he changed the name of the course to Judicial Process, and while the catalog is unclear, I think he went back to Magill.\textsuperscript{227}

Scott and Simpson got a fair number of adoptions and inspired some two dozen schools to call their basic procedure courses Remedies at various times in the 1940s and 1950s. A few of these courses lingered on into the 1960s and even later\textsuperscript{228}—at Wyoming into the 1990s.\textsuperscript{229} There is no way to know how many teachers who adopted

\begin{itemize}
\item\textsuperscript{224} Magill, supra note 139.
\item\textsuperscript{225} See, e.g., University of Iowa Publication: College of Law Announcements 1944–1945, at 11.
\item\textsuperscript{226} University of Iowa Publication: College of Law Announcements 1945–1946, at 11.
\item\textsuperscript{227} See University of Iowa Publication: College of Law Announcements 1946–1947, at 11. The printed course description says “Materials to be announced.” All three copies in the Iowa library appear to have been photocopied from an original in which this sentence had been crossed out, with new information written in by hand, possibly in pencil. The photocopies are not legible. I am confident that the first word is Magill; what I can make out of the rest is consistent with “Magill & Chadbourn.” James Chadbourn at Pennsylvania was the co-author of Magill’s third edition. Roswell Magill & James H. Chadbourn, Cases on Civil Procedure (3d ed. 1939).
\item\textsuperscript{228} Boston College Bulletin: The Law School Bulletin 1964–1965, at 35 (Remedies, described essentially as it was described in 1940–1941, infra note 233); University of Richmond School of Law: Catalogue Number for 1972 with Announcements for 1972–1973, at 20 (Judicial Remedies, described essentially as it was described in 1939–1940, infra note 233); Graduate Bulletin, School of Law: Seton Hall University 1969–1971, at 18 (1969) (Civil Procedure, described in procedural terms plus “the history of equity; the fusion of common law and equitable remedies under modern practice codes; the relation of remedies to rights,” a description first found at Seton Hall in 1951); Suffolk 1972, supra note 78, at 43 (Remedies, with course description listing the principal forms of action plus civil procedure).
\item\textsuperscript{229} Judicial Remedies was a first-year course at Wyoming continuously from 1948. See, e.g., University of Wyoming Bulletin: College of Law Announcements for the Sessions 1948–1950, at 16. The catalog did not include course descriptions until 1966, when the course was described as follows: “An introduction to courts and judicial systems, and the common law and equitable remedies available in civil cases, with attention to the historical background, development, and framework of modern procedural systems.” University of Wyoming College of Law 1966–68, at 19. This description continued without substantive change until the course was modernized and moved to the second year in 1984–85. See University of Wyoming College of Law
Scott and Simpson taught the chapter on specific performance and injunctions; presumably some teachers were attracted by other features of the book. For those who taught the third edition in the 1950s, the brief unit on specific performance and injunctions would not have fundamentally changed the course even if taught with loving detail. Some courses called Remedies were taught out of traditional procedure books, and some courses called Procedure were taught out of Scott and Simpson. A few schools changed the name of their course from Remedies to Procedure, or vice versa, without changing the book or the course description.

1984–85, at 13. The old course description was briefly restored in the 1990s, and the course returned to the first year, but in these years there was also a more conventional Civil Procedure course. WYOMING 1992, supra note 215, at 20–21.


It is reasonable to assume that people who called their course Remedies thought they were signaling some difference in approach from that of similar courses called Procedure, but it is hard to know what that difference was. The descriptions of courses called Remedies in this era basically describe procedure courses, some of which probably included specific performance and injunctions. A majority of these descriptions refer to equitable remedies or equitable jurisdiction, but a substantial minority do not. Portia Law School can know for sure is that they changed the name of the course without changing the course description. Compare RUTGERS - THE STATE UNIVERSITY: SCHOOL OF LAW ANNOUNCEMENT 1962–1963, SOUTH JERSEY DIVISION 34 [hereinafter RUTGERS-CAMDEN 1962] (Judicial Remedies), with RUTGERS - THE STATE UNIVERSITY: SCHOOL OF LAW ANNOUNCEMENT 1964–1965, SOUTH JERSEY DIVISION 28 (Civil Procedure); compare RUTGERS UNIVERSITY, THE STATE UNIVERSITY OF NEW JERSEY: SCHOOL OF LAW – NEWARK, ANNOUNCEMENT 1970–1971, at 13 [hereinafter RUTGERS-NEWARK 1970] (Remedies), with RUTGERS UNIVERSITY, THE STATE UNIVERSITY OF NEW JERSEY: SCHOOL OF LAW AT NEWARK, 1971–1972 ANNOUNCEMENT 19 (1971) (Civil Procedure).

233. E.g., BOSTON COLLEGE 1940, supra note 84, at 26 (Remedies, taught from Scott and Simpson, with procedural description plus “Extraordinary legal remedies. History of equity; development and classification of equity jurisdiction.”); THE CATHOLIC UNIVERSITY OF AMERICA ANNOUNCEMENTS: THE SCHOOL OF LAW 1957–58, at 17 (1957) (Judicial Remedies, taught from Scott and Simpson, with procedural description plus “equity jurisdiction”); IDAHO 1955, supra note 84, at 12 (Judicial Remedies, described as “The common law and equity as an introduction to modern civil procedure, including forms of action, extraordinary legal remedies, equitable remedies, organization of courts, jurisdiction and judicial power”); THE OHIO STATE UNIVERSITY BULLETIN: COLLEGE OF LAW 1940–41, at 20 (1940) (“Remedies (Including Equity),” for eight hours on quarter system, with procedural description plus “Powers of Courts of Equity; a study of the decree, the relation of Equity, [sic] and the common law culminating in their fusion in the Codes, and equity jurisdiction”); UNIVERSITY OF PENNSYLVANIA BULLETIN: THE LAW SCHOOL ANNOUNCEMENT 1952–1953, at 17 (1952) [hereinafter PENNSYLVANIA 1952] (Judicial Remedies, with procedural description plus “principles of equity jurisdiction and problems of fusion under the one form of action”); CATALOGUE OF THE T.C. WILLIAMS SCHOOL OF LAW IN THE UNIVERSITY OF RICHMOND: SESSION, 1938–1939 WITH ANNOUNCEMENTS FOR 1939–1940, at 16 (Judicial Remedies, taught from Scott and Simpson, described as “Development of the court system, the forms of action, pleading in actions at law, extraordinary legal remedies, the history of equity, elementary principles of specific performance of contracts and equitable relief against torts”); BULLETIN OF RUTGERS UNIVERSITY: ANNOUNCEMENT OF THE SCHOOL OF LAW 1951–1952, at 15–16 (Remedies: Legal, Equitable, and Quasi-Judicial, described as “An introduction to the law of procedure,” plus more on procedure, plus “a consideration of the basic principles of equity jurisdiction”); STANFORD UNIVERSITY BULLETIN: SCHOOL OF LAW 1952–1953, at 25 [hereinafter STANFORD
(now New England School of Law\textsuperscript{235}) taught for a single year a remarkable course, called Remedies, that aspired to include jurisprudence, legal research, procedure, and possibly a bit of equitable remedies.\textsuperscript{236} St. John’s briefly described Judicial Remedies as offering “a comprehensive picture of the American legal system as an integrated whole” and “a panorama of [the student’s] entire curriculum

\textsuperscript{1952} (“Remedies and Equity,” described as “The principal common law actions; elements of common law pleading; an introductory study of procedure in civil actions at common law and under the codes. An introductory study of the origin and nature of equity jurisdiction; inadequacy of the legal remedy as a basis for the exercise of equitable powers; equitable jurisdiction over torts.”).

234. \textit{See} e.g., \textit{Cincinnati 1940}, \textit{supra} note 216, at 17 (Legal Remedies, described in terms of judicial system, forms of action, pleading, and procedure); \textit{Eightieth Annual Catalogue and Register of the School of Law of National University: Regular School Year 1948–1949}, at 35 (1948) (Judicial Remedies, taught from Scott and Simpson, described as “Designed to introduce the entering student to the organization and operation of the judicial machinery and to give such instruction in procedure at law and in equity as is essential to optimum progress in the substantive law courses”); \textit{Rutgers-Camden 1962}, \textit{supra} note 232, at 34 (Judicial Remedies, described as “Methods by which issue is joined preparatory to trial; evolution of code pleading into modern procedure; merger of law and equity; jurisdiction; other procedural problems.”); \textit{Rutgers-Newark 1970}, \textit{supra} note 232, at 13 (Remedies, described as “A study of adjudication in modern legal systems and of the rules of participating lawyers—from the initial decision to adjudicate through to a final disposition. Inquiry is focused upon persistent problems common to various kinds of formal adjudication, approached from functional, comparative, and historical perspectives.”); \textit{Suffolk University Law School Catalogue for 1953–1954}, at 30 (Remedies, described in lengthy but purely procedural terms).

235. \textit{See New England School of Law 1977/1978}, at 7 (explaining that Portia was founded in 1908 as a law school for women, that it became coeducational in 1934, and that it changed its name in 1969).

236.

The nature of law; Common or Anglican Law; Civil or Romanesque Law; sources of law; common or unwritten law (judicial decisions); statutory law (constitutions, statutes, ordinances, by-laws, rules); how to find the law; legal bibliography. Actions at law and suits in equity; common-law pleading; modified common-law pleading; code pleading; state and federal court systems; the judicial function.

in the Law School.” ²³⁷ The more specific parts of this description described a conventional course in civil procedure. ²³⁸

The many changes in course description at New York University illustrate most of the variations. In 1941–1942, Procedure I had a procedural course description that made no mention of equitable remedies, although it did mention “extraordinary legal remedies.” ²³⁹ In 1944–1945, the course became Judicial Process I, taught from Scott and Simpson, with this new description:

A study of the judicial process; proceedings in an action at law; the forms of action, defensive pleadings and procedure; trial at law; appellate review; validity and effect of judgments against the person and against property; enforcement of judgments; extraordinary remedies.

Proceedings in a suit in equity; jurisdiction of equity; enforcement of decrees. Unified civil procedure under a merger of law and equity. ²⁴⁰

This course description is overwhelmingly about procedure, but “jurisdiction of equity” could easily have meant specific performance

²³⁸. See id. (“The subject matter of the course begins with the common law forms of action and the well-known cases under each, the present-day cause of action, its pleading, the trial, the motions made before, during, and after trial both at common law and under the codes, with particular attention to the New York Civil Practice Act and the Federal Code [sic] of Civil Procedure.”).
²³⁹.
Introduction to modern pleading and practice; organization and operation of the courts, ancient and modern; proceedings in actions at law from the summons to appellate review; jurisdiction; pleadings, the trial, judgments, and extraordinary legal remedies. While adequate consideration is given to the forms of action, pleadings, and procedure at common law, the course primarily is intended to serve as a foundation course in modern procedure.

New York University School of Law Announcements for the One Hundred and Seventh Session 1941–1942, at 17.
and injunctions; Scott and Simpson and many others discussed the restrictions on equitable remedies in terms of equitable jurisdiction.\textsuperscript{241}

In 1946–1947, the description was condensed, the casebook was no longer specified, and “jurisdiction of equity” became “history of equity”:

An introduction to civil procedure; the forms of action and their abolition under codes; procedure under common law, equity and code systems, with special emphasis upon problems of pleading; history of equity; code fusion of law and equity; modern procedural developments.\textsuperscript{242}

In 1948–1949, this course description was unchanged, but the course was expanded from four hours to six, and its name was changed from Judicial Process to Judicial Remedies I and II.\textsuperscript{243} In 1951–1952, the course was reduced to four hours again, the name was changed to Civil Procedure, and the description became purely procedural.\textsuperscript{244} In addition, there was a two-hour course on Common Law Remedies, which covered the forms of action and common law procedure,\textsuperscript{245} and a modern sounding course on Equitable Remedies, both required.\textsuperscript{246}

Whatever had gone on in the 1940s, the 1951–1952 changes indicate a

\textsuperscript{241} The titles of three of Scott and Simpson’s chapters on equity were “The Exclusive Jurisdiction,” “The Concurrent Jurisdiction,” and “The Auxilliary Jurisdiction.” SCOTT & SIMPSON, supra note 190, at 749, 775, 953. If an equitable remedy would not issue because the legal remedy was held adequate, lawyers sometimes said that equity would not take jurisdiction. 1 DOBBS, supra note 11, § 2.7, at 182 (debunking the notion).


\textsuperscript{244} “Actions under modern codes and rules of court with emphasis upon the Federal Rules, jurisdiction (forms of service), pleading, demurrers and substitute motions, summary judgments, discovery, control of jury, instructions, verdicts, judgments, appeals, joinder of parties and causes, interpleader, third-party practice, intervention, representative suits.” NEW YORK UNIVERSITY SCHOOL OF LAW ANNOUNCEMENTS FOR THE 117TH SESSION 1951–52, at 47.

\textsuperscript{245} Id. at 47.

\textsuperscript{246} Id. at 48.
clear decision to separate equitable remedies from the procedure course. But these new Remedies courses lasted only two years.\textsuperscript{247}

Of course these one-paragraph course descriptions are thin guides to classes that read hundreds of pages and met for forty or more clock hours. It is hard to know how much attention these courses gave to equitable remedies, or whether they differed from other procedure courses in some other way. Probably some of the later decisions to call the procedure course Remedies were simply following the latest fad. The better clues to what was going on are in the earlier course descriptions and in the contents of Scott and Simpson. The easiest part to understand from a modern perspective is that the attempt to merge courses in legal and equitable procedure sometimes brought equitable remedies into the procedure course.

A more fundamental point, which eluded me for a long time, is the continued role of the forms of action. People still thought of the forms of action as remedies. We see evidence of this usage in the Iowa and Northwestern course descriptions,\textsuperscript{248} and accepting it makes much more sense of Scott and Simpson’s title. But the forms of action were also procedure, because they were so closely linked to pleading. A case presenting the question whether plaintiff had pleaded a proper claim under the writ he had selected was plainly a pleading case; it was also a typical case for teaching the boundaries of the forms of action. So the forms of action were both remedies and procedure, again equating the two and reinforcing Pomeroy’s old equation of the civil action with remedial rights. John Bauman gave me the key to all this when he said, “They called those courses Remedies because they combined the common law actions with equity.”\textsuperscript{249}

I did not understand his point at first. I said they taught the forms of action in the civil procedure course too, so how did the courses called Remedies differ from the similar courses called Procedure? When I pushed too hard, he said, “I was just a young guy then; I don’t know why it was called Remedies.”\textsuperscript{250} But he also pointed to some differences between the Remedies and Procedure

\begin{itemize}
\item \textsuperscript{247} See \textit{New York University School of Law Announcements for the 118th Session 1952–53}, at 52–53 (listing Civil Procedure, Common Law Remedies, and Equitable Remedies together for the last time).
\item \textsuperscript{248} See \textit{supra} notes 179, 189 and accompanying text (both referring expressly to the “forms of action”).
\item \textsuperscript{249} Bauman Interview, \textit{supra} note 160.
\item \textsuperscript{250} \textit{Id}.
\end{itemize}
courses. The Scott and Simpson courses included specific performance and injunctions. He also emphasized that the they were thought of as preliminary courses in procedure; there would also be an advanced procedure course, and at state law schools, that course would emphasize that state’s procedural code.\textsuperscript{251} Simpson’s description of the Harvard curriculum corroborates this recollection; Simpson described “a definitive and complete course on civil procedure” to be offered in the third year, after students had taken the Scott and Simpson course.\textsuperscript{252} Clark’s preface described a similar pattern of a common law pleading course followed by later attention to the local rules; he was trying to change that.\textsuperscript{253}

Of course the other group who might know why procedure teachers called their courses Remedies would be surviving procedure teachers from that era. There do not appear to be many of these, and I did not know them. Paul Carrington, Edward Cooper, and Geoffrey Hazard were all too young; they remembered nothing. But after consulting with them, I wrote Leo Levin, who worked principally in civil procedure and taught from 1947 to 1989, mostly at Pennsylvania.\textsuperscript{254} There is a good chance Levin taught a procedure course called Remedies; Penn used that title through much of Levin’s early career.\textsuperscript{255} I wrote Levin because people at Penn told me that his mind was sharp but his ears were not, and that a phone conversation would be difficult. He wrote back that he did not remember much, but that “at one time the procedure was indeed remedy specific.”\textsuperscript{256} This

\begin{itemize}
\item \textsuperscript{251} Id.
\item \textsuperscript{252} Simpson, supra note 206, at 976.
\item \textsuperscript{253} 1 Clark, supra note 163, at v (“[T]here has been a tendency to emphasize history apart from the modern law of procedure . . . . And when the subject of modern pleading is at length reached, emphasis is placed on local rules.”).
\item \textsuperscript{254} See 2007 Directory, supra note 73, at 730.
\item \textsuperscript{255} See Pennsylvania 1956, supra note 232, at 32; Pennsylvania 1955, supra note 232, at 34; Pennsylvania 1952, supra note 233, at 17; Pennsylvania 1948, supra note 230, at 16.
\item \textsuperscript{256} Levin’s handwritten response read in full:

Dear Prof. Laycock,

My first reaction was that I have nothing to offer you beyond good wishes in the enterprise. You may well conclude that that is indeed the case. However, it did occur to me that at one time the procedure was indeed remedy specific—if you wanted replevin, ejectment would not do.
is the underlying connection, going back to the forms of action. He had not worked out why the usage survived so long, but his explanation is broadly consistent with Bauman’s. And it was valuable to learn that he did not have some completely different explanation that had been common knowledge among the proceduralists but completely unknown to the remedies scholars.

Dan Dobbs did not have Bauman’s explanation, but he had a useful reminder of broader perspective. He said, “I don’t know what they were thinking when they called it remedies. I usually think things like that result from inadequate analysis.” 257 “You have to have the category,” and our modern idea of remedies is “a category that they didn’t have.” 258 If they did not have the category, then usages that look odd or confused to us would not have seemed odd or confused to them.

Dobbs’s point is of quite general importance in any investigation of the past. But in this case it requires further specification. Pomeroy and Langdell had long since explained the difference between our modern idea of remedies and remedies as the forms of action or the civil action; 259 even Austin seems to have understood it. 260 But Austin’s jurisprudential category had been secondary rights and duties, Pomeroy had labeled that category “remedial,” 261 and no one had sufficiently attended to distinguishing the remedial and procedural components within the category. They had distinguished two meanings of remedies, but they had not

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If you wanted money damages, replevin would not do. So the emphasis was properly on remedies. With one form of action things changed.*

I look forward to reading your article.

Sincerely,
A. Leo Levin

* The remedy did not change, the sole emphasis was on the procedure to be followed.

Letter from A. Leo Levin to Douglas Laycock (undated, postmarked Nov. 16, 2007) (on file with author). Levin’s clarification in the footnote is substantively identical to Pomeroy’s clarification of the same point a century and a third before. See supra note 113 and accompanying text.

257. Dobbs Interview, supra note 72.
258. Id.
259. See supra notes 62, 109–113 and accompanying text.
260. See supra notes 89–100 and accompanying text.
261. See supra note 107 and accompanying text.
proposed two meaningfully different labels for the two meanings, so remedies remained a multifarious category. The profession lived with that multifariousness for another three-quarters of a century, roughly equating remedies and procedure in a variety of contexts. And the forms of action played a remarkably long-lasting role in sustaining the dual usage.

5. John Cribbet

In 1937–1938, Oliver McCaskill at Illinois changed the name of his first-year course from Procedure I to Remedies. He taught both courses from unpublished materials entitled Cases on Actions and Suits. The course description, which did not change, suggests that the course treated the forms of action and compared them to suits in equity, although I found very little on equity or equitable remedies as such when I leafed through his teaching materials page by page. In 1946–1947, Edward Cleary took over the course for a year.

263. OLIVER L. MCCASKILL, CASES ON ACTIONS AND SUITS (undated). These are two mimeographed volumes in the University of Illinois Law Library. The library believes they were produced sometime in the 1930s. They contain no table of contents and few headings. Volume I has headings for each of the principal forms of action, and this is apparently Part I. What appears to be Part II is simply labeled "II," with no further heading. It contains a number of cases on joinder of claims and the scope of a cause of action. For example, the first case in II is Den v. Snowhill, 13 N.J.L. 23 (N.J. 1831), in which the issue was whether plaintiff could recover three parcels of land under a single writ of ejectment, or must bring three separate claims. (One was enough.) Part III, titled "Blending Actions and Suits and the Actions by Legislation," appears to cover early cases under the procedural codes and the merger of law and equity. For example, Part III opens with Rubens v. Joel, 13 N.Y. 488 (1856), refusing to permit a suit on promissory notes to be joined with a suit to set aside a fraudulent transfer of defendant's assets, notwithstanding the then-new procedural code.
264. See ILLINOIS 1937, supra note 232, at 16 ("The relation between remedial and substantive law, and the different modes in which remedies developed at law and in equity; distinctions between actions and suits, and the distinctions between the actions; tendencies to minimize these distinctions before the codes.").
265. See UNIVERSITY OF ILLINOIS: COLLEGE OF LAW ANNOUNCEMENT FOR 1946–47, at 17 (1946) (Remedies, described as "History and organization of courts; comparative development of legal and equitable remedies; the search for flexibility in judicial administration").
taught it from Magill and Chadbourn’s *Civil Procedure* and Sunderland’s *Cases on Judicial Administration*. Sunderland’s casebook was a procedure book that covered most of the standard topics and also offered substantial units on the structure of the court system, the functions of its personnel, the nature and scope of judicial power, and federal jurisdiction. Both McCaskill and Cleary were principally procedure scholars.

In 1947–1948, the course was assigned to a new assistant professor, John Cribbet. Cribbet eventually abandoned the field; he told me that he wanted to teach property from the beginning but had to wait for a section to become available. He went on to become a distinguished property scholar and Chancellor of the University of Illinois. But for about ten years, while he was assigned to teach Remedies, he made the course his own. The first year, he taught it from Magill and Chadbourn. The next year, he switched to William Walsh’s *Cases on Equity*, supplemented by a new and quite short civil procedure book. That same year, he changed the name of the course to Judicial Remedies, and he rewrote the course description to emphasize equitable remedies and the forms of action. A year or two after that, he abandoned Walsh and substituted Walter Wheeler.

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266. Magill & Chadbourn, supra note 227.
268. *Id.* at 373–591, 763–1378 (including jurisdiction, forms of action, venue, pleading, and joinder).
269. *Id.* at 1–372, 592–762.
270. See supra notes 134 and 144 and accompanying text.
274. Magill & Chadbourn, supra note 227.
275. Walsh, supra note 51.
277. See Illinois 1948, supra note 84, at 18 (Judicial Remedies, described as “Common-law forms of action, extraordinary legal remedies, equitable remedies, abolition of the forms of action, the merger of law and equity”).
Cook’s equity book, which had recently been updated by Maurice Van Hecke.  

In 1954, Cribbet published *Cases and Materials on Judicial Remedies*. His remedies book is an interesting and somewhat puzzling transitional form, with elements of all three understandings of remedies—forms of action, procedure, and the modern idea. It seems to me much closer than Scott and Simpson to a modern remedies book, but it is still not there. It is divided into six “parts” of quite unequal length. Part 1 is an introduction, and Parts 3 through 6 respectively address equity, equitable remedies, statutory remedies (declaratory judgments, attachment, and garnishment), and “extra-judicial remedies” (a very brief introduction to arbitration and administrative remedies). Restitution is not covered. Part 2, on legal remedies, includes a chapter on “extraordinary legal remedies” (quo warranto, mandamus, prohibition, and habeas corpus). But there is no treatment of damages. Most of the rest of Part 2—nearly 20% of the book—teaches the forms of action and the boundaries between them. The forms of action appear to have been at the core of the course that Cribbet inherited from McCaskill, and Cribbet did not change that. The final chapter of Part 2 addresses the abolition of the forms of action and the consequences of their abolition for amending pleadings, joinder of claims, and splitting a cause of action. The preface argues that despite their abolition, the forms of action are still “[o]ne of the best introductions to the study of law” and to “that exactitude of thought which the legal discipline requires.”


279. CRIBBET, supra note 1, at v.

280. *Id.* at 1–38.

281. *Id.* at 301–410.

282. *Id.* at 411–653.

283. *Id.* at 655–92.

284. *Id.* at 693–702.

285. *Id.* at 39–299.

286. *Id.* at 173–246.

287. *Id.* at 39–172.

288. *Id.* at 247–99.

289. *Id.* at vii–viii.
The conflation of remedies and procedure was still alive in this book, but the proportions had been reversed. Cribbet’s *Judicial Remedies* differs from Scott and Simpson’s *Judicial Remedies* principally in what it omits: it teaches much less civil procedure. Even so, Cribbet intended this book to substitute for the first-year civil procedure course:

It is not a casebook in procedure alone, although it is intended as a three or four hour course in the student’s first semester of law school and, as such, would be the only procedure taught in the first year.... [T]he student should discover, in some detail, what courts do before he launches his study into how they do it. The specific mechanics of pleading, evidence, appeals, etc., are left to later procedure courses.... A study of the full array of judicial remedies—legal, extraordinary, equitable, and statutory—is a study of what courts do; it is procedure in the broadest sense.  

Cribbet thus conceived this course as a preliminary procedure course. And Cribbet’s book can be described as combining the forms of action with equitable remedies. Either or both of these facts could explain why John Bauman remembered Cribbet and Scott and Simpson as taking similar approaches to the course.

Cribbet’s organization is in some ways quite modern. One can organize a remedies course by remedies categories—damages, equity, restitution, etc.—or by categories from the rest of the substantive law—remedies for personal injury, remedies for breach of contract, etc. There are advantages and disadvantages to each approach, and some books use both (in different parts of the book), but the trend has been

290. *Id.* at vii.
toward more reliance on remedies categories and less reliance on categories from the rest of the substantive law.\textsuperscript{293} Cribbet is an early example of organization principally by remedies categories—legal remedies, equitable remedies, statutory remedies, extra-judicial remedies.

The preface explains Cribbet’s conception of remedy, which was also quite modern: “The remedy is the end result of a law suit. It constitutes what the court actually does for, or to the client in the particular case.”\textsuperscript{294} This closely parallels what I tell my students today.\textsuperscript{295} But Cribbet did not entirely follow through. The “end result” of a successful suit at law, “what the court actually does for” the successful plaintiff, is the award and collection of damages—not the decision whether plaintiff has selected the proper form of action. Under the definition in Cribbet’s preface, the principal legal remedy is damages. He says he understood that “logically, damages belonged in the course.”\textsuperscript{296} But “that was too much to hack off at that point.”\textsuperscript{297} He said he was trying to consolidate the separate courses in common law remedies and equity, and he could not fit damages in as well.\textsuperscript{298} The unspoken predicate here is that he could not bring himself to eliminate the forms of action, or perhaps he lacked authority to do so. So his remedies book fell short of a modern conception of the course. And others had gotten there before him, although publication would be delayed.

\textsuperscript{293} Compare, e.g., KENNETH H. YORK & JOHN A. BAUMAN, CASES AND MATERIALS ON REMEDIES, at xiii–xix (1967) (table of contents showing two chapters—223 pages—on “Remedial Goals” and “Introduction to Equitable Remedies,” followed by twelve chapters—1,037 pages—on remedies for various kinds of wrongs), with RENDLEMAN, supra note 81, at v–xii (table of contents of successor volume to York and Bauman, showing five chapters—553 pages—on “Remedial Goals,” damages, injunctions, and restitution, followed by four chapters—389 pages—on remedies for various kinds of wrongs). See also LAYCOCK, supra note 2 (all chapters based on remedies categories; none on remedies for various kinds of wrongs).

\textsuperscript{294} CRIBBET, supra note 1, at vii.

\textsuperscript{295} See supra note 1 and accompanying text.

\textsuperscript{296} Cribbet Interview, supra note 272.

\textsuperscript{297} Id.

\textsuperscript{298} Id.
IV. THE EMERGENCE OF THE MODERN REMEDIES COURSE

A. John Norton Pomeroy (again)

The earliest example I have found that hints at the modern course is Pomeroy's lectures on remedies at the University of California's Hastings College of Law. Pomeroy was a prolific and influential late-nineteenth-century treatise writer, one of the leading legal figures of his generation. His misnamed treatise on *Code Remedies* went through five editions through 1929; his *Treatise on Equity Jurisprudence* went through five editions through 1941; his other texts and treatises covered all of American law. A strong advocate of the reformed procedure, of the elimination of technicalities, and of the liberal use of equitable remedies, he taught at New York University from 1864 to 1871, before resigning because of health problems. In 1878, he was called to be the founding faculty at Hastings—literally. For the first two years, he was the only professor and taught every course. His protégé and successor at Hastings, Charles Slack, credited him with inventing "most of the essentials" of the case method several years before Langdell.

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300. JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN THE UNITED STATES OF AMERICA ADAPTED FOR ALL THE STATES AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE (5th ed. 1941).
301. E.g., JOHN NORTON POMEROY, LECTURES ON INTERNATIONAL LAW IN TIME OF PEACE (1886); JOHN NORTON POMEROY, INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (1870); JOHN NORTON POMEROY, INTRODUCTION TO MUNICIPAL LAW (1883) (where "municipal law" meant the entire body of American law).
302. BARNES, supra note 101, at 99–100.
303. For the date, see id. at 100.
304. See id. at 116–17.
305. Pomeroy, Jr., supra note 101, at 99 & n.7. For descriptions of his classes, mostly by his students, see id. at 98–101; BARNES, supra note 101, at 89, 111–14. On the relationship between Pomeroy and Slack, see BARNES, supra note 101, at 88–89, 117–18; Pomeroy, Jr., supra note 101, at 114 n.32. Pomeroy, Jr.'s admiring work liberally cites and quotes from reviews and letters to Pomeroy, Sr. from the leaders of the nineteenth-century bench and bar, highly praising his various treatises. Pomeroy, Jr., supra note 101, at 96–98 & nn.3–4, 103–06 & nn.18–20, 108–14 & nn.24, 26, 28–29, 121 n.46, 126–27 & n.54, 129 n.59, 132 n.61.
In Pomeroy’s curriculum at Hastings, the entire first semester of the third year was devoted to “Remedies: pleading & practice per the Reformed System—theory of forms of action; common law & equity pleading; evidence.” So far as I know, this was the first course called Remedies to be taught in an American law school. Perhaps it was the first course we would recognize as remedies today, but probably it was not. The brief description of this semester implies a procedural emphasis on pleading and practice under the reformed procedural rules—the meaning of “remedial” that dominated his treatise. The description also mentions the forms of action.

We have an 1880 syllabus of those lectures on remedies. This is a bare outline, only twenty pages long, summarizing an entire semester’s work, with elements of all three usages of the word “remedy.” The subtitle on the first page of text is “Remedies and Actions Therefor, Legal and Equitable.” This subtitle not only implies that “remedies” and “actions” are something sensibly listed together, but also that they are distinct—that one brings an action in order to get a remedy. The syllabus reads in some ways like a list of causes of action, but its organization is to some extent remedial. At the highest level of organization, Pomeroy distinguishes remedies “For Violation of Primary Rights in Rem” from remedies “For Violation of Primary Rights and Duties in Personam.” At the next level of organization, under rights in rem, we get “Restoration and Rights of Restoration,” “Compensation and Rights of Compensation,” and “Prevention and Rights of Prevention”—almost the division into restitution, damages, and equity familiar from many modern remedies books. The entries under rights in personam are divided into “Specific Performance and Rights Thereto,” “Reformation or Re-execution of Contracts,” “Rescission or Cancellation,” “Compensation, and

306. BARNES, supra note 101, at 105.
308. Id. at 3.
309. Id. at 3, 14.
310. Id. at 3.
311. Id. at 7.
312. Id. at 13.
313. Id. at 14.
314. Id. at 15.
315. Id. at 16.
Rights Thereto,\textsuperscript{316} and "Prevention and Rights Thereto,"\textsuperscript{317} this structure also sounds in remedial alternatives and could readily be rearranged into the structure of restitution, damages, and equity. But many of the entries under these subheadings sound like writs, causes of action, or particular applications of causes of action, ranging down to such detailed entries as "Actions to recover damages for injuries to plaintiff's land by defendant's animals negligently straying—his cattle, horses, sheep, dogs, etc."\textsuperscript{318} His headings are so wide-ranging as to suggest the Mordecai and McIntosh course at Duke a generation later; perhaps Mordecai and McIntosh were following Pomeroy's lead. Of course we know essentially nothing about how Pomeroy, Mordecai, or McIntosh elaborated these headings.

Pomeroy's son, who later became a law professor at Illinois,\textsuperscript{319} published \textit{A Treatise on Equitable Remedies} in 1905.\textsuperscript{320} This was two volumes devoted to equitable remedies in something like the modern understanding of that phrase. The subtitle described this book as "Supplementary to Pomeroy's Equity Jurisprudence: Interpleader, Receivers, Injunctions, Reformation and Cancellation, Partition, Quiet title, Specific Performance, Creditors' Suits, Subrogation, Accounting, etc."\textsuperscript{321} Such a treatment of equitable remedies was to have been Part IV of Pomeroy senior's \textit{Treatise on Equity Jurisprudence}, but he died before Part IV was written.\textsuperscript{322} Here is another example of the modern usage—confined to equitable remedies only, but, within equity, identifying remedies the same way we would identify remedies today. In Pomeroy's writings, his teaching, and his planned but uncompleted writings, there was much of the modern idea of remedies. But often it was entangled with the procedural meaning, and sometimes with the forms-of-action meaning.

We have already seen Langdell noting both the forms-of-action usage and the modern usage in 1887.\textsuperscript{323} It was the modern usage that

\begin{itemize}
  \item \textsuperscript{316} \textit{Id.}
  \item \textsuperscript{317} \textit{Id. at 18.}
  \item \textsuperscript{318} \textit{Id. at 8.}
  \item \textsuperscript{319} \textit{See Association of American Law Schools, Directory of Law Teachers in Member Schools 1922, at 31 (1923).}
  \item \textsuperscript{320} \textit{John Norton Pomeroy, Jr., A Treatise on Equitable Remedies (1905).}
  \item \textsuperscript{321} \textit{Id. at 1.}
  \item \textsuperscript{322} \textit{See Barnes, supra note 101, at 96–97.}
  \item \textsuperscript{323} \textit{See supra notes 62 and 112 and accompanying text.}
\end{itemize}
Langdell elaborated, and like Pomeroy, he tracked the modern division into damages, equity, and restitution:

It is because rights exist and because they are sometimes violated that remedies are necessary. The object of all remedies is the protection of rights. . . . An action may protect a right in three ways, namely, by preventing the violation of it, by compelling a specific reparation of it when it has been violated, and by compelling a compensation in money for a violation of it. 324

We also find the modern usage in Maitland. When he finally comes to specific performance, in the nineteenth of his twenty-one lectures, he begins by contrasting remedies with substantive law:

In the past we have seen Equity inventing certain new rights and obligations, rights and obligations of a substantive kind. . . . We have now to observe it inventing not, at least in the first instance, new substantive rights, but new remedies. Two great remedies it invented, remedies peculiar to itself—the decree for the specific performance of a contract, and the injunction. 325

The same distinction between substantive rights and remedies is unambiguously implicit in the eighteenth lecture, on “The Remedies for Breach of Trust.” 326

Pomeroy, Langdell, and Maitland may have been ahead of their time. Or perhaps the modern idea of a “remedy” also appeared in many more obscure places and in the conversations of nineteenth-century lawyers. Whether or not lawyers commonly used “remedy” to

324. Langdell, supra note 62, at 111.
325. Maitland, supra note 28, at 237.
326. See id. at 170–80.
describe the ways in which the law could remedy a violation, most of them had not clearly distinguished that usage from other common uses of the word. No one thought of remedies as a field of study about which books might be written. If remedies had unambiguously meant what a court could do to remedy a violation of law, all the twentieth-century usage of remedy to mean procedure would have been impossible.  

B. The Inventors

1. Edgar Durfee and John Dawson

Edgar Durfee taught at Michigan for forty years, from 1911 to 1951. He published an equity casebook and co-authored a restitution casebook, each discussed below, plus two other casebooks and a number of articles, most of them very short. He taught Quasi-Contracts from the beginning and Equity from 1919.

327. I found one other hint that an author may have been thinking in terms of remedies as we understand the concept today, but this turned out to be a false lead. Howard C. Joyce published separate treatises on damages and on injunctions in the first decade of the twentieth century. Joyce, supra note 37; Joyce & Joyce, supra note 36. But there is no indication in either of these treatises that he saw the slightest relationship between them. Joyce cranked out hackwork treatises on all sorts of unrelated topics; damages and injunctions were just two more. See Howard C. Joyce, The Law Relating to Intoxicating Liquors (1910); Howard C. Joyce, Treatise on the Law Governing Indictments (1908); Joseph A. Joyce & Howard C. Joyce, A Treatise on the Law of Defenses in Actions on Commercial Paper (1907); Joseph A. Joyce & Howard C. Joyce, Treatise on the Law Governing Nuisances (1906); Joseph A. Joyce & Howard C. Joyce, A Treatise on Electric Law (1900); Xenophon P. Huddy, The Law of Automobiles (3d ed. 1912 by Howard C. Joyce); Darius H. Pingrey, A Treatise on the Law of Suretyship and Guaranty (2d ed. 1913 by Howard C. Joyce); 5 Charles Frederic Chamberlayne, A Treatise on the Modern Law of Evidence (Howard C. Joyce ed., 1916).


329. Durfee, supra note 51.

330. Durfee & Dawson, supra note 54.


332. Palmer, supra note 328, at 450.
Equity I and II was a two-semester, six-hour, required sequence, and even at this early date, it appears to have been principally devoted to equitable remedies.

Durfee also appears to have been one of those scholars who inspired his students and improved the work of his colleagues in ways all out of proportion to his publications. John Dawson and George Palmer, who were Durfee's students, then his younger colleagues at Michigan, and in time the two great restitution scholars of their generation, praised him highly, both substantively and

333. See University Bulletin, University of Michigan Department of Law Annual Announcement 1920–1921 and Catalogue of Students 1919–1920, at 25 (1920). Michigan catalogs are available in the University of Michigan Law Library; Iowa's collection does not begin for Michigan until after the period examined in this article.

334. See id. at 27 ("Equity I.—A general introduction to the principles of equity, with particular consideration of the nature of equity jurisdiction, specific performance of contracts and bills for an account."); id. at 28 ("Equity II.—The principles of equity further considered with special reference to specific reparation and prevention of torts, protection of interests in personality, bills of peace, bills quia timet and reformation and rescission for mistake."). Durfee did not create these course descriptions; they were carried forward from earlier years and earlier instructors. See University Bulletin, University of Michigan Department of Law Annual Announcement 1919–1920 and Catalogue of Students 1918–1919, at 25, 28 (1919). For later examples of the casebook transition from substantive equity to equitable remedies, see supra note 55 and accompanying text.


337. Palmer's great work is his four-volume treatise on restitution. Palmer, supra note 40; see also George E. Palmer, Mistake and Unjust Enrichment (1962). Dawson's work in the field includes John P. Dawson, Unjust Enrichment (1951), numerous articles, and his early collaborations with Durfee, discussed below.
personally.\textsuperscript{338} My colleague John Reed, who overlapped with Durfee for two years and briefly took over his Equity course when he retired, recalls that Durfee "was highly regarded by his colleagues, who also enjoyed the stories about his foibles," both real and apocryphal.\textsuperscript{339} The Michigan faculty said that "Edgar Durfee was the kind of teacher about whom school legends grow. Whether or not the events related in many of them ever happened matters little, since they are faithful to the spirit of the man and reflect the esteem and often the affection of his students."\textsuperscript{340} More directly relevant to the history of remedies is Durfee's propensity to teach for years at a time out of his own unpublished casebooks in "mimeographed or lithographed form."\textsuperscript{341}

Durfee's student and co-author, John Dawson, taught at Michigan from 1927 to 1956 before moving to Harvard, and later, when he reached Harvard's mandatory retirement age, to Boston University.\textsuperscript{342} He had a distinguished and prolific career, publishing on restitution, contracts, and legal history,\textsuperscript{343} and he was vividly remembered, both at Michigan and at Harvard.\textsuperscript{344} John Reed recalls that the Michigan faculty viewed Dawson as their leading light, that the students were initially less impressed, but that later, as alumni, they remembered Dawson as one of the people who had taught them the most.\textsuperscript{345} Dawson was a Democrat who ran for Congress in 1950

\textsuperscript{338} See John P. Dawson & George E. Palmer, Cases on Restitution, at vi (1958) ("Our lasting debt, which thanks alone can never repay, is to Professor Edgar Noble Durfee, to whom this volume is dedicated."); John P. Dawson, Specific Performance in France and Germany, 57 Mich. L. Rev. 495, 495 (1959); Palmer, supra note 328, at 449–52.

\textsuperscript{339} The quotation is from an e-mail from John Reed to Douglas Laycock (Sept. 21, 2007) (on file with author). The addendum that some of these stories were true and some were not is from an in-person interview with John Reed (February 26, 2008) (interview notes on file with author).


\textsuperscript{341} Palmer, supra note 328, at 450–51.

\textsuperscript{342} 1976 Directory, supra note 335, at 294. John Reed confirms the inference that Dawson's move to BU at age 70 was because of mandatory retirement. In-Person Interview with John Reed (April 8, 2008) [hereinafter Reed Interview] (interview notes on file with author).

\textsuperscript{343} For his bibliography, see Appendix: The Writings of John Philip Dawson, 99 Harv. L. Rev. 1126 (1986).


\textsuperscript{345} Reed Interview, supra note 342.
The faculty was overwhelmingly Republican, and in Dawson’s second race, five of his senior colleagues signed an advertisement opposing him. Reed thinks that this advertisement contributed to Dawson’s move to Harvard five years later.

In 1928, Durfee published *Cases on Equity.* The bulk of this book, and the heart of the course Durfee taught from the book, were two long chapters on specific performance of contract and injunction against tort. The equity of primary rights and duties—trusts, mortgages, estates, and the like—is gone. As already noted, this material had been gone from the equity courses at Michigan for many years.

In 1930, Durfee produced a thin pamphlet entitled *Remedies for Breach of Contract.* This pamphlet was only twenty-eight pages, more outline than exposition, produced on a typewriter and duplicated at a local print shop, for his students in Equity I. Some pages are single-spaced and some double-spaced, suggesting that they were produced at different times; retyping whole sections to make the format consistent would have been a significant burden on secretarial resources. Production of different parts at different times suggests that there may have been earlier versions that have not survived.

The pamphlet is confined to contract remedies, but its conception of remedies is thoroughly modern. Liability questions are eliminated at the outset: “a valid contract and its breach are assumed.” Three familiar sets of remedies are listed under the heading of “Actions”: “Action at law for damages;” “Suit in equity for specific performance;” and “Suit at law or in equity for restitution, in specie or in value, on theory of rescission.” There are discussions of

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347. See id. (“some of his colleagues”); Reed Interview, *supra* note 342 (“five senior colleagues”).
348. Reed Interview, *supra* note 342.
349. DURFE, *supra* note 51.
350. Id. at 225–715. For a brief description of how he organized the course, see id. at iii.
351. See *supra* note 334 and accompanying text.
352. EDGAR N. DURFE, REMEDIES FOR BREACH OF CONTRACT (1930). The pamphlet is available in the University of Michigan Law Library.
353. Id. at 1. Compare LAYCOCK, *supra* note 2, at 2 (“In every case we will assume that defendant’s conduct is unlawful and ask what the court can do about it . . . .”).
self-help remedies,\textsuperscript{355} the need to choose a single remedy and the various rules that preclude double recoveries,\textsuperscript{356} the measure of damages,\textsuperscript{357} and collection of money judgments.\textsuperscript{358} The equitable remedies were not developed because they were already in the casebook.

By 1930, Durfee had thus conceived the ideas of introducing damages and restitution into a course in equity, of assuming liability and focusing on remedies, and of comparing the legal and equitable remedies for the same cause of action. The execution was still primitive, confined to breach of contract and to a short outline, but the ideas are unmistakable. There is another edition of \textit{Remedies for Breach of Contract} in 1935, expanded to thirty-one pages, with substantially the same coverage and the same mode of production.\textsuperscript{359}

In 1939, Durfee and Dawson published a casebook, somewhat curiously entitled \textit{Cases on Remedies II: Restitution at Law and in Equity}.\textsuperscript{360} John Cribbet described it as “one of the best books I used.”\textsuperscript{361} This was a restitution book that emphasized restitutonary remedies, both legal and equitable:

\begin{quote}
The editors are completely committed, in this as in other fields, to the combination of legal and equitable materials.\ldots
\end{quote}

This book aims to include substantially all the subject-matter usually assigned to the course in Quasi-Contracts and also the relevant material on equitable remedies such as subrogation, equitable lien, and constructive trust.\ldots

Throughout the emphasis is primarily on remedies, though much attention is given to the substantive grounds for rescission of contract and the course is in this sense a supplement to the course in Contracts. The first Part of the book attempts to push into the background so far as possible problems as to

\textsuperscript{355} \textit{Id.} at 2–3.
\textsuperscript{356} \textit{Id.} at 3–13.
\textsuperscript{357} \textit{Id.} at 13–21.
\textsuperscript{358} \textit{Id.} at 21–28.
\textsuperscript{359} Edgar N. Durfee, \textit{Remedies for Breach of Contract} (1935). This version is also available in the University of Michigan Law Library.
\textsuperscript{360} Durfee & Dawson, \textit{supra} note 54.
\textsuperscript{361} Cribbet Interview, \textit{supra} note 272.
substantive grounds of liability, and to concentrate
attention on the remedies of quasi-contract, equitable
lien, equitable accounting, and constructive trust. 362

If this was volume II, what was volume I? The answer
appeared twenty years later, when Dawson and Palmer published a
edition of this book was originally planned to be volume II of a series
on remedies, of which volume I would deal with legal and equitable
remedies for Tort and Contract. Altered plans and lapse of time have
made it necessary to abandon this original plan.” 363

The University of Michigan Law Library has multiple drafts of
the projected volume I. These materials comprise some 26 thin
volumes of typescript, reproduced at a local print shop, and bound in
soft covers. After much sorting and comparing, I have identified two
complete versions with some partial revisions in between. One
complete set, entitled Cases on Equity, is divided into ten “books.”
There is no date on the title pages, but this set is dated 1936 in
handwritten cataloging information on the inside of each volume. 364
There is a “Revised” edition of Books I, VI, and X, dated 1937 in the
handwritten cataloging information. 365 Perhaps only these volumes
were revised, or perhaps the whole set was revised and these are the
only volumes extant.

There is a “New” edition of Books VII through X, dated 1940
in the handwritten cataloging information. 366 This “New” edition
appears to match up with two undated volumes entitled Cases on
Remedies, which the library believes to have been printed in 1939 or
1940. 367 This 1940 edition of Cases on Remedies covers the same

362. DURFEE & DAWSON, supra note 54, at iii–iv.
363. DAWSON & PALMER, supra note 338, at vi.
364. EDGAR N. DURFEE & JOHN P. DAWSON, CASES ON EQUITY (1936).
This set consists of eleven physical volumes; the last one is labeled “Book X
(continued).”
365. EDGAR N. DURFEE & JOHN P. DAWSON, CASES ON EQUITY (rev. ed.
1937).
366. EDGAR N. DURFEE & JOHN P. DAWSON, CASES ON EQUITY (new ed.
1940).
367. EDGAR N. DURFEE & JOHN P. DAWSON, CASES ON REMEDIES (c. 1940).
The dates appear only in Lexcalibur, the online catalog of the University of
ground as Books I and II of the 1936 edition of *Cases on Equity*. Once again, I have no way to know whether there was a 1940 revision of Books III through VI that has been lost.

Finally, there is a 1946 “Revised Edition” of *Cases on Remedies*, which covers, with some reorganization, all the ground of Books I through VI of the 1936 edition, and a 1946 “Revised Edition” of *Cases on Equity*, which covers the ground of Books VII through X of earlier editions. So the Revised Edition of 1946 of *Cases on Remedies* plus *Cases on Equity* appears to be a complete set and the final version extant. I will suggest to the Michigan librarians that they consolidate these many volumes into bound sets, so that any future researcher can more easily see how the volumes match up.

I will describe only the 1946 edition. But it is important to note that the 1936 edition has the same scope and is actually longer: 987 pages in 1936 had been condensed to 829 pages by 1946. And Palmer says that Durfee abandoned his published casebook and began teaching from “a paperback revision” in 1935. So the courses taught from these books were being offered by 1936 at the latest, and quite possibly by 1935.

The 1946 Revised Edition of *Cases on Remedies* has three chapters: a short “History of Our Remedial System,” a chapter on “Valuation,” and a lengthy chapter on “Remedies for Breach of Contract.” Valuation is central to measuring damages, and the chapter on valuation contains a variety of cases presenting valuation issues for purposes of condemnation, taxation, conversion of property, negligent destruction of property, and failure to deliver

368. **Edgar N. Durfee & John P. Dawson, Cases on Remedies** (rev. ed. 1946). The date appears on a title page, which is present in one extant copy and missing in another. The date is further confirmed by two subheadings in the chapter on history, surveying developments from “1200 to 1946.” *Id.* at 5, 9. One copy of these two volumes has been bound together in a single hard cover that appears to have been added by the library.


372. *Id.* at 29–103.

373. *Id.* at 104–461.

374. *Id.* at 59–74.

375. *Id.* at 36–59, 79–85.

376. *Id.* at 74–75, 93–95.

377. *Id.* at 29–32, 85–90, 97–100.
freight under a bill of lading. Some of these cases gave students a peek at tort damages, but only in cases involving interference with tangible property.

The chapter on "Remedies for Breach of Contract" is divided into six sections, addressing the sale of land (subdivided into purchaser's remedies and vendor's remedies), other contracts (subdivided into damages and specific performance), "Incomplete Agreements: Open Terms; Relative Practicability of Legal and Equitable Remedies," "Consideration: Hardship: Laches," "Want of Mutuality," and "Partial Specific Performance." Some of these titles sound more substantive than remedial, but that is misleading. The cases on consideration are about refusing specific performance because of inadequate consideration; the cases on mutuality are about mutuality of remedy. The restitutionary remedies are not addressed; they were published in volume II.

The relevant features of Cases on Equity are easier to summarize. The 1946 Revised Edition covers injunctions against tort, injunctions to control litigation in other courts, some of the minor equitable remedies, contempt of court, "framing,

378. Id. at 101–03.
379. Id. at 104–218.
380. Id. at 219–317.
381. Id. at 318–49.
382. Id. at 350–98.
383. Id. at 399–423.
384. Id. at 424–61.
386. E.g., Buck v. Smith, 29 Mich. 166 (1874), reprinted in DURFEE & DAWSON, supra note 368, at 399–400 (refusing specific performance of a promise to convey property in exchange for plaintiff's future services as a manager, because it would be impractical to specifically enforce plaintiff's obligation).
387. DURFEE & DAWSON, supra note 54.
388. 2 DURFEE & DAWSON, supra note 369, at 813–902. The first page number in volume 1 of Cases on Equity is 532, presumably because this edition was created from Books VII through X of the earlier edition. See supra notes 368–369 and accompanying text.
389. 2 id. at 704–62.
390. 2 id. at 763–812 (cancellation of instruments, removal of cloud on title, declaratory judgment, and interpleader).
391. 1 id. at 619–703.
construing, amending and vacating decrees and orders,\textsuperscript{392} and some issues of equity procedure.\textsuperscript{393}

At Michigan, \textit{Cases on Remedies} and \textit{Cases on Equity} were both assigned in Equity I, a required first-year course; the rest of \textit{Cases on Equity} was assigned in Equity II, a required second-year course; and the published restitution volume was assigned in Restitution, an elective.\textsuperscript{394}

Within its scope, this integrated series of three books and three courses offered a modern treatment of remedies—probably the first modern treatment. Durfee and Dawson focus on the choice of remedies and the measure and administration of each remedy. They treat both legal and equitable remedies, and by legal remedies they mean the measure of damages, not the forms of action. The principal omission was damages for injuries to the person and to intangible interests; the planned unit on tort damages was apparently never written.

The influence of this work appears to have been limited. The course was not called Remedies, and volume I of the casebook was never published. After Durfee retired in 1951, John Reed and Roy Steinheimer took over Equity I and adopted the new edition of the Chafee and Simpson \textit{Equity} book.\textsuperscript{395} Dawson, Steinheimer, and Hart Wright continued to use Durfee and Dawson's \textit{Cases on Remedies} in Equity II for two more years,\textsuperscript{396} then the curriculum was reorganized. Equity I and II disappeared as separate courses, but much of their content was integrated into a new first-year course called Introduction

\textsuperscript{392} 1 id. at 577–618.
\textsuperscript{393} 1 id. at 532–76.
\textsuperscript{394} \textsc{University of Michigan Official Publication: Law School Announcement} 1946–1947, at 17–18, 21 (1945).
\textsuperscript{395} \textsc{University of Michigan Official Publication: Law School Announcements} 1952–1953, at 21 (Equity I, with same course description, now taught from "Chaffee [sic], Simpson, \& Maloney, Cases on Equity (3d ed."). That book is \textsc{Zechariah Chafee, Jr.}, \textsc{Sidney P. Simpson} \& \textsc{John P. Maloney}, \textsc{Cases on Equity} (3d. ed. 1951).
\textsuperscript{396} \textsc{See} \textsc{University of Michigan Official Publication, Law School Announcement, 1953–1954}, at 24 (1953).
to Law and Equity, and an expanded Contracts course, taught from a new set of materials by Dawson and William Harvey.

We are now in position to make an educated guess about the "altered plans" that led to so much of the Durfee and Dawson materials never being published. As in many collaborations, there was a division of labor. Probably Dawson was responsible for volume II, on restitution. He pushed it to prompt completion and it was published in 1939.

Probably Durfee was responsible for the planned volume I, on the other legal and equitable remedies, and he never got it done. Palmer refers to these materials as a revision of Durfee's Equity casebook, refers to Durfee teaching from them until his retirement, and does not mention Dawson in connection with them. Dawson confirms that Durfee wrote at least chapter I, a history of the remedial system. Durfee's early pamphlet on Remedies for Breach of Contract shows his interest in what became the lengthy chapter of the same title; and even before that, in the preface to his Equity casebook, Durfee said he thought that "all can agree that the former [contracts] is more illuminated by a study of remedies than is the latter [torts]."

In 1953, Dawson and Harvey produced a draft of a casebook on Contracts and Contract Remedies, with a long opening chapter on contract remedies. This chapter is heavily revised from the earlier

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397. See University of Michigan Official Publication, Law School Announcement, 1954--1955, at 21 (1954). This course was taught from multiple books, on legal bibliography, equity, and civil procedure, but it did not use any of the Durfee and Dawson materials. Id.

398. For the course, see id. For the materials, see infra notes 402--403 and accompanying text. John Reed has no memory of this transition or of the unpublished Durfee and Dawson materials. He was junior at the time and assigned to the Equity course; he might not have been consulted. It is also possible that, despite the catalog entry, he never actually taught Equity II. He does remember teaching Equity I from Chafee and Simpson. Reed Interview, supra note 342.

399. Palmer, supra note 328, at 450.

400. Dawson, supra note 338, at 495.

401. DURFEE, supra note 51, at iii.

402. JOHN P. DAWSON & WILLIAM B. HARVEY, CASES AND MATERIALS ON CONTRACTS AND CONTRACT REMEDIES (1953). This typescript is available in the University of Michigan Law Library. The book was eventually published and subsequent editions are still in print. JOHN P. DAWSON, WILLIAM BURNETT HARVEY, STANLEY D. HENDERSON & DOUGLAS G. BAIRD, CONTRACTS: CASES AND COMMENTS (9th ed. 2008).
Durfee and Dawson chapter on contract remedies; a majority of the cases are new.\footnote{403} Of course Dawson might have revised his own earlier draft this extensively, but it is more likely that he was revising Durfee's draft to better fit his own preferences. When Durfee failed to finish volume I, no one else was both able and willing to finish it for him. Or at least that is a reasonable inference.

2. John Wilson

John Wilson taught at the Baylor Law School from 1948 to 1986.\footnote{404} He appears to have been a larger-than-life figure. Family tradition has it that he played minor league (or maybe semi-pro) baseball while still in high school and that he could throw a football the length of the field.\footnote{405} He left baseball, and turned down overtures from the University of Texas football coach, preferring to concentrate on his degree. He was in the Navy from 1943 to 1946,\footnote{406} serving on the USS \textit{Tillman},\footnote{407} a destroyer that saw heavy combat in the Atlantic and Mediterranean and then transferred to the Pacific in time to be the

\footnote{403} The Durfee and Dawson chapter on contract remedies is 358 pages and contains 71 principal cases. DURFEE \& DAWSON, supra note 368, at 104–461. The Dawson and Harvey chapter on contract remedies is only 191 pages, but contains 87 principal cases. DAWSON \& HARVEY, supra note 402, at 1–191. Only 40 of these cases appeared in Durfee and Dawson; 47 of them are new.


\footnote{405} This sentence and the next are based on Telephone Interview with Andrew Wilson (April 16, 2008) [hereinafter Andrew Wilson Interview] (interview notes on file with author); E-mail from Margaret Wilson to Douglas Laycock (March 11, 2008) (on file with author); and E-mail from Margaret Wilson to Douglas Laycock (April 15, 2008) [hereinafter Wilson April 15 E-mail] (on file with author). Margaret and Andrew Wilson are John Wilson's children. Margaret Wilson practices law in Austin; she formerly served as General Counsel to Gov. George W. Bush, and before that she was a partner at Vinson \& Elkins. Andrew Wilson is a Baptist minister in Waco.

\footnote{406} \textsc{Directory of Law Teachers in American Bar Association Approved Law Schools 1960}, at 347 (1959) [hereinafter 1960 DIRECTORY]

\footnote{407} E-mail from Margaret Wilson to Douglas Laycock (March 23, 2008) [hereinafter Wilson March 23 E-mail] (on file with author); Andrew Wilson Interview, supra note 405; \textit{The Men and Women in World War II from Navarro County Texas} 280 (1945) (author or editor unknown), available at http://www.rootsweb.ancestry.com/~txnavarr/war/world_war_ii/men_and_women_in_wwii/p279_280.htm.
scene of the Japanese surrender of Yap. Wilson was only a junior officer, but somehow he came away with the Japanese commander’s sword, which still hangs on his son’s wall. He earned his law degree at Southern Methodist in 1948, and immediately joined the Baylor faculty.

His students came to call him “Crazy John,” and when I spoke to them in 2008, they variously capsulized him as “a raconteur,” one who “could have been a comedian,” and a teacher who succeeded despite his “unorthodox methods.” He exhorted his students to “THINK—the word released in booming tones,” and they say he taught them how to do it. His relied heavily on memorable hypotheticals involving his fictional characters Bill Sprivvens and Harry Hoskins, who seem to have inflicted a long series of colorful wrongs on each other; early in the semester, one of them rear-ended the other’s battered sedan just when it was carrying a trunk load of rare hummingbird eggs. Wilson committed much time to teaching, both


409. Wilson March 23 E-mail, supra note 407.


411. See Sidney A. Fitzwater, Dedication, John R. Wilson, 38 Baylor L. Rev., at vii (Spring 1986).

412. Telephone Interview with Margaret Wilson (March 8, 2008) [hereinafter Margaret Wilson Interview] (interview notes on file with author).

413. Telephone Interview with Donald McLachlan (March 17, 2008) [hereinafter McLachlan Interview] (interview notes on file with author). McLachlan is now President and CEO of SilverQuest Consulting Group in Georgetown, Texas.

414. Id.

415. See Dedication, John R. Wilson, 38 Baylor L. Rev., at iii (Spring 1986) (contribution of Baylor Law Review editorial staff).

416. E-mail from Margaret Wilson to Douglas Laycock (April 5, 2008) [hereinafter Wilson April 5 E-mail] (on file with author). Some years the cargo was a rare antique, McLachlan Interview, supra note 413; some years the car itself had “enormous sentimental value,” Dedication, supra note 415, at iii. Sprivvens and Hoskins did not appear in every hypothetical, and may not have appeared in the automobile hypothetical that so many people remembered, but they appeared often. They “stepped nimbly from hypo to hypo, adding spice and continuity to the divergent areas within the broad field of remedies.” Id.
in class preparation and in meeting with students outside of class, and he taught year-round. When he took a summer off, he listed himself as “[o]n leave, summer 1967–68.” He published only occasionally, on judgments, adoption, jurisdiction, and insurance, but not on remedies.

Beginning in 1951–1952, Baylor offered an eight-hour Remedies course (on the quarter system), taught from mimeographed materials, that covered what was “usually considered in the courses of Equity, Restitution and Damages with some materials from the Creditors’ Rights course.” Baylor catalogs did not list faculty assigned to courses in those days, but this was Wilson’s course. He listed Damages as a course beginning in 1948, and Equity beginning in 1950. His name appears on the Association of American Law School’s first list of remedies teachers in 1952, and beginning in 1953, he listed himself as a current teacher of Remedies and a past teacher of Damages and Equity. Michael Vaughn, a protégé of Wilson’s who briefly taught Remedies at Baylor about 1967, reviewed the Baylor faculty roster in 1951—there were only seventeen, and Vaughn had known nearly all of them—and judged that no one but

417. Dedication, supra note 415, at iii; Wilson March 23 E-mail, supra note 407.
418. Erwin A. Elias, Dedication, John R. Wilson, 38 BAYLOR L. REV., at ix (Spring 1986).
420. Dedication, supra note 415, at iv n.2 (listing six articles in the Baylor Law Review); see also John R. Wilson, Jurisdiction Over Nonresidents, 22 TEX. B.J. 221 (1959); John R. Wilson, Note, The Uniform Business Corporation Act, 1 TEX. L. & LEGIS. 309 (1947). Texas Law and Legislation was the original name of the SMU Law Review.
422. 1948 DIRECTORY, supra note 410, at 285.
426. Telephone Interview with Michael Vaughn (March 3, 2008) [hereinafter Vaughn Interview] (interview notes on file with author); 1967 DIRECTORY, supra note 419, at 296.
Wilson could have created the new course in Remedies. Vaughn is an unabashed admirer of Wilson; he says that “Wilson was well ahead of the times, and certainly the most innovative thinker on the Baylor faculty during that time.”

Due to an oversight early on, I did not discover the permanence of this course until deadlines were looming. Wilson never published his teaching materials, and they were not in the Baylor library. Margaret Wilson, John Wilson’s daughter and one of his former students, spent many hours in her garage, going through previously unexamined boxes of her father’s papers. Baylor e-mailed all its living alumni from the classes of 1952 to 1986, asking if anyone had a copy of John Wilson’s teaching materials. Of course Margaret found the master copy as soon as that e-mail went out. She and I plan to place copies in the Baylor, Texas, and Michigan law libraries.

The mass e-mail led to many calls from Baylor alumni with vivid memories of John Wilson, and they sent me multiple copies of his teaching materials. Some had discarded their teaching materials but sent me detailed class notes. They sent me two course outlines that were circulated among Baylor students, one with a copyright notice(!) from 1973, and Marvin Jones sent me final exams from 1975–1976. Some of these alumni said they were packrats; others said they kept things only from Wilson’s courses, because Wilson was such a great teacher or such a powerful personality.

427. E-mail from Michael Vaughn to Douglas Laycock (March 3, 2008) (on file with author).
428. Id.
429. Many Telephone Interviews with Margaret Wilson (March 7–13, 2008). Margaret Wilson is more fully described supra note 405.
430. E-mail from Becky L. Chollett to Baylor Law Alumni (March 13, 2008) (on file with author).
431. Delta Theta Phi, Remedies Outline (undated); Remedies (undated, author unknown). The fraternity outline is only twenty-three pages, but it is the one with the copyright notice. The anonymous outline is sixty-one pages. Donald McLachlan sent a copy of each. Susan Jensen sent another copy of the Delta Theta Phi outline that belongs to her husband and law partner; she practices with Jensen & Jensen in Arlington, Texas. Tom F. Pruitt sent another copy of the anonymous outline; he is in-house counsel at ExxonMobil Chemical Co. in Baytown, Texas.
Unfortunately, I did not get an early version of his materials. Wilson taught the course from “mimeographed materials” beginning in 1951–1952, but students who took that course would be in their eighties today. They may have moved many times in the interim, creating more opportunities to throw away old papers; they may have moved to smaller quarters. Early versions of the course are probably lost forever.

All the teaching materials that I received were different copies of the same typescript, entitled Cases on Remedies on the cover and Cases and Materials on Judicial Remedies at the top of the table of contents. This document is undated, but probably it was completed in 1966. In his entry in the Directory of Law Teachers, Wilson listed these materials as “Cases & Materials, Judicial Remedies, 1966.” The most recent versions had six inserts, with pages numbered 13A, 13B, etc., that were not present in early versions.

Wilson’s course evolved more rapidly than his unpublished casebook. Michael Vaughn said that Wilson was a great reader of advance sheets and whenever he found a new case of any significance was quick to incorporate that into his classes. But this was before word processing and before cases could be downloaded from databases; some secretary had to type all 598 single-spaced pages of the casebook, and any revisions more complex than inserting extra pages would require substantial retyping. So Wilson apparently assigned many new cases by simply telling students to go to the library

433. BAYLOR 1951, supra note 421, at 18.
434. JOHN WILSON, CASES ON REMEDIES (c. 1966).
435. 1976 DIRECTORY, supra note 335, at 1008. Internal evidence tends to confirm this date. I looked at every page of Wilson’s book, although of course I didn’t read every page; the latest case citation I saw (except for the inserts detailed in the next footnote) was from December 1965. See WILSON, supra note 434, at 486 (citing Lee v. Bowles, 397 S.W.2d 923 (Tex. Civ. App.—San Antonio 1965, no writ)).
436. WILSON, supra note 434, at 13A–13F (inserting damage provisions of U.C.C. Art. 2); id. at 130(a)–130K (treating damages from fraud); id. at 202A–2021 (inserting a 1971 case on a landlord’s breach of a lease); id. at 340-A (inserting notes on damages to real property); id. at 360A–360B (inserting a 1958 case on destruction of a farm by contamination from a sewage plant); id. at 442A–442E (inserting a 1974 cases on damage to land from a sanitary landfill).
437. E-mail from Michael Vaughn to Douglas Laycock (March 13, 2008) [hereinafter Vaughn March 13 E-mail] (on file with author). To similar effect, Margaret Wilson said her father “spent hours in the library, adding and deleting cases.” Margaret Wilson Interview, supra note 412.
and read them. Stephen Fogle, who took the course in 1983–1984, sent me a list of eighty-one cases that were assigned outside the casebook. Fogle had photocopies of some of these cases in a separate binder, and others interspersed with the casebook. Margaret Wilson, who took the course in 1982, had no memory of the casebook and did not know her father had written one. She remembers “much more of an ad hoc collection of cases and assignments than a big casebook.” But however little or much he was assigning from it, he was still distributing the casebook. Fogle sent me a copy, as did Susan Satterwhite, a classmate of Margaret Wilson’s. Jack Woods sent a copy from when he took the course in 1975; he also remembered being told to read supplemental cases in the library. William McKinney sent a copy of the materials from when he took the course in 1970. All copies are the same, except for the number of inserts included; the Woods and McKinney copies have only one insert, on the damage provisions in Article 2 of the Uniform Commercial Code. So the master copy that Margaret Wilson found, which includes all six inserts and the table of contents, can be accepted as the final edition of the casebook.

This is, without doubt, a modern remedies book. It covers damages for tort and contract, specific performance, injunctions, declaratory judgments, and restitution. The organization is primitive; no one mentioned organization as one of Wilson’s strengths, but this may also reflect the technological burden of making revisions. Deciding from scratch how to organize a remedies casebook is a

439. Wilson March 23 E-mail, supra note 407. Wilson April 5 E-mail, supra note 416.
442. Telephone Interview with Jack Woods (April 16, 2008) [hereinafter Woods Interview] (interview notes on file with author). Woods represents the Texas Department of Transportation in Austin.
443. McKinney is a solo practitioner in Amarillo.
difficult task, and it is much easier if material can be rearranged with a few keystrokes.

Wilson has no chapters as such, but there are thirty-some main headings, some with one level of subdivisions. I fudge on the exact number because he is not consistent about distinguishing main headings from subdivisions, and the headings in the table of contents are not always entirely consistent with the headings in the book. He starts with "General Rules" at law and in equity, and then continues with "Certainty," and "Uncertainty or Inadequacy." There are nine units on contract remedies, organized partly in terms of damages and specific performance and partly in terms of different kinds of contracts. Next comes "Injury to Business Interests," "Temporary Injunction," "Injury to Interests of Personality," and "Declaratory Judgments." Then follow three units on damage to personal property, one on "Avoidable Consequences," and eight


445. WILSON, supra note 434, at 1–35.

446. Id. at 35–60.

447. Id. at 60–71. This unit dealt with arguments that damages were inadequate because too uncertain or unprovable.

448. Id. at 72–201 (including "Breach of Contract to Convey Land" (subdivided into "Executory Contracts" and "Executed Contracts"), "Breach of Contract to Convey Land in Equity," "Defenses to Specific Performance," "Mutuality of Remedy," "Specific Performance: Abatement," "Breach of Contract: Personal Services," "In Equity" (still referring to personal service contracts); "Breach of Construction Contract at Law: General Rules," and "In Equity" (now referring to construction contracts)).

449. Id. at 203–17.

450. Id. at 217–19.

451. Id. at 220–58. This is divided into subunits on remedies at law and in equity.

452. Id. at 259–64.

453. Id. at 265–96 ("Injuries to Personal Property," "Fluctuation in Value," and "Value of Loss of Use of Personal Property").
on damage to real property. The book closes with three units on restitution and, finally, a unit on personal injuries and wrongful death. He may have taught the personal injury material rarely or never; this unit is omitted from both circulating course outlines, and this is the only unit with no listing of individual cases in the table of contents.

The 1966 casebook has no introduction or other explanation of Wilson’s conception of the course. But about 1979, Wilson wrote A Prefatory Comment, describing his “grudging surrender” to Baylor’s decision to cut the course from eight hours to five. In this

454. Id. at 297–325.
455. Id. at 326–486 (“Injuries to Real Property Wrongful Occupancy,” “Separable Damage to Realty,” “Non-Separable Damage,” “Damage to Appurtenances,” “Nuisance: At Law,” “Nuisance and Limitations,” “Taking, Damaging, and Destroying,” and “Nuisance: In Equity”).
456. Id. at 487–541 (“Benefits Tortiously Acquired,” “Recission,” and “Election of Remedies”).
457. Id. at 542–98.
458. See Remedies Outline, supra note 431, at 23; Remedies, supra note 431, at 61.
459. Wilson, supra note 434, at sixth page of table of contents. The table of contents appears to have been added to the original manuscript at some later date, and its pages are not numbered. All copies received from students who took the course in the 1980s included the table of contents; the 1970 and 1975 copies from William McKinney and Jack Woods did not.
460. John Wilson, A Prefatory Comment 1 (c. 1979). This document is undated, but there is a citation to Jones v. U.S. Secret Service, 81 F.R.D. 700 (D.D.C. 1979), as an unreported case, Wilson, supra, at 2, and there are two hypothetical special issues asking for the value of property on August 8, 1979, id. at 5–6. Baylor catalogs show that the course was reduced from eight hours to five in 1979–1980, increased to six hours in 1981–1982, again reduced to five hours in 1984–1985, and reduced to four hours in 1986–1987, after Wilson retired. See The School of Law, 1978–1979 Bulletin of Baylor University 32 (listing Remedies as an eight-hour course); The School of Law, 1979–1980 Bulletin of Baylor University 32 (listing Remedies as a five-hour course); 1981–1982 Bulletin of Baylor University: The School of Law 32 (listing Remedies as a six-hour course); 1984–1985 Bulletin of Baylor University: The School of Law 26 (listing Remedies as a five-hour course); 1986–1987 Bulletin of Baylor University: The School of Law 34 (listing Remedies as a four-hour course). There are inconsistencies in some of these catalog entries, but Leah Jackson, the current Associate Dean at Baylor, interpreted them as stated here. Baylor had adopted standardized course numbers in this period, in which the second digit of the course number indicated the number of credit hours, and in her
document, Wilson said that the course would make students "well acquainted with the anatomy of a typical lawsuit," and that "[s]tress will be laid upon (a) the choice of remedy and (b) the art of legal evaluation." Indeed, "[p]erhaps the most significant thing a lawyer does is in the job of evaluation." A large amount of "our time" will be spent in learning how the lawyer evaluates the many divergent types of property interests and subject matter the various suits can involve—for, actually, the lawyer is a professional CONVERTER—he/she takes the "facts" of a given case or situation and molds them into a presentable case or controversy in order that a court may act upon it judicially.

The emphasis on valuation suggests a practical bent to the course, and there were certainly elements of that. He "constantly" wrote on the board "P-E-I," for pleadings, evidence, issues; the point was that a lawyer's pleadings, evidence, and issues must all line up in neat agreement. (Texas submits nearly all jury cases on special issues, and in Wilson's time, the issues were narrow and numerous.) Wilson also drew the "are" from cause of action to remedy; these also had to match. Wilson may have emphasized the practical, but all of his former students who called me said that he also emphasized skills and reasoning and preparing his students to face novel situations. Jack

461. Wilson, supra note 460, at 3.
462. Id. at 4 (emphasis changed from underlining to italics).
463. Id. at 3 (emphasis changed from underlining to italics).
464. McLachlan Interview, supra note 413; Wilson April 5 E-mail, supra note 416. "Constantly" was McLachlan's word.
465. See WILLIAM V. DORSANEIO, III & DAVID CRUMP, TEXAS CIVIL PROCEDURE: TRIAL AND APPELLATE PRACTICE § 4.02[A], at 222–23 (2d ed. 1989) (reviewing changes from the pre-1973 rule, under which cases were submitted "on an element by element, issue by issue basis," to a transitional rule, under which the trial judge had discretion to formulate issues broadly or narrowly, to the post-1988 rule, under which "broad-form questions are now required whenever feasible"); see also id. § 4.01[A], at 217 (noting that Texas special issues are now called "jury questions").
466. Wilson April 5 E-mail, supra note 416.
Woods remembers Wilson as “more conceptual” than most faculty. And Wilson once insisted in a discussion with faculty colleagues that Baylor was in the business of training “architects,” not “carpenters”—a comparison that was not well received by those implicitly accused of training carpenters.

The casebook and *A Prefatory Comment* also give hints of older understandings of remedies. Wilson says that “every case brought to court comes upon a remedy—and as the term imports, ‘remedies’ encompasses the *whole* of the laws’ goals whatever the course title or its study might entail.” What follows the dash in this quotation is vaguely reminiscent of Mordecai and McIntosh, and of Pomeroy’s 1880 lectures, seemingly surveying all of law under the heading of remedies.

What comes before the dash suggests remedy as a cause of action—not the award of relief at the end of the case, but something at the beginning that brings the case to court: the case “comes upon a remedy.” This implicit idea continues in Wilson’s next paragraph, which describes several causes of action recently recognized or expanded in Texas and elsewhere. I came across occasional hints of this usage as I paged through the main volume. He includes *Kidd v. Hoggett* as a principal case; *Kidd* is a slander of title case in which the principal issue is not the measure of damages but whether malice is an element of the tort. And on the 1976 final exam, there was a short-answer question: “What are the elements of a slander of title action? Be specific.”

Remedy as a cause of action is the modern descendant of remedies as the forms of action. Especially with respect to more novel

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468. Vaughn March 13 E-mail, *supra* note 437. Vaughn, who was a junior faculty member present at this conversation, thought that the implicit accusation was unfair to its target. But he also thought that the comparison accurately captured Wilson’s ambitions for the school and for his own courses.
469. Wilson, *supra* note 460, at 2 (emphasis changed from underlining to italics).
470. *See supra* notes 63–74 and accompanying text.
471. *See supra* notes 307–318 and accompanying text.
or unusual causes of action, I have heard lawyers say that the cause of action is the remedy for the wrong that it addresses. Wilson occasionally thought that way, but the great bulk of his casebook is about issues that are unambiguously remedial: the measure of damages and the availability of specific performance primarily, with somewhat less attention (though certainly sufficient) to injunctions, declaratory judgments, and restitution.

There is no reason to doubt that Wilson created this course himself, probably with little help or input from anybody else. But it is possible that he did not independently have the original idea for the course. There were recurring contacts between Baylor and Michigan in this era. Three members of the Baylor faculty earned an LL.M. at Michigan: Abner McCall, the Dean, in 1943; Ralph Norvell in 1949, and Angus McSwain in 1951. Any one of them could have gotten the idea from Durfee or Dawson or anyone else at Michigan who knew what Durfee and Dawson were doing. But there is no evidence that that happened, or even that it was very likely.

The Registrar at Michigan still has the student files, with transcripts, thesis topics, and thesis committees, of all three of these links between Baylor and Michigan. None of them took any course from Durfee or Dawson, none of them wrote a thesis on a topic related to remedies or to equity, and none of them worked with Durfee or Dawson as their committee chair. McCall wrote his thesis on a civil procedure topic, and Durfee was on his committee, but Edson Sunderland was the chair. Assuming that the practice in those days at Michigan was like the thesis and dissertation practice at most universities over the last generation, the student would have worked mostly with the committee chair and would have had far less contact with other members of the committee. Norvell and McSwain

476. Id. at 240.
477. Id. at 212.
478. University of Michigan Law School Record of Angus Stewart McSwain, Jr. (1951); University of Michigan Law School Record of Ralph Norvell, Jr. (1949); University of Michigan Law School Record of Abner Vernon McCall (1943).
479. Edson R Sunderland, Report of Committee Supervising Graduate Student (1942) (Abner McCall). The thesis topic was “What Constitutes ‘The Same Cause of Action.’” The third member of the committee was William Blume.
wrote on property topics, with Lewis Simes as their chair and George Palmer as a member of both committees.\textsuperscript{480} Norvell had some contact with Dawson, because the file contains a very brief recommendation from Dawson, with the notation that “Simes knew him much better.”\textsuperscript{481} None of this is conclusive, but it does seem clear that neither Norvell, McCall, nor McSwain had any degree-related reason to learn that the Durfee and Dawson sequence in Equity had been redesigned as a remedies course. If one of them learned in a casual conversation, he had no apparent reason to pursue the idea or attach any significance to it. And because Durfee and Dawson had not changed the name of the course, there was nothing to call attention to the fact that the Michigan Equity course was not like other Equity courses.

McSwain was alive and well and still teaching part time at Baylor when I spoke to him in 2008; he emphatically denied that he had brought the idea back from Michigan.\textsuperscript{482} McSwain thought the course was probably Wilson’s own idea.\textsuperscript{483} He thought it possible, but less likely, that the idea arose from conversations between Wilson and Norvell. McSwain remembered Norvell as thinking about opportunities to consolidate courses into more efficient units, and at some point Norvell had responsibility for assigning courses.\textsuperscript{484} McSwain may have been thinking of a later period, because Norvell was only thirty when Wilson began teaching Remedies.\textsuperscript{485} That seemed to me to be a bit young to be put in charge of curriculum, but Michael Vaughn responded that the whole Baylor faculty was young in

\textsuperscript{480} Lewis M. Simes, Report of Committee Supervising Graduate Student (1948) (Ralph Norvell); Lewis M. Simes, Report of Committee Supervising Graduate Student (1950) (Angus McSwain). Norvell’s thesis topic was “Power of a Life Tenant to Invoke Principal;” the third member of his committee was Hart Wright. McSwain’s thesis topic was “The Requirement That Holders of Future Interests Be Made Parties to Actions Involving Title;” the third member of his committee was William Blume.

\textsuperscript{481} This appears to be in the nature of a memo to the file; the letter has no addressee. It is dated June 28, with no year indicated.

\textsuperscript{482} Telephone Interview with Angus McSwain (April 10, 2008) (interview notes on file with author). He was eighty-four. His memory was clear and it was he who thought of looking for the LL.M. files.

\textsuperscript{483} Id.

\textsuperscript{484} Id.

\textsuperscript{485} 1951 DIRECTORY, supra note 475, at 240.
those days, so young people could be given major responsibility.\textsuperscript{486} Even so, based on his knowledge of Norvell and McCall in later years, Vaughn thinks it “highly unlikely that either of them had anything to do with the [remedies] course.”\textsuperscript{487}

Against the possibility of someone bringing the idea back from Michigan is a complete lack of evidence that Durfee and Dawson had any influence on Wilson. If someone brought their idea for a new course back to a young assistant professor, why not bring their teaching materials and permission to use them? Or if Wilson liked the idea, why develop the course from scratch instead of writing Durfee (or asking his Dean with a Michigan degree to write Durfee) and getting the materials? None of the Durfee and Dawson books are in the Baylor library—not even the published restitution book\textsuperscript{488} and Margaret Wilson did not find them in Wilson’s papers or library.\textsuperscript{489} Wilson’s course materials from the early years have not survived, but the 1966 version bears no resemblance to Durfee and Dawson. Both the organization and the selection of cases is radically different. Wilson’s first and greatest interest seems to have been damages; Durfee’s first interest was equity.

The idea might also conceivably have come from Minnesota. In 1950, William Lockhart published a five-paragraph description of Minnesota’s proposed sequence in Judicial Remedies.\textsuperscript{490} But even if Wilson saw the article’s title in a table of contents—and there is no reason to assume that he was regularly looking at the newly created

\textsuperscript{486} E-mail from Michael Vaughn to Douglas Laycock (April 10, 2008) (on file with author).
\textsuperscript{487} E-mail from Michael Vaughn to Douglas Laycock (April 11, 2008) (on file with author).
\textsuperscript{488} Durfee & Dawson, supra note 54.
\textsuperscript{489} E-mail from Margaret Wilson to Douglas Laycock (April 7, 2008) (on file with author). She quit looking in the papers after finding the master copy of the casebook, but she reasonably believed that she would not find anything else of relevance. Id. Books would be in his library. As to papers, she reasons that if her father had corresponded with anyone at Michigan or Minnesota about this course, there would have been no reason to keep that correspondence except for historical purposes. “It is really not like him” to hold on to things because “they might make history.” E-mail from Margaret Wilson to Douglas Laycock (March 27, 2008) (on file with author). But if he did keep something because he thought it was historically interesting or important, she thinks he would have told his children about it. Wilson April 15 E-mail, supra note 405.
\textsuperscript{490} William B. Lockhart, The Minnesota Program of Legal Education—The Four Year Plan, 3 J. LEGAL EDUC. 234, 249–50 (1950).
Journal of Legal Education—nothing in Lockhart’s title hinted at anything of particular interest to a teacher of Damages and Equity. The title mentioned only Minnesota’s attempt, ultimately abandoned, to expand legal education from three years to four.491

There is no way to know for sure, but my guess is that Wilson knew nothing of Durfee and Dawson’s work and nothing of the Minnesota experiment. Certainly he created his own course; probably it was his own idea. He is an independent inventor of the modern remedies course.

3. The Minnesota Curriculum Committee and Charles Alan Wright

The experiment that led to publications and spread to other schools occurred at Minnesota, which in 1950 combined courses on equity, damages, and restitution into a required six-hour sequence on remedies.492 The transition was considerably more complicated than this summary; the sequence expanded before it contracted. The Curriculum Committee appears to have worked for two years, 1948–1950, on a wide-ranging proposal, of which the remedies sequence was only one part.493 The original committee proposal called for a four-hour Judicial Remedies I in the first year that would use the history of equity and the forms of action to “give the student a perspective of the basic processes and principles of judicial relief as developed at common law and in equity during the course of history to meet the needs of a changing society.”494 This sounds somewhat like a Scott and Simpson course. Judicial Remedies II and III, a six-hour sequence over three semesters, would “be a study of modern judicial remedies... integrat[ing] most of what has been taught previously in the second year equity course, in damages, and in an advanced equity course that included such topics as restitution and quasi-contracts.”495 The stated “main objectives” of this sequence were “to make students remedies conscious so that they will always think of available remedies, rather than of ‘liability’ in general,” and to give them the

491. Id.
492. See WRIGHT, supra note 55, at ix–xi.
493. See Lockhart, supra note 490, at 234 n.*, 249.
494. Id. at 249.
495. Id. at 249–50.
technical knowledge and training "to take full advantage of the remedies available in a given situation." It was this proposed sequence that became the modern remedies course at Minnesota. The catalogs reveal yet other variations as the sequence evolved.

Here too it is possible that someone from Minnesota got the idea from someone at Michigan. But again, there is no evidence of such a link. The Curriculum Committee that proposed the course consisted of William Lockhart, Chair, Everett Fraser, Robert McClure, Horace Read, Stefan Riesenfeld, and Henry Rottschaefer. Rottschaefer had graduated from Michigan—in 1915. This was before Durfee began teaching Equity, and twenty years before he began teaching anything that looked like remedies.

One section of Minnesota's new sequence was taught by a new assistant professor, Charles Alan Wright. Wright was appointed at Minnesota in 1950, after the new sequence had been adopted but just in time to help with its implementation. Wright had clerked for Judge Clark, and collaborated with him on a leading casebook. It was Clark who had proposed the unified treatment of legal and

496. Id.
497. In 1949, there was a six-hour course called Common Law Actions and Equity I, a six-hour course called Equity II, and a three-hour course in Damages. The Bulletin of the University of Minnesota: The Law School Announcement for the Years 1949–1951, at 13–14 (1949). By 1952, there was a six-hour course on Judicial Remedies I, taught from Mclaine's Introduction to Civil Procedure and mimeographed materials by Riesenfeld; a three-hour course called Judicial Remedies II, taught from McCORMICK, supra note 50, and mimeographed materials by Charles Alan Wright; and a six-hour course called Judicial Remedies III, taught from DURFEE AND DAWSON, supra note 54, McCORMICK, supra note 50, WALSH, supra note 51, and more mimeographed materials by Wright. The Bulletin of the University of Minnesota: The Law School Announcement for the Years 1952–1954, at 12 (1952). The Riesenfeld materials were presumably by Stefan Riesenfeld, who taught at Minnesota from 1938 to 1952 before moving to Berkeley, 1960 Directory, supra note 406, at 281, and served on the Curriculum Committee that proposed the new courses, Lockhart, supra note 490, at 234 n.*. By 1954, there was a single, six-hour Remedies course in the second year, taught from Wright, supra note 55. Bulletin of the University of Minnesota Law School 1954–1956, at 13. The catalogs do not include course descriptions for any of these courses.
498. Lockhart, supra note 490, at 234 n.*.
499. 1951 Directory, supra note 475, at 274.
501. Wright, supra note 55, at ix.
502. Wright's junior contribution is curiously credited. See CLARK (ASSISTED BY WRIGHT), supra note 138.
equitable remedies in 1930, and Wright was fully persuaded of the wisdom of Clark’s idea. In 1955, Wright published *Cases on Remedies*, based on his teaching materials at Minnesota. He said that “Judge Clark may properly be regarded as the intellectual father of the present book,” but he also credited “two other stimuli of importance”: the experience of writing his student comment for the *Yale Law Journal* on a remedies issue, and the Curriculum Committee at Minnesota. He did not credit any conversations with colleagues at other schools or indicate any awareness of remedies courses elsewhere. He had taught from the Durfee and Dawson restitution book, and the odd “Remedies II” in the title must have suggested that something more was going on, but Wright did not indicate any awareness of Durfee and Dawson’s unpublished books on remedies and equity. And his organization and case selection does not much resemble either Durfee and Dawson’s or Wilson’s.

Whatever Judge Clark may have said to Wright in chambers, Wright had carried the idea of remedies far beyond what Clark had written. Wright’s *Remedies* was a modern remedies book, in no sense a civil procedure book. The book was organized by the nature of the injury suffered—tort injury to the person, injury to interests in personal property, breach of an enforceable agreement, etc.—and these categories of injury tended to track substantive law categories. With respect to each injury, the book explored all the available remedies—not just the equitable remedies, as Cribbet and Clark and Pomeroy, Jr. had each done in his own way, but also damages and restitution and the measure of each. In sharp contrast to Cribbet the year before,

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503. See *supra* notes 163–177 and accompanying text.
504. *Wright, supra* note 55, at xi.
505. *Id.* at x.
508. See *id.* at xii.
509. *Id.* at xvii.
510. *Id.* at 1–17 (measure of damages for wrongful death).
511. *Id.* at 56–71 (restitutionary measure of recovery for unauthorized takings of chattels).
Wright summarily dismissed the forms of action as "absurdities,"\textsuperscript{512} of interest only to the "antiquarian."\textsuperscript{513}

Durfee and Dawson had anticipated many of these improvements, but not all. Wright's book included remedies for personal injury and death, which Durfee and Dawson had omitted, and he fit the whole package into a single volume that could be taught in one semester. Wright said he had "persuaded [his] colleagues to reduce the course to four hours."\textsuperscript{514} This consolidation of materials was in itself an important step. The Durfee and Dawson sequence took nine credit hours over three semesters, and Wilson's sequence at Baylor took eight hours over two quarters. Students at many schools could take separate courses in Damages, Equity, and Restitution,\textsuperscript{515} with Equity often required, but that also took eight or nine hours. Wright said that consolidation eliminated much duplication, but it is clear that it also eliminated much detail. Wilson's students, and Durfee's students, learned far more detailed rules than my students will ever encounter about measures of damage in particular cases and specific performance in the face of varied circumstances.

If all three courses were taught from separate and unrelated casebooks, as they would have been everywhere except Michigan and Baylor, there were worse problems than length. As Wright argued:

The book, and the kind of course for which it has been devised, proceed on the assumption that it is well for the future lawyer to study in one place the rich variety of tools which are available to a court when it has determined to give redress to one who has been, or may be, injured. . . .

The traditional arrangement of the courses in remedies [by which he meant Equity, Damages, and Restitution] is a surely wasteful, and probably unsuccessful, means of providing this education. . . . It is based on a division of purely historical significance,

\textsuperscript{512} Id. at x.
\textsuperscript{513} Id. at ix.
\textsuperscript{514} Id. at xi.
\textsuperscript{515} Wright described that as the "traditional arrangement" and "typical" at the time. Id. at x. \textit{See also} BAYLOR 1951, supra note 421 (describing the new Remedies course as covering what had traditionally been covered in Damages, Equity, and Restitution).
which does not assist, but rather hampers, any functional view of the subject. The remedies are presented as ends in themselves, each subject to a horde of peculiar requirements. Principal emphasis, both in time and place in the curriculum, is given to the equitable remedies, though any practicing lawyer or reader of the advance sheets knows that damages are sought and awarded much more frequently than is specific relief. The old arrangement requires teaching the equitable remedies, with their emphasis on the adequacy of the remedy at law, before the student has learned what are the remedies at law. It causes an inordinate amount of duplication and wasted time. It emphasizes doctrinal niceties rather than practical realities.

The student taught in this traditional pattern may end up being a good historian but he is less likely to be a sound counsellor. He has not been trained to be "remedies conscious," nor to think, when a case comes to him, of all the alternatives which may be available. And he is even less likely to conceive of the law of remedies as an institution of no little social significance, as much in need of constant attention and reform as are other branches of the law.516

In the same year he published the casebook, Wright also published an article, The Law of Remedies as a Social Institution.517 "[L]aw as a social institution" was a phrase from Roscoe Pound,518 and the idea was attractive to the legal realists, including Wright. Wright insisted that "[d]amages, equity, restitution, and the other incidental

516. WRIGHT, supra note 55, at ix.
518. See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (rev. ed. 1954) ("I am content to think of law as a social institution to satisfy social wants . . ."); ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 99 (1922) (same sentence); Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence (pt. 3), 25 HARV. L. REV. 489, 516 (1912) (stating with approval that sociological jurists "regard law as a social institution which may be improved by intelligent human effort").
judicial devices must be viewed as part of an integrated law of remedies.\textsuperscript{519} And he argued that compensation was only one remedial principle; there are also specific relief, restitution, punishment of the wrongdoer, and scheduled benefits.\textsuperscript{520} He insisted that we should make deliberate choices among these alternatives, that the way "to create a law of remedies which will meet the needs of society today is to look to the needs of society today, rather than to be guided by the dead hand of historical limitations which should long since have been forgotten."\textsuperscript{521} He proposed five strikingly modern "tentative principles as working hypotheses for a socially useful law of remedies."\textsuperscript{522} These principles would have preferred preventive or specific relief to monetary relief and would have put damages and restitution on an equal footing by awarding "the plaintiff's loss or the defendant's gain, whichever is greater."\textsuperscript{523} He also commented on a number of more fine-grained issues that would benefit from rethinking in functional terms.\textsuperscript{524}

Still in that same year, 1955, Wright moved to the University of Texas.\textsuperscript{525} His persuasion of his Minnesota colleagues did not survive his departure; the Remedies course there stayed at six hours, taught first by John Cound and then Arthur Miller.\textsuperscript{526} Wright taught Remedies at Texas for several years,\textsuperscript{527} but eventually abandoned the field and went on to become a giant in constitutional law and federal courts. When I published a tribute on the occasion of his retirement at

\textsuperscript{519} Wright, supra note 517, at 391--92.
\textsuperscript{520} Id. at 377--81.
\textsuperscript{521} Id. at 382.
\textsuperscript{522} Id. at 381.
\textsuperscript{523} Id. at 381--82.
\textsuperscript{524} Id. at 382--91.
\textsuperscript{525} Douglas Laycock, Charles Alan Wright and The University of Texas School of Law, 32 Tex. Int'l L.J. 367, 367 (1997).
\textsuperscript{526} Bulletin of the University of Minnesota Law School 1956--1958, at 16; Bulletin of the University of Minnesota Law School 1962--64, at 14.
\textsuperscript{527} The University of Texas, School of Law 1956--1957 and 1957--1958 with Announcements for 1958--1959 and 1959--1960, at 39 (describing a two-hour Remedies course to be "[g]iven for the first time in 1957--1958"). The instructor is not identified, but the description closely fits Wright's casebook, and he listed Remedies as a course that year in the AALS Directory. Association of American Law Schools, American Bar Association Approved Law Schools: Directory of Teachers 1957, at 321.
Texas, I was only dimly aware of his early work in remedies and had no idea of its importance. I had seen those titles on his bibliography, but there had always been some more urgent task. I had never examined them, and I did not mention them. Shame on me.

Dan Dobbs understood better and earlier. Attempting to summarize the history of the field in a paragraph, he simply said that the "major remedial categories were treated as separate fields of legal study until about the middle of the twentieth century when Charles Alan Wright’s casebook on remedies brought them together." Wright did not originate the idea; he was handed a course description when he arrived at Minnesota. But Wright was predisposed to enthusiastically adopt the idea, and he was the person who carried it to completion.

C. Proliferation and Takeover

1. Proliferation

So when and where was the first modern remedies course actually taught? After all this inquiry, there is still room for doubt or debate. The uncertainty is mostly a matter of definition and partly a matter of missing information. Durfee was first to have the idea and to begin to implement it; he and Dawson were teaching an integrated, three-semester sequence fifteen years before anybody else. But they never quite finished the task—tort damages is central and it was mostly omitted—and the course was abandoned shortly after Durfee’s retirement. The Baylor and Minnesota courses were nearly simultaneous; probably, although there is no way to be sure, the Minnesota course was offered for the first time starting in January 1951, and the Baylor course starting in January 1952.

528. Laycock, supra note 525.
529. DOBBS, supra note 11, § 1.1, at 2.
530. The Curriculum Committee worked for two years and its recommendations were adopted in 1950. Lockhart, supra note 490, at 234 & n.*. Assuming the normal rhythms of the academic year, this would be spring of 1950. Remedies I, the Scott and Simpson course, was to be offered in the fall of the first year; Remedies II and III, the modern remedies course, was to begin in the second semester of the first year and continue into the second year. Id. at 249. If we assume prompt implementation in academic year 1950–1951, the modern remedies course would thus have begun in January 1951. A year’s delay would mean it
If the criterion is a one-semester course that fits into three or four semester hours, then it may have been Charles Alan Wright in the mid-1950s at Minnesota. But we do not know for sure that he taught his four-hour version there; it never appeared in the catalog and he left Minnesota in the same year he announced that he had persuaded his colleagues to permit it. If not Wright, there was a four-hour course, with a quite modern course description, taught over two semesters at Toledo in 1956–1957.\textsuperscript{532} If a two-hour course counts, then Douglas Parker, an Assistant Professor at Colorado, taught a modern sounding course beginning in 1954,\textsuperscript{533} using Judson Crane's \textit{Damages} book\textsuperscript{534} and, apparently, Maurice Van Hecke's revision of Walter Wheeler Cook's \textit{Equity} book.\textsuperscript{535}

There are other early experiments that I know little about. Lyman Wilson at Cornell taught a two-hour seminar on Election of Remedies beginning in 1938–1939.\textsuperscript{536} This seminar continued under various titles and descriptions, all with a recognizable common core, until 1956–1957, when it was taught by Peter Ward.\textsuperscript{537} After that it appears to have been abandoned.

Lyman Wilson's original course description described what might have been a modern approach to remedies: "A study of the general principles of damages at law, and a comparative study of forms

\begin{footnotes}
\footnotetext{531. Remedies is first listed in the Baylor catalog for 1951–1952, to be taught in two-quarter sequences, Winter and Spring, Summer and Fall. \textit{Baylor} 1951, supra note 421, at 18. If the first offering were Winter and Spring of academic year 1951–1952, Remedies I would have begun in January 1952.}
\footnotetext{532. \textit{See Bulletin of the University of Toledo} 264 (1956).}
\footnotetext{534. \textit{Crane}, supra note 50.}
\end{footnotes}
of alternative relief, together with a consideration of the elements involved in a choice among available remedies."538 But this language was not intended in all its generality. I have examined the 1949 syllabus for the seminar, and two substantial problems that were apparently used in the seminar in other years—ten pages in all.539 This skimpy surviving evidence indicates that the seminar focused on damages, with some consideration of the choice between damages and rescission for fraud.540 Students were instructed to read one of several damages texts in the first two weeks of the course and warned that "[a]ll discussions will assume familiarity with this material."541 Even allowing for the limited coverage possible in a seminar, this was not a modern remedies course.

In 1949–1950 and 1950–1951, Dale Stansbury at Duke taught a six-hour Remedies course that combined a conventional four-hour procedure course with a two-hour remedies course; damages were included but got only "such incidental reference . . . as is necessary for comparison."542 This was similar to the procedure courses being

538. CORNELL 1938, supra note 536, at 16.
539. These documents are headed “1949 Election of Remedies—Syllabus” [hereinafter 1949 Syllabus] and “Choice of Remedies Problem No. _____” (two different problems). Jeremy Cusker, a librarian in Ithaca, found these pages in a folder labeled “Handouts” in Lyman Wilson’s papers, which are housed in the Kroch Library at Cornell. There were four boxes of papers, but they contained nothing else of any relevance.
541. 1949 Syllabus, supra note 539, at 1.
542. DUKE 1949, supra note 84, at 31–32. The course description reads:

Remedies. A study of the principal remedies available for the judicial enforcement of substantive rights, and the procedure by which these remedies are pursued. The first part of the course is devoted chiefly to equitable remedies, but includes the basic principles of restitution (quasi contract and specific restitution) and declaratory judgments, with such incidental reference to damages as is necessary for comparison. The second part (approximately two-thirds of the course) consists of a general study of procedure in civil actions at common law and under the codes and the Federal Rules of Civil Procedure: jurisdiction, venue, institution of suit, parties, joinder of causes, pleadings and objections thereto, provisional and extraordinary remedies, pre-trial hearings, trials, judgments, and appellate review. Three hours a week throughout the year.
offered under the Remedies label at the same time, but there were important differences: restitutionary remedies were included, and damages, not the forms of action, were recognized as the legal parallel to specific performance and injunctions. In these two ways, it represents a transitional form between the procedure-as-remedies courses and the modern remedies course. But damages got only incidental attention, and the course appears to have been taught for only two years.

I have considered and eliminated still other candidates. Probably there were other early courses that I did not find. Note too a problem I have been ignoring: the first year a course was taught may not match the date on the catalog that first lists the course. Some catalogs covered multiple years, and all catalogs required information to be submitted far in advance. The resulting imprecision does not matter for the intellectual history of how the course emerged, but it does matter for precise claims of priority.

Trying to decide who was first captured my imagination, but that is just a trivia question. The important point is that a recognizably modern remedies course appeared by the early 1950s. Edgar Durfee, John Wilson, and Charles Alan Wright each independently invented and developed the course, and others were experimenting with similar ideas. Wright and Minnesota introduced the course to the rest of legal academia. Minnesota published a brief description of its planned


543. John Bauman confirms that his course at New Mexico in 1947 or 1948 was a Scott and Simpson course. See supra note 200 and accompanying text. Marshman Wattson, an Assistant Professor at Indiana-Bloomington, listed Remedies and Equity in the Directory beginning in 1947. Association of American Law Schools, Directory of Teachers in Member Schools 1947–1948, at 261 (1947). These courses were listed in the Indiana catalog, but without course descriptions. Indiana University Bulletin: Indiana University School of Law Announcements, 1947–48, at 20 (1947). John Bauman reports that he replaced Wattson at Indiana, and took over his Remedies course when Wattson returned to practice, and that there was nothing like the modern remedies course at Indiana in that era. Bauman Interview, supra note 160. Bauman says he taught nothing like the modern course until he moved to UCLA. Id.
course in 1950,\textsuperscript{544} and by 1955 Wright had published a casebook\textsuperscript{545} and a substantial argument for the modern course.\textsuperscript{546}

The course spread slowly from those beginnings. Notre Dame began teaching a quite modern sounding course from Wright’s \textit{Remedies} beginning in 1957–1958, although they called it “Procedure II (Remedies).”\textsuperscript{547} Arizona listed a modern sounding course in 1959–1960, UCLA and Florida in 1960–1961. And the \textit{Directory of Law Teachers} began listing far more remedies teachers than I found course descriptions.

Remedies first appeared as a field in the \textit{Directory} in 1952.\textsuperscript{548} I have found no record of who asked for this listing, or on what grounds. I do not know whether the initiative came from the procedure-as-remedies teachers or from the modern remedies teachers, but I assume the former because, as far as I know, there were only three modern remedies teachers in the country in 1952. The \textit{Directory} still listed Damages, Equity, and Restitution as separate fields.\textsuperscript{549} That first listing showed twenty-one teachers of remedies,\textsuperscript{550} but only seven of those teachers listed Remedies, or Judicial Remedies, as a course title,\textsuperscript{551} and most of those were really teaching procedure courses on the Scott and Simpson model.\textsuperscript{552} The others listed Equitable

\textsuperscript{544} See Lockhart, \textit{supra} note 490, at 249.
\textsuperscript{545} WRIGHT, \textit{supra} note 55.
\textsuperscript{546} Wright, \textit{supra} note 517.
\textsuperscript{548} 1952 \textit{DIRECTORY SUPP., supra} note 424, at 56.
\textsuperscript{549} \textit{Id.} at 24, 27, 56.
\textsuperscript{550} \textit{Id.} at 56.
\textsuperscript{551} ASSOCIATION OF AMERICAN LAW SCHOOLS, \textit{DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 1952–1953}, at 144 [hereinafter 1952 \textit{DIRECTORY}] (Wendell Grimes at Boston College, who also listed Damages as a course taught in the past); \textit{Id.} at 244 (Lowell Nicholson at Northeastern); \textit{Id.} at 338 (Ralph Wescott at Rutgers-Camden); \textit{Id.} at 345 (John Wilson at Baylor, who also listed Damages and Equity as courses taught in the past); \textit{Id.} at 326 (Frank Trelease at Wyoming, who also listed Damages and Equity as courses taught in the past); \textit{Id.} at 336 (Marshman Wattson at Indiana-Bloomington, who also listed Equity); \textit{Id.} at 252 (George Osborne at Stanford, who also listed Equity). Osborne in effect listed the same course twice; the name of his course was “Remedies and Equity.” \textit{See Stanford 1952, supra} note 233 (quoting the course description).
\textsuperscript{552} The Remedies courses at Boston College, Indiana, Rutgers-Camden, Stanford, and probably Wyoming were really procedure courses in this era. \textit{See}
Remedies, Equity, Equitable Relief Against Torts, Contract Remedies, Special Legal Remedies, or Civil Procedure. These teachers of Equitable Remedies, Equitable Relief Against Torts, Contract Remedies, and Special Legal Remedies were teaching only part of the modern remedies course, but they were using the word in something like its modern sense when they categorized their courses as remedies. The subject-matter list in the Directory is neither complete nor entirely reliable. Most obviously, no one from Michigan or Minnesota was listed. But one person who was listed reported no course title that was even arguably part of remedies.

The Directory lists thirty remedies teachers in 1955, but only twenty-nine in 1962. Then growth began to pick up; the Directory listed 53 remedies teachers in 1965, 115 in 1970, and about 200 in 1975. That was also the last year that AALS published a list of

supra notes 228–234, 543 (describing courses at these and other schools). I know nothing about the course at Northeastern.

553. 1952 DIRECTORY, supra note 551, at 96 (William Curran at Santa Clara); id. at 148 (George Haller at Detroit College of Law); id. at 246 (Robert Nordstrom at Ohio State); id. at 290 (Bernard Schwartz at NYU, who also listed Equity and Restitution as courses taught in the past); id. at 333 (Leon Wallace at Indiana); id. at 350 (William Wyatt at Chicago-Kent, who also listed Damages as a course taught in the past); id. at 93 (Clifford Crandall at Florida); id. at 306 (Hector Spaulding at St. Louis University, who also listed Equity).

554. Id. at 336 (Marshman Wattson); id. at 252 (George Osborne); id. at 306 (Hector Spaulding).

555. Id. at 240 (William Muse at Richmond).

556. Id. at 295 (Harold Shepherd at Stanford, who also listed Damages and Equity as courses taught in the past); id. at 346 (Henry Witham at Indiana-Indianapolis).

557. Id. at 45 (Santos Amadeo at Puerto Rico).

558. Id. at 350 (Victor Wright at Rutgers-Camden).

559. Id. at 261 (Edward Platt at Rutgers-Camden, listing Property, Evidence, Trusts, Crimes, Insurance, Legal Ethics, Constitutional Law, and Conflicts).


teachers of Damages, or of Restitution; surviving courses under those names were folded into Remedies beginning in 1976. But Equity retained its separate listing, and retains that listing today. The current Directory lists about 380 remedies teachers, including someone at most of the top-ten schools. It also lists sixty-three equity teachers: it is a reasonable guess, based on my sense of the field and conversations with a few of the people listed, that most of these equity teachers are teaching Injunctions or Equitable Remedies.

2. Takeover: Kenneth York and John Bauman

Kenneth York began teaching a required six-hour remedies sequence at UCLA in 1960–1961. John Bauman, who had moved to UCLA that year, told me that this course was part of a larger curricular consolidation. The faculty voted to combine some of the commercial law courses, to combine some of the property courses, and to combine separate courses in damages, equity, and restitution into a remedies course. York and Bauman were assigned the task of creating the new remedies course. At first they assigned three separate casebooks: McCormick on *Damages*, Chafee and Simpson on *Equity*, and Wade on *Restitution*. The students hated that. Then they used mimeographed materials, and the students hated that too. This was still just before the general availability of good photocopiers, and well before computerized word processing.

Ken York confirmed most of this story and added more background. York was about ninety-one when I talked to him. He sounded frail. He said his memory was not good, and in response to

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565. *Id.* at 252, 338–39.
566. 1976 *DIRECTORY*, *supra* note 335, at 1135.
567. *Id.* at 1085–86.
569. You didn’t really think I was going to list them did you?
570. 2007 *DIRECTORY*, *supra* note 73, at 1296.
572. *See,* e.g., 2007 *DIRECTORY*, *supra* note 73, at 274.
573. This sentence and the four that follow are based on Bauman Interview, *supra* note 160.
574. This paragraph and the next are based on York Interview, *supra* note 214, with dates confirmed from relevant editions of the *Directory of Law Teachers*. 
some questions he said he just did not remember. He seemed clear and sharp about the things he did remember, except that he was unsure about dates, and except for dates, his memories were accurate with respect to everything that I could check in any other source. He taught at Willamette and Southern California before going to UCLA in 1950, and he was a Visiting Lecturer at George Washington in 1947 and 1950. In one of those years, GW asked him to teach Restitution, which he had never taught before. He read the casebook on the long plane flight across the country; this was before passenger jets. "That was my epiphany," he said to me. "I saw how this and the equity stuff fit together. Then I started thinking about damages." This is an early and independent invention of the idea, but it would be a long time before he implemented it.

At UCLA, he pushed the idea of a remedies course "around the faculty all the time." Eventually he chaired the Curriculum Committee and pushed it through as Bauman remembered it; York's recollection was that "there wasn't much of a fight." When I talked to him, I had not confirmed the date of his visit at George Washington, so I did not push on dates and I do not know why it took ten or thirteen years from his epiphany to the introduction of the course. Bauman might have been the catalyst, although the decision to offer a remedies course in 1960–1961 was surely made the year before, and thus before Bauman arrived in 1960. There seems to be some confusion about chronology here, but they both recalled the same sequence of basic events.

Finally, in 1967, they published a casebook, Cases and Materials on Remedies. This was the second modern remedies book actually published. (I am counting Charles Alan Wright's 1955 book as the first, and Durfee and Dawson's work and John Wilson's work as unpublished.) York and Bauman began much as I began this article, distinguishing remedies from substance on one side and from procedure on the other. They promised to display "a marked indifference to the substantive elements of the cases" and to assume that defendant is liable to plaintiff "without undue belaboring." But because the substantive law of restitution was not taught elsewhere in the curriculum, they made the reasonable judgment to include it as "an integral element" of the remedies course. The book was principally

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575. York & Bauman, supra note 293.
576. Id. at 1.
577. Id.
578. Id.
organized on the basis of remedial choices for different kinds of underlying wrongs, and it offered greatly expanded coverage—nearly 1,300 pages compared to Wright’s 500. Wright’s book was finely tailored to his own course; York and Bauman gave teachers choices, even if some of those teachers thought the book a bit bloated. It had many more recent cases, and Wright never did a second edition, so York and Bauman quickly came to dominate the field. In later editions, this book became York, Bauman, and Rendleman, and now simply Rendleman.  

 Robert Childres at Northwestern published *Equity, Damages, and Restitution* in 1969. This book was organized in terms of remedies for injuries to property interests, to business interests, and to personal interests, and it took the view that most of the law of remedies makes little sense. The book lapsed after two editions.

The AALS Round Table on Remedies, which had long been a round table on procedure in disguise, had entered a period of inactivity. After 1960, it stopped presenting programs. From 1961 to 1965, there was no change in the membership of its Council, which was still composed of proceduralists. For 1966, no nominations were

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580. RENDELEMAN, *supra* note 81.
583. *See id.* at xix (reprinting the introduction to the first edition).
submitted. For 1967, an entirely new Council was appointed: William de Funiax at San Francisco, Kurt Hanslowe at Cornell, Thomas Jones at Alabama, Arthur Miller at Michigan, Gerard Moran at Rutgers-Newark, Richard Seeburger at Pittsburgh, and Albert Stone at Montana. Every member of this new Council had taught Remedies or Equity, although most of them appear to have taught it as a service course and not as a primary interest.

I initially envisioned some sharp-eyed remedies teacher noticing the empty Council in 1966 and moving aggressively to fill the void. That characterization began as fancy, but it is not far off. The remedies teacher in question, sharp-eyed or not, was Bill de Funiax. Equity was one of his research interests, and he chaired the new Council in 1967, 1968, and 1969. De Funiax continued as a member in 1970, and Michael Vaughn at Baylor became chair.

Cribbet told me that when Stone took over the course, he "did more with damages" than Cribbet had done. Cribbet Interview, supra note 272.


588. See id. Arthur Miller made his reputation in Federal Procedure, but he also taught Equity at the time and had taught a modern remedies course at Minnesota. Gerard Moran's Remedies course at Rutgers-Newark may have still been a Scott and Simpson procedure course. See supra note 232 (describing the Rutgers-Newark course in this era).

589. See William Q. de Funiax, Handbook of Modern Equity (2d ed. 1956); William Q. de Funiax, Cases on Equitable Relief (undated typescript available in the University of Michigan Law Library).


Vaughn was only twenty-seven, but he was a friend and admirer of John Wilson, and he had taught Remedies—once. His principal qualification seems to have been that he was helping de Funikay revise a community property book. He left Baylor after 1971, later taught for two years at South Texas, and then practiced law for many years; he is now retired. When I contacted him in 2008, I was like a ghost from another life. But he remembered key events about the Round Table that all other survivors had forgotten, and he took an enthusiastic interest in my project. It was Vaughn who alerted me to John Wilson’s work and first put me in touch with Wilson’s daughter.

Vaughn says that he was “strictly a placeholder,” a front for de Funikay. No one on the Council had the time to do anything on behalf of the Round Table. They talked about disbanding it, but decided instead to keep it alive as a vehicle until someone could make it into something. This explains why de Funikay’s takeover did not lead to any new activity. From 1961 through 1971, no matter who was in charge, the Round Table on Remedies presented no program.

Edward Butler, who taught Equity and Remedies at Willamette, chaired the Council in 1971. This was probably still de Funikay’s work; de Funikay had visited at Willamette in 1967.

592. ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 1971, at 531 (1971) [hereinafter 1971 DIRECTORY] (listing his birth year and listing Remedies as a course formerly taught); Vaughn Interview, supra note 426 (describing his relationship with Wilson and the fact that he taught Remedies only once in his career).


594. Vaughn Interview, supra note 426; ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 1980–81, at 873. He told me that teaching was his first love, but that he could not send four children to college on what he was earning at South Texas.

595. Ken York, Arthur Miller, and Thomas Jones remembered nothing of these events. I was unable to contact Richard Seeberger. The other members of the Council from this era are deceased.

596. All but the last sentence of this paragraph is based on Vaughn Interview, supra note 426.


598. 1970 DIRECTORY, supra note 563, at 136. Vaughn does not remember Butler’s appointment as chair, but he remembers having dinner with Butler, and he
new Council’s composition changed very slowly in these years; de Funiaq’s original new members stayed on but important additions included Ken York in 1970 and Howard Oleck, the Dean at Cleveland-Marshall, in 1971.

In 1972, under Oleck’s chairmanship, the Round Table on Remedies finally presented a program, and that program publicly announced the takeover of the section. The program’s title was “What ‘Legal Remedies’ Is, and Will Be,” and the principal speakers were Ken York and John Bauman, the editors of the leading casebook.

This was the same annual meeting at which the AALS reorganized from Round Tables to Sections. The new personnel of the Round Table on Remedies created the Section on Remedies and identified its target audience as “teach[ers] of Remedies, Equity, Restitution and Damages.” The new section immediately undertook to help cement the modern remedies course in the curriculum. It planned a program for 1973 on “how Remedies should be incorporated into the curriculum and how it can best be taught.” At that 1973 meeting, the section undertook to compile sample exam questions, teaching problems, and syllabi from all remedies teachers willing to share. In 1974, at last recognizing that they no longer had a section, procedure teachers created a new Section on Civil Procedure.

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599. See Round Table Councils for 1970, supra note 591, at 210 (listing Vaughn and York, along with de Funiaq, Jones, Miller, Moran, Seeburger, and Stone).
600. See Round Table Councils for 1971, supra note 597, at 238 (Butler and Oleck, along with de Funiaq, Jones, Miller, Moran, Seeburger, Stone, and York). Oleck was the author of Howard L. Oleck, Cases on Damages (1962).
602. Id.
603. See Report of the Executive Director for the 1972 Annual Meeting, in 1972 PROCEEDINGS, supra note 216, at 125, 126–27 (explaining that the round tables had outgrown their minimal governing structure and proposing sections with voting members and elected officers).
605. Id.
606. See generally id.
D. Dan Dobbs

No one did more to institutionalize remedies as a field than Dan Dobbs, who spent his career at North Carolina and Arizona. His work is well known to anyone likely to be reading this article, so little detail is required, but some things must be said. Dobbs published the first treatise, *A Handbook on the Law of Remedies*, in 1973. The book is organized partly in terms of remedies categories—damages, injunctions, declaratory judgments, restitution, etc.—and partly in terms of other substantive law categories and causes of action. Under these other substantive law categories, his discussion is purely about the remedial choices available for each type of wrong. The second edition, in a three-volume practitioner edition and one-volume student edition, appeared in 1993. Dobbs also published a set of teaching materials, *Problems in Remedies: Damages—Equity—Restitution*, in 1974, with a co-authored second edition in 1993. He might have published more frequent editions, except that remedies is his second field; he has been more prolific in torts.

I asked him how he came to write the treatise, and the answer was surprising. He visited at Minnesota in 1966–1967 and taught Equity as he recalls it, or possibly the equity portion of Minnesota’s Remedies sequence as Minnesota viewed it. West Publishing Company was bringing out the York and Bauman casebook, and it wanted a treatise or handbook with the same scope. John Cound at

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608. E.g., 2007 DIREC'TORY, supra note 73, at 440.
610. DOBBS, supra note 11.
612. DAN B. DOBBS & KATHLEEN KAVANAGH, PROBLEMS IN REMEDIES (2d ed. 1993).
614. Minnesota at this point listed Remedies as a six-hour course taught by Arthur Miller and described as: “Equity, damages, restitution; primary emphasis upon equitable relief, with legal material largely restricted to contract.” UNIVERSITY OF MINNESOTA BULLETIN: LAW SCHOOL 1964–1966, at 10.
Minnesota recommended Dobbs to Roger Noreen, the longtime acquisitions editor at West. Dobbs had never thought about remedies as an integrated field, nor even taken a course in damages or restitution. He said he had taken a six-hour Equity course from the Walter Wheeler Cook casebook, and that it had seemed to be a miscellaneous jumble.

Dobbs wanted something in return. He said to Noreen that he wanted to do a torts casebook, and that if West would publish his casebook on torts, he would write their handbook on remedies. The remedies book took five years to write and came out in 1973.\textsuperscript{615} Shortly thereafter, Dobbs accepted an invitation from Page Keeton at Texas to help revise the Prosser torts hornbook. That hornbook finally came out in 1984,\textsuperscript{616} and the bargained-for torts casebook did not appear until 1985.\textsuperscript{617}

Dobbs is a scholar of extraordinary diligence; he begins work daily at 4:00 a.m.\textsuperscript{618} He reads widely and has a powerful ability to organize and synthesize what he reads. His treatise is an invaluable resource that everyone in the field relies on. Jean Love, who spent her career at Davis, Iowa, and now Santa Clara, recently told me that she taught her first remedies course with “Dobbs at [her] side, both in manuscript form and over the phone,” and that she still advises new remedies teachers to begin by reading Dobbs.\textsuperscript{619} As the treatise ages, it is not so good for finding authoritative cases any more, but its analysis is still authoritative and it continues to answer questions for novices and old hands alike.

I promised Dobbs I would tell my own story of accidental entry into the field in exchange for the chance to tell his. I joined the Chicago faculty in 1976, shortly after Owen Fiss moved to Yale, and I took over his Injunctions course. I had gotten my lowest grade in law school in Injunctions, but no one seemed to notice, and I had loved the course. I somehow got the idea that injunctions was too narrow and that I should expand it into an Equity course, which I undertook to do,

\textsuperscript{615} E-mail from Dan Dobbs to Douglas Laycock (Oct. 10, 2007) (on file with author).
\textsuperscript{616} \textit{DOBBS, KEETON & OWEN, supra} note 613.
\textsuperscript{617} \textit{DAN B. DOBBS, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY} (1985).
\textsuperscript{619} E-mail from Jean C. Love to Douglas Laycock (Sept. 7, 2007) (on file with author).
supplementing Fiss's casebook with duplicated materials. In 1981 I moved to Texas, and in working out the details of that move, I met with the Dean, John Sutton, to discuss a teaching schedule. I said I would like to continue teaching Equity, and he immediately responded, as though he were giving me what I wanted, that a Remedies course would be fine. It passed through my head but not through my lips to clarify the difference between equity and remedies; I had just become a remedies teacher. Of course he had saved me from pursuing a dead end, but I did not understand that until later.

E. Remedies After Dobbs

The rest of the story can be briefly told. Probably the modern understanding of the field and its scope had been firmly established by the time of the Dobbs treatise in 1973; certainly it was established thereafter. The Dobbs treatise greatly facilitated the work of other remedies scholars and helped accelerate the rapid growth in the number of remedies teachers and in the choices of teaching materials.

In the wake of the Dobbs treatise, two of the leading equity books were modernized and transformed into remedies books. In 1975, Judge Edward Re published a new version of the old Chafee and Simpson Equity book, under the title Equity and Equitable Remedies. In the 1982 edition, he added substantial units on restitution and damages and changed the title to Remedies. The other new book grew out of Walter Wheeler Cook's Equity book. After Cook died in 1943, Maurice Van Hecke published a fourth edition of Cook. In 1959, Van Hecke published a very substantial

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621. See CHAFEE & SIMPSON, supra note 51.
622. EDWARD D. RE, CASES AND MATERIALS ON EQUITY AND EQUITABLE REMEDIES (1975).
624. COOK, supra note 51. Cook was a major figure, who taught over the years at Nebraska, Missouri, Wisconsin, Chicago, Yale, Columbia, Johns Hopkins, and Northwestern. See ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 1942–1943, at 52 (1942).
625. COOK, supra note 55.

Other books were presented as remedies books from the start. In 1975, Kellis Parker at Columbia published a casebook on *Modern Judicial Remedies,*\(^ {629}\) but that book was not maintained. Thompson and Sebert's *Remedies: Damages, Equity and Restitution*\(^ {630}\) first appeared in 1983. My own *Modern American Remedies,*\(^ {631}\) in 1985, was the first book to attempt an organization entirely in terms of remedial categories, with no chapters based on other substantive law categories.\(^ {632}\) Shoben and Tabb's *Cases and Problems on Remedies*\(^ {633}\) first appeared in 1989. *Remedies: Public and Private*\(^ {634}\) by David


\(^{629}\) Parker, *supra* note 215.


\(^{632}\) See generally Laycock (1985), *supra* note 444, at vii–xxiv (table of contents showing chapters on compensatory damages, injunctions, the relationship between legal and equitable relief, declaratory remedies, restitutionary remedies, punitive remedies, enforcing the judgment, problems of implementation, problems of locating the rightful position (attorneys' fees and contractual specification of remedy), equitable defenses, problems of timing (laches, statutes of limitation and modification of decrees), and problems of political power).


Schoenbrod and his co-authors, first appeared in 1990; Modern Remedies: Cases, Practical Problems, and Exercises, by Russell Weaver and his co-authors, appeared in 1997. This array of casebooks allows for a wide variety of teaching styles and techniques, and for slicing, dicing, and organizing the field in many different ways. But all these books share the modern idea of remedies—that the subject for study is the options available to a court in attempting to correct a violation of law.

The earliest Gilbert's outline that I have been able to find appeared in 1974, a year after the Dobbs treatise. This outline suggests a field already large enough to be worth commercial exploitation. York and Bauman took over this outline in 1980, publishing as Bauman and York, and "it became a gold mine" when California added remedies to the bar exam. I was unable to learn how many states have added remedies to the bar exam, or when they did it. I know that Remedies was on the Texas bar exam by 1975, because Ted Steinke sent me his bar review materials with his notes from John Wilson's course handwritten in all the margins and white spaces. John O'Connell at Western State published the first remedies Nutshell in 1977, and Mary Kay Kane at Hastings published the first Sum and Substance of Remedies in 1981. Of course such student aids, at all levels of ambition, have continued to proliferate.


638. York Interview, supra note 214.

639. Sheldon E. Padgett, Remedies (1975) ("Mini-Outline" for Institute for Texas Bar Review, Inc.). Texas lawyers of a certain age will remember this as the Finkelstein course. Ted Steinke is a solo practitioner in Dallas.


642. RICHARD L. HASEN, REMEDIES EXAMPLES AND EXPLANATIONS (2007); JAMES M. FISCHER, UNDERSTANDING REMEDIES (2d ed. 2006); RUSSELL L.
In the late 1980s, the American Law Institute considered a 
*Restatement of Remedies*, which would have ensconced the field even 
more firmly in the legal establishment. But all the scholars whom the 
Institute was willing to appoint as Reporter declined, mostly for lack of 
time to take on such a large commitment, perhaps some for other 
reasons. Quite probably it still could happen, if a willing and able 
Reporter could be found.

V. CONCLUSION

This has been an unexpectedly long and winding tale. The 
legal concept of remedy is hundreds of years old, and something like 
the modern idea has very early roots. Yet the concept remained 
multifarious, with different meanings coexisting, until less than half a 
century ago. In retrospect, those different meanings seem quite 
 inconsistent.

The forms of action were a well understood category in the 
nineteenth and twentieth centuries. The phrase “civil procedure” had 
substantially its modern meaning by the time of World War I, at the 
latest. Remedies as what a court could do to vindicate a right or 
correct a violation of law was a concept that Pomeroy, Langdell, and 
Maitland all clearly understood. And yet the same word, remedies, 
continued in use to describe all three of these meanings. If lawyers in 
the first half of the twentieth century had any method of distinguishing 
among these meanings, any code or signal that made clear which 
meaning they intended, that method is lost to us. Probably they had no 
such method. They had three concepts, but they had not untangled 
them or clearly distinguished them.

As so often happens in the history of ideas, when the time was 
finally ripe, several people hit upon the idea independently. Edgar 
Durfee and John Dawson, John Wilson, and Charles Alan Wright each 
snatch credit for independently creating the modern remedies course. 
It is striking that Wilson and Wright were young assistant professors, 
as was John Cribbet, who had so much of the modern idea but fell well 
short in his attempts to implement it. Durfee was a mature scholar

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*Weaver & Michael B. Kelly, Remedies: Black Letter Outlines* (2005); 

643. See *Lind*, *supra* note 51, at 94–95 (listing early Civil Procedure 
casebooks).
working with a much younger colleague. Youth is not essential to invention, but it has its advantages; the young are less likely to be captured by old ways of understanding things.

The modern idea of remedies seems obvious today, at least to remedies teachers, but plainly it was not obvious in its inception. Nearly a century elapsed between the publications of John Austin’s *Lectures on Jurisprudence* in 1863 and Charles Alan Wright’s casebook on *Remedies* in 1955. Three-quarters of a century elapsed after rather clear statements of the modern idea of remedies by Pomeroy and Langdell before Wright’s casebook. And even after Wright’s book was published, it was another fifteen to twenty years before the course really took off. If we count from Durfee’s first teaching the course around 1935, the period from Austin, Pomeroy, and Langdell gets twenty years shorter, but the delay before widespread adoption grows twenty years longer.

Austin, Pomeroy, and Langdell distinguished the idea from surrounding concepts but did not give it a distinct label. Durfee did not publish what could have been his seminal work. Plainly these failures delayed dissemination of the modern idea of remedies. But mostly these delays illustrate that reorganizing a field of law is hard—hard to figure out, hard to disseminate, hard to implement.

I have no doubt that the modern conception of remedies is an improvement over the older, multifarious conception. It is not just a change in fashion or in modes of speech. What a court can do to remedy a violation of law is a logically valid and practically useful category, clearly distinct from procedure, from the forms of action, and from primary substantive rights. Having that category available helps us more clearly pose the choices among alternative remedies; it helps us think about the law of remedies more systematically. We understand and speak more clearly than Scott and Simpson or the leaders of the Round Table on Remedies.

But Scott and Simpson were no dummies, and neither were the leaders of the Round Table on Remedies. And we should not be smug. A century hence, some legal scholar will uncover how we thought about some legal concept we think we understand, and no doubt wonder how we could have been so confused, so unable to see distinctions that have become obvious in the meantime.