

2013

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Recommended Citation

David I. Levine, *Remedies A Course Fit for Civil Procedure Teachers*, 57 *Saint Louis University Law Journal* 585 (2013).

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REMEDIES: A COURSE FIT FOR CIVIL PROCEDURE TEACHERS

DAVID I. LEVINE*

John Godfrey Saxe, the nineteenth century lawyer and poet who wrote “The Blind Men and the Elephant,”¹ might have appreciated the challenge of teaching Remedies. Foremost among the challenges of teaching the course is that there is a wide variety of material. Few have the background to feel entirely comfortable teaching all of it, at least to start. As discussed elsewhere in this symposium, the typical range of the course requires the teacher to cover damages, equity, and restitution. The material derives from a wide variety of other substantive fields, including contracts, torts, real and intellectual property, civil rights, and constitutional law. Casebooks focus on different aspects of those topics, depending on the interests and predilections of the casebook authors.

In a previous essay elsewhere, I have addressed how the course in Remedies can be taught effectively from a public law perspective.² For this Essay, I thought I would touch another part of the elephant. I will briefly describe some examples of how those with a background in the course in Civil Procedure, like myself, can use that experience in teaching at least portions of

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1. The famous poem, based on an old Indian tale, begins:

It was six men of Indostan
To learning much inclined,
Who went to see the Elephant
(Though all of them were blind),
That each by observation
Might satisfy his mind.

JOHN GODFREY SAXE, *The Blind Men and the Elephant*, in THE POEMS OF JOHN GODFREY SAXE 259 (Boston, James R. Osgood & Co. 1873). Each of the six reached a different conclusion depending on where they touched the elephant. Was the elephant they could not see most akin to a wall (“his broad and sturdy side”), a spear (the tusk), a snake (“[t]he squirming trunk”), a tree (“felt about the knee”), a fan (the ear), or a rope (“the swinging tail”)?

As an aside, Saxe may have been the first to observe the following: “Laws, like sausages, cease to inspire respect in proportion as we know how they are made.” THE YALE BOOK OF QUOTATIONS 86 (Fred R. Shapiro ed., 2006).

2. See David I. Levine, *Thoughts on Teaching Remedies from a Public Law Perspective*, 39 BRANDEIS L.J. 557 (2001); see also DAVID I. LEVINE, DAVID J. JUNG & TRACY A. THOMAS, REMEDIES: PUBLIC AND PRIVATE 6 (5th ed. 2009) (introducing the “public law litigation” model).

Remedies.³ My intended audience, therefore, is a professor who has some experience with Civil Procedure and is interested in adding Remedies as another course.⁴

One way of thinking of Remedies is that its primary concern is implementing the prayer for relief in the litigants' initial pleadings. The "demand for the relief sought" is of course required in any pleading stating a claim for relief.⁵ However, in the Civil Procedure class, this portion of the pleading is typically given short shrift while the instructor necessarily spends time leading the students through what "a short and plain statement of the claim" means.⁶ In Remedies, however, it is key to know what has been pleaded—and proven—before moving on to see what a court can and cannot grant as a remedy.

Other examples abound. In Civil Procedure, the right to trial by jury in suits at common law is a staple subject. There, the issue is whether a litigant is or is not entitled to a jury. The test the U.S. Supreme Court has developed for deciding this issue requires consideration of two questions. First, are the rights in question akin to common law rights? Second, is the remedy requested legal or equitable in nature?⁷

As the modern test for the right to trial by jury suggests, the law/equity distinction is a key topic in Remedies. The standard formula for entitlement to equitable relief, such as an injunction, requires a showing that the remedy at law is inadequate.⁸ The distinction also turns up in the question of the availability of monetary relief in law and equity.⁹ Finally, the law/equity division is relevant to teaching restitution, where legal forms of restitution historically were treated separately from equitable forms.¹⁰

3. Some Civil Procedure casebooks make this connection explicit by including material on Remedies. *E.g.*, RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 64–92 (5th ed. 2009). The benefits flow in reverse as well because teaching Remedies helps in understanding parts of Civil Procedure.

4. To be more pragmatic, imagine that your dean has dropped into your office to "ask" that you add Remedies to your teaching repertoire, which is otherwise centered in Civil Procedure.

5. FED. R. CIV. P. 8(a)(3).

6. FED. R. CIV. P. 8(a)(2).

7. *See* *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

8. *E.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). This is not the place to debate the merits of *eBay*. *See, e.g.*, Symposium, *eBay*, 2 AKRON INTELL. PROP. J. 1 (2008). However, the new teacher should be aware of the controversy. *See, e.g.*, Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 76 n.71 (2007) (remedies scholars "had never heard of the four-part test" for permanent injunctions that Justice Thomas's majority opinion said followed "well-established principles of equity").

9. *E.g.*, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993).

10. *See* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1278 (1989) (discussing quasi-contracts and constructive trusts as the "great subdivisions" of the

The Federal Rules of Civil Procedure are integral to parts of the Remedies course. Rules 64 through 71 are organized as “Provisional and Final Remedies.”¹¹ These rules, which are rarely reached in the basic course in Civil Procedure,¹² cover topics such as seizing a person or property,¹³ receivers,¹⁴ and execution.¹⁵ Some of these rules, particularly on seizure and execution, are brief because they expressly rely on the law of the state where the court is located.¹⁶ These succinct rules afford the opportunity to return to the wonders of *Erie*,¹⁷ as the students must work through how to make an “*Erie* educated guess” on the remedial law to be applied in any particular situation.¹⁸

The most detailed of this group of rules governs injunctions and restraining orders,¹⁹ which is a core part of any Remedies course. Rule 65 covers the procedure for issuing preliminary injunctions, temporary restraining orders, and security for these orders.²⁰ To be sure, there is caselaw on these topics as well.²¹ But, a professor familiar with teaching the Federal Rules and cases together will feel comfortable in this realm.

One injunction-related topic deserves special mention here because of its interaction with other federal rules. That is the question of who is bound by an injunction. Rule 65(d)(2) provides the starting point.²² For present purposes,

first Restatement of Restitution (1937)). The new Restatement (Third) of Restitution and Unjust Enrichment § 4 acknowledges the legal and equitable origins of the field of restitution. See Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 931 (2012) (reviewing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011)).

11. FED. R. CIV. P. Title VIII.

12. The major exception is offer of judgment. See FED. R. CIV. P. 68.

13. FED. R. CIV. P. 64.

14. FED. R. CIV. P. 66.

15. FED. R. CIV. P. 69.

16. FED. R. CIV. P. 64(a), 69(a)(1).

17. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

18. See David Crump, *The Twilight Zone of the Erie Doctrine: Is There Really a Different Choice of Equitable Remedies in the “Court a Block Away”?*, 1991 WIS. L. REV. 1233–34, 1233 n.4 (1991) (examining the Erie-Remedies problem).

19. See FED. R. CIV. P. 65; see also FED. R. CIV. P. 65.1 (governing proceedings against a surety).

20. FED. R. CIV. P. 65.

21. E.g., *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (discussing the prerequisites for a preliminary injunction).

22. This portion of Rule 65 provides:

Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties’ officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

FED. R. CIV. P. 65(d)(2).

the interesting question is when someone who is neither a party nor an agent of a party can be bound.

A Remedies casebook staple on the issue is *United States v. Hall*.²³ The origin of the case was an action seeking school desegregation in Jacksonville, Florida.²⁴ At one formerly white high school, the court's desegregation order was met with racial violence and unrest.²⁵ The school superintendent and the county sheriff petitioned the court for help with so-called black adult outsiders who were alleged to be trying to disrupt the operation of the school through boycotts and other actions.²⁶ Hall was identified as one of the protestors.²⁷ The district court issued an order limiting access to school grounds to specified categories of persons, such as students and teachers.²⁸ The court directed the sheriff to serve the order on Hall and other named protestors.²⁹ Hall responded a few days later by appearing on the high school grounds for the purpose of deliberately violating the order.³⁰ Hall was adjudged guilty of contempt,³¹ even though Hall's relationship to the case was tenuous. He was neither a party to the original action, nor was he added as a party, nor was he a legal surrogate of a party, nor did he act in concert with a party.³²

Despite Hall's limited ties to the matter, a truly legendary circuit court judge, John Minor Wisdom, wrote an opinion affirming Hall's contempt citation.³³ Judge Wisdom's opinion for the Fifth Circuit panel held that the trial court had inherent power (i.e., beyond the literal terms of Rule 65(d)(2)) to act.³⁴ It was permissible to protect a binding judgment between the original parties to the desegregation action "by issuing an interim ex parte order against an undefinable [sic] class of persons," which included Hall.³⁵ Even though Hall clearly fell outside of the limits of Rule 65(d)(2), Judge Wisdom concluded that he could be held in criminal contempt under these circumstances because he had notice of the order and willfully violated it.³⁶

23. 472 F.2d 261 (5th Cir. 1972).

24. *Id.* at 262.

25. *Id.* at 263.

26. *Id.*

27. The petitioners alleged that Hall was "a member of a militant organization known as the 'Black Front.'" *Id.*

28. *Hall*, 472 F.2d at 263.

29. *Id.*

30. *Id.* at 264.

31. *Id.*

32. *Id.*

33. *Hall*, 472 F.2d at 262.

34. *Id.* at 265.

35. *Id.* at 268.

36. *Id.* at 267.

My goal here is not to debate at length whether Judge Wisdom reached the correct result in finding this nonparty in contempt of court.³⁷ That issue is, of course, central to classroom treatment of the case.³⁸ For present purposes, it is instructive to ponder how a proceduralist might bring the Federal Rules into the discussion. First, there is the question of Judge Wisdom's assertion that "Rule 65(d) was intended to embody rather than to limit [courts'] common law powers."³⁹ This allowed him to claim that the rule "cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment."⁴⁰ This claim about the Federal Rules can be examined in class as a general proposition as well as a question about the specific rule at issue.⁴¹

Second, Judge Wisdom also justified his use of inherent power because, in this specific situation, "third parties such as Hall were in a position to upset the court's adjudication."⁴² He claimed that "[t]his was not a situation which could have been anticipated by the draftsmen of procedural rules."⁴³ The seeming novelty of the situation buttressed Judge Wisdom's conclusion that the district court did not exceed its inherent powers. The proceduralist will quickly note, however, that this claim by an esteemed judge is just incorrect. Rule 19 provides for this precise situation. A person in whose "absence the court cannot accord complete relief among existing parties" is *required* to be joined if the person is subject to service of process and will not deprive the court of subject-matter jurisdiction.⁴⁴ There is no obvious reason that can be gleaned from the opinion why Hall could not have been joined as a party under Rule 19 once the parties alleged that he was a serious threat to achieving peaceful school desegregation. The parties had already provided the district court with Hall's name; the sheriff had little difficulty promptly serving Hall with a copy of the order.⁴⁵ Why couldn't the court have ordered that Hall first be made a party⁴⁶ and then served with an amended complaint and the motion? These

37. The Supreme Court of the United States has cited *Hall* with approval. *E.g.*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979).

38. The related issue of what to do about nonparties in a variety of situations is also worthy of treatment. *See, e.g.*, John F. Dobbyn, *Contempt Power of the Equity Court over Outside Agitators*, 8 ST. MARY'S L.J. 1 (1976). Examples include protestors motivated by the justice of a cause who come forward to support persons enjoined from continuing to protest. These could include labor, civil rights, abortion, or antiwar demonstrations. A related example is the reach of gang injunctions.

39. *Hall*, 472 F.2d at 267.

40. *Id.*

41. *See* Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 312 n.5 (2010) (citing judicial opinions and scholarly articles on the topic).

42. *Hall*, 472 F.2d at 267.

43. *Id.*

44. FED. R. CIV. P. 19(a)(1)(A) (comma omitted for clarity).

45. *Hall*, 472 F.2d at 263–64.

46. *See* FED. R. CIV. P. 19(a)(2).

papers would have notified Hall that the court was contemplating issuing a temporary restraining order to which he could have responded. Why instead serve an order issued *ex parte* on Hall without giving him a chance to be heard in advance? How did this rushed procedure meet basic due process standards?⁴⁷ All these questions flow from the simple introduction of Rule 19 into the discussion of the case.⁴⁸

If you are in a procedural state of mind⁴⁹ teaching *Hall*, you can then easily move on to discuss how the Federal Rules might be used to help solve the problem of large waves of protestors or other groups. What is a court to do when there are so many protestors that joinder of all is impracticable? Consider using Rule 23, of course. In the right case, the court can certify a class of protestors who can be heard—and legally bound—en masse while keeping within the constraints of due process.⁵⁰ Creating a defendants' class action is not the right result in every instance, of course, but it is worth consideration in this context as a possible remedy contemplated by the Federal Rules.⁵¹ In sum, bringing the joinder of party rules into the discussion of the reach of an injunction greatly enriches the learning experience.

This is not the only aspect of the “Who is bound?” question which can be a good place to consider the interaction of remedial doctrines and the Federal Rules. Another good example is the binding effect of an order on a successor to a public office. The rules worth considering briefly here are Rule 25,⁵² the

47. See *Carroll v. President & Commiss'rs of Princess Anne*, 393 U.S. 175 (1968).

There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

Id. at 180.

48. Rule 24 can also come into play in this discussion. Hall could have moved to intervene in the underlying desegregation case and challenge the order that the sheriff had served upon him. Instead, Hall brazenly defied the court's order and suffered the consequences of being found in criminal contempt. This observation leads to discussion of whether it is the existing parties' obligation to reach out under Rule 19 to bring in necessary parties such as Hall, or whether Hall should have to protect his rights by seeking intervention under Rule 24. The Supreme Court has determined that the former is the right position. *Martin v. Wilks*, 490 U.S. 755, 765 (1989).

49. See JAY-Z & ALICIA KEYS, *Empire State of Mind*, on THE BLUEPRINT 3 (Roc Nation 2009); BILLY JOEL, *New York State of Mind*, on TURNSTILES (Columbia Records 1976).

50. In my casebook, we pair *Hall* with a case involving waves of disruptive antiwar protestors on a university campus. See LEVINE ET AL., *supra* note 2, at 347–49 (quoting *State Univ. of N.Y. v. Denton*, 316 N.Y.S.2d 297 (1970)).

51. See generally Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73 (2010) (proposing a general theory of defendant class actions).

52. FED. R. CIV. P. 25.

rule on substitution of parties, and Rule 60(b)(5),⁵³ part of the rule on relief from a judgment or order, such as an injunction issued under Rule 65.

Rule 25(d) addresses what happens when a public officer dies or is separated from office.⁵⁴ The modern practice under this rule provides for the automatic substitution of public officers sued in their official capacity when one person leaves office and another comes in.⁵⁵ The current rule provides that a civil action does not abate, the substitution is automatic, and misnomers do not affect the parties' substantial rights.⁵⁶ There is no time limit for ordering the substitution.⁵⁷ At first blush, this is a simple housekeeping rule, which assumes that public officers named in their official capacity are nothing but nominal parties to an action.⁵⁸ Now that this is so straightforward, the modern substitution rule probably gets no more than fleeting attention in a basic Civil Procedure course.

To a great degree, it is true that the modern rule for substitution of public officers works as smoothly as intended. However, in at least one area of Remedies, it has caused a bit of difficulty. When a permanent injunction or consent decree is entered under Rule 65, the expectation is that it will remain in place for a long period of time.⁵⁹ When such a decree is entered into by a public official, however, it is very likely that the public official is also binding successors in office under Rule 25(d). When the decree calls for far-reaching reform to major institutions, such as schools, prisons, and fire or police departments, the relief will take years to implement and probably will require large expenditures. The successor in office may find him or herself automatically bound to implement detailed and expensive policies agreed to by a predecessor or a predecessor's predecessor.

53. FED. R. CIV. P. 60(b)(5).

54. FED. R. CIV. P. 25(d).

55. *Id.*

56. *Id.*

57. *Id.* For discussion of the practice before and after the current rule was promulgated in 1961, see 7C CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 1959–1960 (3d ed. 2007). The prior practice was derided as “largely useless rigmarole” by no less an authority than the Reporter to the Advisory Committee. Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961–1963 (I)*, 77 HARV. L. REV. 601, 604 (1964).

58. As the authors of *Federal Practice and Procedure* have explained, naming and substituting public officers in their official capacity is part of the fiction allowing suits against the government while avoiding problems under the Eleventh Amendment. WRIGHT ET AL., *supra* note 57, § 1960.

59. See David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary on the Supreme Court's Adoption of the Second Circuit's Flexible Test*, 58 BROOK. L. REV. 1239, 1239 n.5 (1993) (“A consent decree is a negotiated settlement of a case brought in equity that is enforced through the court's power to enforce equitable decrees or orders. Thus, a consent decree traditionally has been treated as possessing characteristics of both a long-term contract between the parties and a judicial decree.”).

A good example of this phenomenon, which is commonly used in Remedies books, is a case concerning the conditions in the county jail serving Boston, Massachusetts.⁶⁰ The litigation, which ran for over twenty-five years, was directed at the conditions in a jail built well before the Civil War.⁶¹ In the case, Sheriff Rufo invoked Rule 60(b)(5)⁶² in seeking modification of a consent decree that had been agreed to by a predecessor more than ten years before.⁶³ The defendant sheriff wanted to modify the consent decree, which promised jailed prisoners single-cell occupancy, to allow for some double bunking in order to increase the capacity of the new jail.⁶⁴ Even though the prisoners were not entitled to a single cell under the U.S. Constitution,⁶⁵ Sheriff Rufo had to implement what his predecessor had agreed to unless he could show a significant change in circumstances in the governing law or facts that had become manifest since the decree was entered.⁶⁶ He could not use the proposed modification to “strive to rewrite a consent decree so that it conforms to the constitutional floor.”⁶⁷

The test for modification that the Supreme Court imposed on Sheriff Rufo was more flexible than what the Court had demanded in some prior cases.⁶⁸ However, the decision of the sheriff’s predecessor to enter into a consent decree calling for an expensive form of housing prisoners still worked as a significant constraint on the current sheriff’s discretion.

This reasoning flows naturally from the terms of Rule 25(d), with its automatic substitution of the successor public officer for the predecessor.⁶⁹ It is immaterial that one public officer might have different policy preferences than the predecessor.⁷⁰ In fact, the best that the Advisory Committee was able to offer successors in public office was this advice:

60. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 372 (1992).

61. *Id.*

62. This rule merely provides that “the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . applying it prospectively is no longer equitable.” FED. R. CIV. P. 60(b)(5).

63. *Rufo*, 502 U.S. at 374–76.

64. *Id.* at 376.

65. See *Bell v. Wolfish*, 441 U.S. 520, 541 (1979).

66. *Rufo*, 502 U.S. at 383.

67. *Id.* at 391.

68. The development of the interpretation of the rule is fully discussed in Levine, *supra* note 59, at 1241–42.

69. The prior form of the rule required a showing of a substantial need for continuing and maintaining the action when one public officer succeeded another. WRIGHT ET AL., *supra* note 57, § 1960.

70. Indeed, the modern form of the rule was first promulgated on an emergency basis because the Kennedy Administration was about to take over for the Eisenhower Administration. Kaplan, *supra* note 57, at 604–06.

Where the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after substitution, . . . to seek to have the action dismissed as moot or to take other appropriate steps to avert a judgment or decree.⁷¹

The question for teaching that then arises is whether the combination of Rule 25(d) and Rule 60(b)(5) results in good policy. The Supreme Court has shown some skepticism in at least one case,⁷² which some scholars have applauded.⁷³

As this Essay is intended to be about how a proceduralist might teach aspects of Remedies, however, I am not going to pursue this particular debate any further. I trust that this short Essay provides a fairly good idea of what can be done in the remedies course when a teacher wants to bring the perspective of careful consideration of the applicable Federal Rules of Civil Procedure to the material.⁷⁴ It puts the Remedies doctrines into the actual context in which the students will be applying them in litigation in the future. It is the perspective that the judges will expect to see in their courtrooms.

To be candid, when it is time to “touch the elephant” in other areas of the Remedies course, the Federal Rules of Civil Procedure and a rules-based approach will not be equally useful. There is little in the material on damages, for example, which can be illuminated by deep consideration of any of the Federal Rules. What will help quite a bit, however, is experience with the trans-substantive nature of Civil Procedure. Just as one expects to encounter Civil Procedure cases arising from many substantive areas of the law, much of Remedies has the same trans-substantive quality. The teacher and the students will encounter cases from a wide range of substantive areas—torts, contract, intellectual and real property—just to name a few. A Civil Procedure teacher who has mastered the art of knowing a little about a lot of substantive areas will find that the art transfers well here.

I don’t want to imply that the lens of Civil Procedure is the only way to teach Remedies. My modest goal here is simply to persuade a few wary Civil Procedure teachers to try something new and to perhaps make their deans happy. Try out the Remedies course and apply this perspective where it is applicable. Perhaps I have also enticed a few Remedies teachers whose strengths lie in other perspectives to try to add a bit more rules analysis into

71. FED. R. CIV. P. 25 advisory committee’s note (commenting upon the 1961 amendments).

72. See *Frew v. Hawkins*, 540 U.S. 431, 441 (2004).

73. See, e.g., Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV. 915 (2005) (discussing the impact of *Frew* on modifications under Rule 60(b)(5)).

74. Our casebook, for one, includes the relevant Federal Rules in an Appendix so they can be conveniently assigned as reading and examined in class. LEVINE ET AL., *supra* note 2, at 975–90.

their teaching. Like Saxe, I don't want anyone to think that the perspective I propose here is the only one.⁷⁵ I am not disputing loud and long. But, we can improve the teaching of Remedies if we all keep reaching out and touching the elephant in many places.

75. The final stanza of Saxe's poem is:

And so these men of Indostan
Disputed loud and long,
Each in his own opinion
Exceeding stiff and strong,
Though each was partly in the right,
And all were in the wrong!

SAXE, *supra* note 1, at 260.