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EQUITABLE RELIEF, BUT NOT EQUITY

ROBERT ALLEN SEDLER *

In an article in the Journal of Legal Education, Professor Ralph A. Newman discusses the substantive principles historically administered by the courts of chancery and laments the fact that they have been insufficiently incorporated into the general body of law. As a corrective, he favors teaching future lawyers and judges such principles by a course in comparative equity and implies that such a course is preferable to one emphasizing equitable relief—that is, the specific and declaratory remedies that were historically administered by those courts. While agreeing that there are all too many instances where our present body of rules and principles ignores the concept of fairness that the courts of chancery stressed, I do not believe that the teaching of an Equity course as one involving only remedies “continues to enforce the dead equity of the past.” Quite to the contrary, I maintain that along with the other aspects of remedies, there is insufficient emphasis on equitable relief in the present curriculums of most law schools. Since the slight specific relief formerly granted by the law courts, primarily replevin and ejectment, involve essentially procedural problems and the situations where they are available are clear, they can adequately be covered in the Procedure course. The coverage of the extraordinary legal remedies in detail is one of those things that generally must be foregone, but the student may manage to learn something about them in the courses in Criminal Law, Municipal Law, Administrative Law, and the like. Equitable relief, then, comprises the great bulk of the specific and declaratory relief with which the student should be familiar. In the absence of a course in Remedies, covering all aspects of relief, Equity is the only course in which such material can be properly and fully covered.

While I believe it is highly desirable to train lawyers in the principles of jurisprudence, to teach them to question the soundness of existing positive law, and to make them aware of the potential contribution of the social sciences in solving legal problems, nonetheless, too often we forget that we are preparing them for the practice of law. A client comes to a lawyer seeking his assistance in obtaining relief rather than to participate in a great intellectual experience. Of course, it is not our function to prepare the student for practice in the sense of “teaching him to make a buck,” or “where he files a deed,” as some practitioners believe. However, we do not depart from our intellectual responsibilities by teaching the student to under-

* Assistant Professor of Law, Saint Louis University School of Law.
2 Id. at 346.
3 Professor Newman points out the basic course in Equity has been eliminated in about half of the law schools. Ibid.

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stand the remedies he must employ in order to effectuate the principles of substantive law he learns. As to the "minutiae," as remedies are sometimes called, I agree with Professor Wright that "the student must master these minutiae somewhere, and perhaps even if we are very skillful and very lucky, he may be persuaded that they are not really minutiae at all." 4 This cannot be done by having remedies taught as part of the substantive courses, for experience as well as logic would seem to indicate that when a teacher is faced with problems of coverage, 5 he is much less likely to be "shifted from the absorbing and familiar features of his subject to those which involve only the process of litigation." 6 Therefore, I feel it is much more important for the student to be taught the principles of equitable relief than the principles of substantive equity. With new courses constantly seeking admission to the law school curriculum and many of the traditional courses being shortened to make this accommodation, where time is still reserved for a course in Equity, 7 I think the course should be one emphasizing remedies rather than jurisprudence. This is particularly true in view of the commendable frequency with which courses in Jurisprudence are now being offered, as well as the tendency of many teachers today to teach jurisprudential principles in substantive courses. 8

Moreover, from a remedies standpoint, it is highly undesirable that the student be oriented to think of equity as a separate system, furnishing standards of justice to guide the development of the substantive law. Such an orientation will result if a distinction is to be drawn between positive law and principles of equity, so that the latter can be incorporated into the former, as Professor Newman suggests. There are many problems that exist in the area of remedies, leading to unfortunate results, because equitable remedies are considered to have a "moral base." If anything, the student ought to be taught that there is no distinction between legal and equitable remedies, except in so far as constitutionally necessary—i.e., the right to a jury trial in actions historically denominated as legal. While Professor Newman's ultimate goal—the incorporation of substantive equitable principles into the general body of law—is desirable and would result in a true union of law and equity, 9 I do not think this will be accomplished by treating equitable principles as part of a separate system.

Historically courts of chancery developed because of two defects in the system of law as then administered. First, the law courts did not protect

4 CHARLES A. WRIGHT, Preface to Cases on Remedies x (1955).
5 I have been advised by my more experienced colleagues that there is no teacher who is not perpetually faced by these problems. This is comforting when one sees that carefully prepared assignments must be constantly revised, as his capacity to assign has outrun his capacity to cover.
7 It is submitted that a course in Remedies is preferable to separate courses in Equity, Damages, and Restitution. See the discussion, infra.
8 For an excellent discussion as to technique in this regard, see Cowan, Jurisprudence in the Teaching of Torts, 9 J.LEGAL ED. 444 (1957).
9 At that time, he advocates discontinuance of the course. Newman, supra, note 1, at 347.
certain types of interests—e. g., those created by a simple contract. Moreover, while in the “strict law” stage, the courts would not look behind the forms the parties had adopted—e. g., they would not enforce a beneficial use. This may be called the substantive defect. Secondly there was a remedial defect in that relief would generally be awarded only after the injury had taken place; also, the relief would only be in the form of money damages. Slowly, the law courts did grant some specific relief (but only after the event) by means of replevin and ejectment, both of which were narrowly circumscribed remedies and often of little practical avail.

The courts of chancery had the function of providing solutions to both defects. It is true that since chancery was a “court of conscience,” there was no “right” to the specific relief it granted, and such relief would be refused if it was “inequitable” to grant it. However, as law emerged into a stage of maturity, the discretionary nature of equitable relief was limited by established principles and precedent, and with the abolition of separate courts, equitable relief became but another remedy the courts had at their disposal.

It is submitted that the relationship between specific relief and damages would have been substantially the same even if they had not historically been administered by separate courts. Specific relief is often more complicated to administer and requires more severe sanctions, such as contempt. Although possibly in early English legal development and under the Roman law, the plaintiff may have had an option in some cases to seek either specific relief or damages, it is doubtful whether this option would have continued as law progressed into the stage of maturity because of the problem of administration and difference in enforcement procedure. Further, with the development of a capitalistic system and the rise of commercialism, economic considerations would often militate against the granting of specific relief where damages were adequate, at least in the contractual area. Where a party has breached a contract, though he is capable of performing, it is probably because he can obtain a better price elsewhere. By limiting the

10 See Roscoe Pound, The Spirit of the Common Law 139 (1921). He lists four stages: (1) conception of peaceable adjustments; (2) strict law; (3) liberalization; (4) maturity.
11 Id. at 142. The courts reacted sharply to the charge that relief related to “the length of the chancellor’s foot.” Note particularly the approach taken in Richards v. Dower, 64 Cal. 62, 28 Pac. 113 (1883).
12 The term is used to denote equitable relief—that is, omitting replevin, ejectment, and the extraordinary legal remedies. Terminology could be more precise if the law courts had administered no specific relief. History is rarely considerate in that respect.
13 Law and equity were indistinguishable during the first two hundred years of judicial administration in England. Adams, The Origin of English Equity, 16 Colum. L.Rev. 87 (1916). It may have been that, influenced by the Roman Law, some specific relief was available; and if so, there is nothing to indicate that the plaintiff did not have a choice of remedy. As to the Roman law, see Jackson, Specific Performance of Contracts in Louisiana, 24 Tul.L.Rev. 401, 411 (1930), for a discussion of specific relief vis-à-vis damages and citation of authorities.
14 If incapable, of course, specific performance could not be decreed.
availability of specific relief to the situation where damages are inadequate, both the plaintiff and the defendant can have the benefit of a profit— the defendant presumably would find that he could still make a profit even though he had to pay damages, if he took that into account— where if specific relief were granted, only the plaintiff could. Today, the courts are becoming more realistic in their determinations as to when damages are really adequate and will grant specific relief on that basis.  

As to the specific relief historically administered by the law courts, perhaps the result would not have been the same, though we may note that at an early date the extraordinary legal remedies were administered with the same discretion as was applied to equitable relief. Moreover, where a narrower form of specific relief is available, whether considered legal or equitable, that relief will be given. For example, rescission, which would terminate the contract, has been refused when reformation will adequately remedy the injury to the plaintiff. With this in mind, the denial of injunctive relief can be justified without reference to historical development if replevin or ejectment would accomplish the same result. So too, equitable defenses are becoming more limited in their scope, as is demonstrated by the changing attitude toward the clean-hands doctrine. Clean hands, which was once treated as constituting an absolute bar because of the plaintiff’s inequitable conduct, may now not prevent relief if the harm the plaintiff caused can be remedied by the issuance of a conditional decree. Therefore, it is clear that equitable relief may be administered under a merged system to produce desirable results independent of its historical origin as a separate system of relief grounded upon considerations of morality and fairness.

On the other hand, the view that equitable relief has a moral aspect about it, which damages and other legal relief do not, has led to undesirable results. One of the most flagrant has been the denial of legislatively created rights by some courts, because of the theory of the relief the plaintiff sought. Thus, a party seeking specific relief against usury or loss of homestead property has been denied the benefit of legislative provisions for his protection; he has been required to pay a debt that the legislature has declared unenforceable, or interest and principal that the legislature has determined shall be forfeited. This was because “equity abhors a forfeiture” and “he

15 See Van Hecke, Changing Emphasis in Specific Performance, 40 N.C.L.Rev. 1 (1961). Professor Van Hecke summarizes the recent trends and concludes that the present test is the relative adequacy of specific performance and other remedies.


17 See, e. g., O’Shea v. Morris, 112 Neb. 102, 198 N.W. 806 (1924).

18 In reality, there should be but one form of specific relief, tailored to meet the needs of the particular case. However, there would have to be a right to a jury trial if the theory of the action was replevin or ejectment.

who seeks equity must do equity.” 20 It was immaterial that the legislation 
was constitutional. It is evident then that equitable principles can be em-
ployed to achieve a discriminatory and unsound—and hence “inequitable”—
result.

I agree with Professor Newman that “we should teach law as it should 
be and is, rather than as it should not be and is not.” 21 But this should not 
be done at the price of perpetuating the concept of a system of equity and 
emphasizing a distinction based on historical necessity. I am suggesting that 
principles of equity as such be abolished for purposes of analysis. I am 
also suggesting that while we teach, time permitting the separate develop-
ment of law and equity, so that the student may see the matter of remedies 
in historical perspective, we teach that this development is now irrelevant 
except as to the trial-by-jury guarantee. The substantive principles of equity 
have merit per se because they are intended to achieve a just result; they 
gain no added impetus because they were formerly employed by the chanc-
cery courts. Moreover, such principles existed prior to and independent 
of those courts. They should not be segregated from any other principles 
relating to the soundness or fairness of positive law. What Professor New-
man proposes would seem to be properly covered in a traditional course in 
Jurisprudence or Comparative Law.

I would hope that he is not advocating that the present course in Equity, 
where one is still offered, become anything other than a course in specific 
relief. I believe it is imperative that a lawyer understand when remedies 
such as injunctions and decrees of specific performance are available. He 
must be made to realize that there is no such thing as “equity jurisdiction,” 
that it is not true that “equity acts only in personam,” and that there are 
(in all but four states) no “courts of equity.” Since a course in Jurispru-
dence is available in most law schools today and one in Comparative Law 
is available in many, there is no need to abandon the teaching of specific relief 
and to substitute a course in equitable principles, even if the latter were 
preferable to the former.

Equity as a concept should be abandoned now and not when everyone 
“recognizes the true relation between the principles of equity and the law 
as a whole,” as Professor Newman suggests. 22 We must cease thinking of 
equitable principles as anything other than principles of fairness and jus-
tice. Moreover, some of the principles applied by the courts of chancery—
 e. g., that the vendee of realty bears the risk of loss as soon as the contract 
is completed 23—may be questionable as to fairness. The retention of equity 
as a separate concept plays havoc with the sound administration of specific 
relief, and as we have seen, may cause decidedly unfair results.

20 See e. g., Jones v. First Nat. Bank of Ashland, 236 Ala. 606, 184 So. 106 (1938); 
problems are fully discussed in the article on Conditional Relief, supra, note 19.
21 Newman, supra note 1, at 347.
22 Ibid.
23 This is the rule of Paine v. Meller, 6 Ves. Jun. 349, 31 Eng. Rep. 1088 (Ch. 1801).
A legal system that traces its origins to the time when man first sought a *modus vivendi* based on respect for rules rather than brute strength is obviously greatly influenced by history. We have the advantage however, of being able to view matters in perspective and can disregard the historical structure of an institution when experience indicates that structure unsound. It is submitted that this should be the case with respect to the concept of equity. Historically principles of law based on ethics and morality had to be treated as constituting a separate system, since the law courts' recognition of them was very superficial. So too, a separate court was necessary to administer specific relief, as the law courts generally refused to do so. Separate courts have proved to be functionally undesirable and have been abolished in the vast majority of states. Since the substantive principles exist as part of our general jurisprudence, and since specific relief is now administered by the same court that awards damages, there is no utility in recognizing equity as a separate concept. Admittedly principles of fairness still do not pervade many areas of substantive law. The universal recognition of those principles, however, is not hastened or affected in any measure by maintaining the concept of equity as administered by the chancery courts; we should not attempt to separate the "equity" as there administered from the ethical and moral considerations upon which it was based.

Most importantly, we must eliminate the concept of equity from the specific relief employed by a court under a merged system. We must cease to think that equitable relief and legal relief are different in their nature and purpose. The function of all relief should be to prevent injury and to compensate for that injury if it occurs. If damages will adequately compensate the plaintiff for a wrong, then that is the remedy he should receive. If they will not or if, under the facts of the case, specific relief will be the more efficacious remedy, then that type of relief should be ordered. The so-called equitable defenses would probably have been recognized, as indicated previously, even if a separate court presided over by an ecclesiastical official had not administered specific relief, because of the extraordinary nature of that relief—*i. e.*, that it would often bring into play the contempt or supervisory powers of the court. Some of these defenses have been carried over into damages actions, while others are peculiarly suited to specific relief. Moreover, the range of these defenses is being narrowed, as courts are thinking more in terms of the practical realities of a granting or denial of救济.

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24 To the extent that relief is denied because of improper conduct by the plaintiff, which can still be remedied, the court is acting punitively rather than remedially. See Zechariah Cripe, Some Problems of Equity 94 et seq. (1950), for a discussion of this factor as it is involved in the clean hands doctrine.

25 As indicated by Van Hecke, supra, note 15, this appears to be the present test in regard to specific performance.

26 However, the view of equitable relief as "moral" has caused the courts to fail to apply conditional relief to actions of replevin and ejectment, to which it is appropriate, because the theory of those actions is "legal." This matter is discussed in the article on Conditional Relief, supra, note 19, and the position taken is that conditional relief is proper in such actions. This is but another example of the harm resulting from thinking of equitable relief as more "moral" than legal relief.
of relief rather than of the "equitable quality" of the plaintiff's conduct. All that remains is for specific relief to be liberated from the shackles of its historical origin. This can be accomplished by eliminating the concept of equity from its administration.

In summary, what is needed is not a course in comparative equity, as Professor Newman suggests, but the removal of the concept of equity from the course in Equity, except in so far as necessary to show its historical development; the course should more properly be called Equitable Relief (in deference to its historical origin, if we wish) or simply Specific Relief. Furthermore, there must be a re-emphasis on remedies in the law school curriculum; where it is presently unavailable, the course in Equity (under its new title) should be resurrected, and courses in Damages and Restitution should also be part of every curriculum. The soundest approach and that most avoiding duplication would be to combine these three courses into an integrated course in Remedies, so that the student would be able to observe the relationship between the various modes of relief and form judgments as to which is the most appropriate and efficacious under the circumstances. When a course in Remedies is so recognized, the position advocated in this writing will become academic. But until all law schools decide that a properly-trained lawyer must have an understanding of remedies, the teaching of specific relief in the course in Equity will assure that he at least knows when he can obtain that kind of relief for his client. Until that time then, let us have Equitable Relief, but return Equity to Jurisprudence, from which it sprung.

27 See the discussion, supra, note 19 and accompanying text.