

PREFACE TO THE FIFTH EDITION

A NEW CO-AUTHOR

The biggest change in this edition is the addition of a second author, Richard L. Hasen of the University of California-Irvine. Rick is a long-time user of the book who has made many helpful suggestions over the years and is the author of *Examples and Explanations: Remedies* (4th ed. Wolters Kluwer 2017). It has been a true collaboration. There are no Laycock chapters or Hasen chapters; we have each reviewed every line of every chapter. We will spare readers our mutual respect and admiration, except to say that we are both very happy with the new arrangement.

THE GOALS OF THE BOOK

We hope and believe that the implementation has improved with each edition, but the book's basic goals remain the same. Most important, this book reflects our belief that a course in remedies should not be a series of appendices to the rest of the substantive curriculum. This book contains no chapters on remedies for particular wrongs. Such chapters are important, but their place is in the substantive courses to which they pertain. This book attempts to explore general principles about the law of remedies that cut across substantive fields and that will be useful to a student or lawyer encountering a remedies problem in any substantive context. It attempts to give the law of remedies an intellectual structure of its own, based on remedies concepts rather than concepts from other fields.

Second, the book tries to integrate the study of public-law and private-law remedies. Public-law remedies are built on traditional private-law remedies. If we study public-law remedies alone, we tear them from their roots and from a set of principles that can help guide the vast discretion that courts exercise in public-law cases.

Third, as the title suggests, the book emphasizes problems of contemporary importance. We have tried to place contemporary issues in historical context, and we have retained some classic cases that are still good law today, but we have not devoted much ink to issues that have been largely mooted by modern developments. We take as givens the merger of law and equity, the ambitious reach of modern American equity, and a generally applicable law of restitution.

Fourth, the book explores and tests the claims of the Chicago school of law and economics. It tries to do so in a way that is accessible to students who lack

backgrounds in economics, that is fair to both sides, and that doesn't dominate the book. We believe that doctrine and corrective justice are as important as economics, and we have tried to give all these values equal treatment. But we think that the course in remedies is an especially important place to test the economic theory. If law is or should be mostly about adjusting incentives, then remedies is where much of the adjusting must occur.

Finally, this book tries to teach students as much as possible before class, so that class discussion has a stronger base. Most of the rest of this preface explains that pedagogical choice.

SOME NOTES ON PEDAGOGY

This book is designed to teach basic principles and to help students think about difficult problems. We have tried to supply memorable cases, lots of structure, and lots of information. The book is principally designed for a survey course that covers the full range of remedies, but we hope the material is rich enough to support more detailed treatment of particular remedies for teachers so inclined.

The book's pedagogical theory is pragmatic. Sometimes the notes ask questions, sometimes they provide explanation, sometimes they summarize related cases, and sometimes they offer our own speculations. The style of the notes depends on the material available. When there are settled rules, we try to explain them. When doctrine is unsettled or when it presents hard problems at the margins, we are more likely to ask leading questions. We never deliberately hide the ball. The law has plenty of real difficulties to grapple with; it is never necessary to create artificial ones.

We have collected illustrations, but not citations. There are no string cites in this book; we have generally taken the view that if the facts are not worth developing, the case is not worth citing. But we do try to provide one good citation, a citation that will lead to others, for each important point. Readers who want more citations for research purposes should follow up on those leads, look at the principal cases in the original reporters to see what the court cited for the points in the opinion, and of course, check the standard reference sources in the field.

What are the standard reference sources in the field? There are two treatises: Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies* (3d ed., West Hornbook Series 2018), and James M. Fischer, *Understanding Remedies* (3d ed., LexisNexis 2014). The Dobbs treatise was foundational to the field and has now been fully updated by Professor Roberts.

There is no treatise on damages since 1935, and no treatise on injunctions for longer than that. There is a treatise on restitution: George E. Palmer, *The Law of Restitution* (Little Brown 1978 & Supp.) (four volumes). The supplement has grown to the equivalent of a fifth volume. A more current and more valuable resource on restitution is the *Restatement (Third) of Restitution and Unjust Enrichment* (Am. Law Inst. 2011).

Finally, there is Douglas Laycock, *The Death of the Irreparable Injury Rule* (Oxford Univ. Press 1991). This is not a standard source, but it does collect and classify hundreds of injunction cases and documents how judges actually decide whether to grant injunctions.

A Note to Teachers

You may occasionally fear that a set of notes has left you nothing to talk about in class — that the notes have given too much away. That is not the students' view, and that has not been our experience. Laycock has taught many of these cases in drafts without notes, then with skeletal and incomplete notes, and finally with full notes. With no exception that he can remember, the more the students knew at the beginning of class, the better the class discussion. If we want students to be thoughtful in class, we have to give them some advance notice of what to think about.

A colleague who read the first edition in manuscript knew all the basic issues in damages, but little of injunctions. She thought the book had given too much away in the chapter on compensatory damages, but she thought she didn't quite understand the chapter on injunctions. She came to the injunctions chapter with a student's perspective instead of a teacher's.

One other important piece of advice: If you are new to the book, you should *look at the teacher's manual*, even if you have never used one. We have tried to make it possible for you to tailor your own course the first time through the book, in the way you would tailor it the second or third time through. The book is organized in daily units of material of roughly uniform length. These units are laid out in the teacher's manual, with a menu of daily assignments for courses of different lengths and with different emphases. There is advice on what to teach and what to skip if you want to sample more chapters than you can cover thoroughly. We also give you the benefit of our own trials and errors in teaching individual cases.

A Note to Students

Most of our students have been enthusiastic about the notes, and we hope that you will be too. The notes provide much information and raise many questions. They are designed to help you learn a lot before you come to class. This allows class to start from a higher base; unprepared students will be at a greater disadvantage. There won't be time to discuss in class every issue raised in the notes; you will be expected to think about some things on your own.

There is a lot of information packed into the notes. No sensible teacher will expect you to memorize that information; that is not the point. Part of our goal is to answer questions that might reasonably arise as you discuss the principal cases. Part of our goal is to immerse you in context. Each principal case arises out of a doctrinal context, and sometimes an historical context or a practical, commercial, or policy context. The more contextual information you get surrounding each case, the better you will understand the case. Some of that information will stick in your memory, and some of it won't, but it will all help you understand the case. And if you return to the book in later years, you can retrieve the information that you don't actually remember.

Take the questions in the notes seriously. They are all questions that you can answer or begin to answer with the information in the book. Where you need facts, we have given them to you; where there is a settled rule, we have told you about it. If a series of leading questions seems to suggest inconsistent answers, all the suggested answers are fairly arguable, and you need to think about the choices.

Finally, the headings in this book *are* part of the text. Chapters and sections and subsections all have headings; every set of notes has a heading; every individual note has a heading; some subdivisions of notes have headings. Those headings organize the material for you and signal the main focus of each unit of material, from chapters down to paragraphs. Read the headings and use them; don't ignore them.

Editing the Cases

The selection and editing of the cases also reflect the decision to direct student attention to central issues. We have tried to select opinions with memorable facts and that focus squarely on an important issue. To the extent possible, we have tried to select cases that are clearly written or can be made so with enough editing. We have edited the cases aggressively in places, always with the goal of making them more readable. We have been careful not to change substance, but we have deleted extraneous issues and excess verbiage.

We have deleted citations in opinions and excerpts, except for the sources of direct quotations and citations to cases the students are likely to recognize. We have standardized citation form inside cases and excerpts, and we have substituted full citations in places where the court used a short form referring back to an earlier citation that has been deleted. We have deleted many footnotes, but those that remain retain their original numbers. We have corrected obvious typos, and sometimes removed internal quotation marks. These changes have been made without notation.

All other editorial changes are identified as such. Inserted or substituted material is in brackets; deletions are indicated with ellipses. We have uniformly used three dots, either following a period or following a word that was originally in the middle of a sentence, without regard to the length or paragraphing of the deleted material. We have occasionally inserted paragraph breaks for judges who didn't do it on their own; these insertions are marked with a paragraph sign in brackets: [¶].

Ellipses and bracketed changes in quotations within principal opinions, or in quotations within quotations in the notes, might have been made either by your editors or by the judge or the quoted author. We have generally not inserted bracketed explanations to explain which it was. Added emphasis in such cases is always by the court or the quoted author; bracketed changes are usually by the court or the author; deletions may be either by us or by the court or the author. We have attributed such editorial changes only in rare cases where we made the change and someone might reasonably think the change is substantively important.

We have omitted dates and publishers from citations to statutes in the notes. Unless otherwise indicated, those citations are always to the statute as it existed in early summer 2018.

Before you quote from any source excerpted in this casebook, you would be wise to confirm the exact quotation with the original source.

CHANGES IN THIS EDITION

Apart from a new co-author, what else is new? The organizational structure of the fourth edition has been brought forward with only modest tweaks at the subunit

level. Two units, on school desegregation and on initiating criminal and administrative remedies, have been omitted. The school cases were receding ever further into the past, and the Supreme Court and the D.C. Circuit had largely ended any private right to force prosecutors or administrative agencies to act. Those materials are available on the book's website for teachers who still want them.

There are nine new principal cases, and we think that each is a clear improvement over the case that it replaces. Older cases that clearly illustrate their central point and work well in the classroom have been retained.

Most of the changes are in the notes, which we have reviewed and updated line by line. We have added many recent illustrations, including cases from the first half of 2018. We have given substantial attention to major new developments, including the rise to prominence of nationwide injunctions that protect persons who were never parties to the litigation, litigation with and about President Trump, and the Supreme Court's intervention in the dispute over cy pres remedies. We have made offsetting cuts, so that the book has not gotten much longer.

We find the continuing flow and development of remedies issues a source of endless fascination. We can only hope that teachers and students find it as interesting to teach and study as we found it to write and revise.

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