

## THE NEW MEANING OF EQUITY\*

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### I. Introduction

New exigencies require new thinking. We have seen the courts within our generation emerge as a powerful new forum for explicit debate over major issues of public policy. This transformation in the important business of the courts suggests the usefulness of a fresh look at some of the theoretical premises of contemporary legal education, quite apart from the thinking that has spurred the clinical education movement.<sup>1</sup>

The current bias of law schooling, particularly in the first year, in favor of the ordinary action at law for damages, should be reviewed in light of the significance of contemporary actions "in equity" for affirmative court orders. Modernization of curricula by elimination of the old equity course is well advanced, and should be pushed on to completion; the body of material subsumed under the traditional heading will not sufficiently serve the needs of the coming generation of lawyers. But it is desirable that realistic modern alternatives be found which can build again into legal education strong theoretical and intellectual foundations for the real work of emerging lawyers, judges, and legal scholars.

### II. The Changing Life of the Law

The weight of important business<sup>2</sup> of the courts today (the bias contemporary legal education notwithstanding<sup>3</sup>) seems to have shifted toward the equity side.<sup>4</sup> From a phenomenological point of view, the change may simply be described as an obvious expansion in the litigation of issues of public interest in both federal<sup>5</sup> and state<sup>6</sup> courts. The paradigmatic, almost normative mode for the testing of these issues has become the action for affirmative injunctive relief, often<sup>7</sup> on behalf of an aggrieved class.<sup>8</sup>

The courts in these cases, usually but not always under statutory authority, seem to have assumed a characteristic and now familiar function of governing by decree; orders issue, not only invalidating legislation<sup>9</sup> or enjoining ongoing conduct,<sup>10</sup> but also affirmatively regulating the business of governmental agencies<sup>11</sup> and the conduct of private entities;<sup>12</sup> and these modern court orders are sometimes broadly legislative in effect, scope and detail. Sometimes the courts merely sets guidelines and orders the parties to develop a plan for the governing of the defendant's conduct; the parties return again and again to the court for modification or clarification.<sup>13</sup> No longer merely the controversial but powerful prohibitory device notoriously associated in the past with control of labor, the injunction today is a broadly affirmative remedy for large-scale social harms. Whatever substantive principles may guide the courts in finding for or against a petitioner for injunctive relief, the courts' discretion--exercised often to affect great numbers of people in fundamentally important aspects of their lives--in framing or requiring the parties to frame relief is subject to restraints which seem at best unclear.<sup>14</sup> Such litigation, indeed, presents whole categories of questions for fresh theoretical analysis.<sup>15</sup>

To those engaged in litigation of these newer sorts of cases it may be doubted how much even the most fundamental equitable concepts, as formerly understood, have

survived intact. It may be doubted, for example, whether a remedy in damages in these sorts of cases, however available, can often seem adequate to do the whole remedial job, of even whether the availability of damages creates another degree of freedom, in the sense of an alternative, broadly equivalent remedial path.<sup>16</sup> Rather, damages are now more likely to be perceived as an additional weapon in the flexible armamentarium of courts; court orders may encompass the granting of damages or other monetary award.<sup>17</sup> In short, the award of damages has become only one of many possible remedies in our unitary civil action, and that civil action may be increasingly perceived as generally equitable in nature.<sup>18</sup>

Among procedural developments creating conditions favorable to modern litigation one would thus have to include merger of law and equity, now nearly complete among American jurisdictions; and reformed codes of procedure in the majority of states, frequently based upon the Federal Rules of Civil Procedure, sometimes reflecting the 1966 amendments of the federal rules which governs multiparty litigation. But modern litigation is basically a phenomenon concomitant with and explained by a dramatic expansion (perhaps dating from the New Deal, and surely in a fresh wave, since the Warren Court) of new substantive law. It is not merely that new remedies have been created for old wrongs;<sup>19</sup> if new causes of action are being found it is also because much conduct or legislation not previously regarded as even undesirable has increasingly begun to be perceived as wrongful or impermissible.<sup>20</sup> Legislatures, agencies and courts have in two great activist eras not only removed old obstacles to the effectuation of such societal judgements, but have crystallized those judgements into law.<sup>21</sup> It is the scope of such new law that is being hammered out in the litigations of our time.

Perhaps what has occurred, then, is not accurately described as a simple shift to equity. What seems actually to have occurred is a shift in emphasis away from old-style actions at law.<sup>22</sup> There is a new reliance on substantive remedies having only attenuated connection with the "fundamentals" of tort or contract. The contemporary expansion of statutory and judicial remedies is unprecedented; there has been not only a qualitative but a quantitative shift toward new remedies, notable apart from their tendency to authorize or invite equitable solutions.

Because the remedies now sought have only recently been created, they tend to differ, sometime fundamentally, from the traditional remedies. Common-law actions for violation of the Securities and Exchange Act<sup>23</sup> will have only so much in common with counterpart remedies under state common-law deceit or even under state blue sky law. These alternatives have respectively different burdens of pleading and proof, different defenses, different remedial possibilities. New developments of this kind, formerly dependant on infrequent enactments or the accretion of centuries of case law, now crowd in upon us in unprecedented abundance. In a very real sense, whether at law or in equity, much of today's litigation has shifted direction, focus; it is no longer obvious that a thorough grounding in torts, contract, and law-side civil procedure is a genuine foundation for a legal education, or for the life work that will follow it.

### III. The Relevance of "Relevance"

At the same time that the important business of the courts has been undergoing these changes, what lawyers do and what law students expect to do has also been changing.

Although the trend may by this time have slowed, many observers would probably agree that there is, at least among entering law students, an increased interest in large questions of public policy.<sup>24</sup> Even where the new young lawyer finds that he must limit this interest to his opportunities to serve pro bono publico, he is likely also to find that his workaday business counseling, taking in as it now must continual developments in regulatory, securities, corporate, labor, antitrust, consumer, and other branches of business law, seems only distantly related to the fundamentals of his legal education. This experience of the corporate, defendants' lawyer, may be shared by the tort specialist, the traditional plaintiffs' lawyer, seeking class relief against pollution, or for damage to civil rights, or for consumer protection,<sup>25</sup> while he views the unrelated but accompanying shrinkage of his traditional<sup>26</sup> tort business under new "no fault" laws. To former lawyer the simple agreement seems less and less to demand the major exercises of his wits; to the latter, the routine litigation of personal injuries seems less and less to demand his real efforts. Their legal education was based on premises only remotely underlying the real life of the law in our day.

#### IV. The Corner into Which

##### Law Schools Have Painted Themselves

The dismemberment<sup>27</sup> of the required separate course in equity in the majority of law school in this country<sup>28</sup> has, from time to time, been the subject of lingering scholarly regret.<sup>29</sup> Writers urging the reinstatement of a separate course in equity have argued, somewhat mystically, that none of the other courses supposed to absorb a share of equitable jurisprudence (whatever that may be)<sup>30</sup> have succeeded so well as the separate course in transmitting to the students not only the profundities of that jurisprudence,<sup>31</sup> not only in the importance and limits of specific relief as a remedy alternative to damages,<sup>32</sup> but also the nature of the judicial process as a whole,<sup>33</sup> and indeed the historical background of the entire legal system.<sup>34</sup>

But those views have not prevailed. Instead substantive portions of a traditional course in equity are dealt with in first-year courses in contracts and in property (and in later elective courses on trusts and such subjects as copyright). Procedural aspects of equity are briefly considered on the first-year civil procedure course,<sup>35</sup> at least to the extent of touching upon joinder devices and upon discovery, and students may in some law schools elect advanced courses in equitable remedies.<sup>36</sup> These developments have been attributed to merger and reasons of logic,<sup>37</sup> or the requirements of economy,<sup>38</sup> of other extraneous considerations.<sup>39</sup> Whatever the cause, and whatever the particular curricular plan, the result would appear today to be that the majority of law school graduates have been given no distinct educational background on equity as such,<sup>40</sup> and probably very little educational background in equity in the other fundamental courses.<sup>41</sup> It is fair to say that the courses offered as required courses, particularly in the first year, tend to focus upon the action at law for damaged. Torts and contracts are the primary reading of beginning law students—the material the law schools consider in some way essential, and upon which they depend to turn students into lawyers.<sup>42</sup> The content of the civil procedure course tends to reflect this emphasis,<sup>43</sup> as does the occasional second-year course in jurisprudence with its concern for such concepts as fault, cause, and intent.<sup>44</sup> Public law courses might make a difference, but the reality seems to be that in a

great number of law schools, criminal law is the only first-year public law course offered.<sup>45</sup> It is fair to point out that modern inputs of criminal procedure do help to add immediacy to this course. In some schools, constitutional law is also offered in the first year,<sup>46</sup> but with traditional emphasis upon substantive, rather than procedural rules. For example, a law student, if he ever encounters *Ed parte Young*<sup>47</sup> or *Bell v. Hood*,<sup>48</sup> may do so only in an advanced elective course on federal courts. The freewheeling equity of modern courts is something today's law student is left to absorb through such second-year courses as corporations, and through unedited portions of cases on constitutional law, minority rights, environmental law, and so on.

It may be perceived that the theoretical questions in equity have always been, and today remain, overwhelmingly "Procedural." as always, our newly developing substantive law will in large part be found in the interstices of these procedures.<sup>49</sup> That the fundamental issues are procedural has contributed to a nearly universal failure to provide systematic exploration of those issues in basic course work. To the extent that clinical courses have arisen to bridge the gap they may have obscured the underlying need for a companion, scholarly approach. The fashionable rush to divest law schooling of equity has reached embarrassing completion.<sup>50</sup>

For meanwhile, the changed circumstances discussed at the outset of this comment have put the described situation in a curious new light. The sudden expansions of new law here touched upon could not have been anticipated, and were largely disregarded as the final demolition of law school equity was being effectuated. To mix metaphors, we have painted ourselves into an unexpectedly remote corner. Now our first-year curricula have begun to seem to some law teachers and some law students almost as musty and peripheral as the old course in equity; there is a feeling that studies of actions at common law for damages are no longer as central as they once seemed.<sup>51</sup> Although most law teachers would probably consider an understanding of the principles of tort and contractual liability of continuing fundamental importance to legal analysis and to an understanding of legal process, the first-year curriculum with its overall emphasis on the law side seems decreasingly able to furnish a foundation for what is studied in the second- and third-year courses, whether of the traditional or newer sort,<sup>52</sup> that in the world beyond law school "the action" is in equity.

Of course, as I have already indicated, the courses offered in the latter years generally do an adequate job of mirroring some of what is happening in the law. The problem, narrowed down, appears to be to bridge the gap between the first-year curriculum on the one hand, and these later studies and the real life of the law on the other. Yet it is the content of the first-year curriculum that law schools consider indispensable to the task of turning students into lawyers; and the first-year curriculum must also furnish, for obvious related reasons, a theoretical foundation for further studies. It is especially in this latter connection that first-year curricula may not be doing the job.

Quite apart from the problem of providing groundwork for the newer sorts of elective offerings,<sup>53</sup> for some time the first-year curriculum appears to have had little relevance to a theoretical understanding of--by now--quite traditional second-year courses. The course in commercial law is probably the most important exception, deriving analytically as it does from contractual and proprietary notions. But the remainder of the second year

seems to carry the student into terra incognita. The single most important example is probably the fundamental course in corporations. There the student cannot help perceiving that courts supervise corporate meetings, elections, financings, all in a high-handed way, with only interstitial references to what the student has already learned. This chronic difficulty is likely to have been exacerbated by the growth of modern shareholder class action; by the creation of modern federal truth-in-securities remedies; and by the proliferation of heroic decrees which these days might unscramble mergers. The newer business courses more likely to be offered as electives--antitrust, labor, securities regulation--increasingly place the student in a similar position.<sup>54</sup>

Many of the new, less traditional courses, which have been generated by the tide of new legislation enforcing constitutional rights and expanding the scope of these rights as against private defendants, are to an even greater extent, of course, deeply bound up with equitable remedies, and remote from the materials of the first year.

The traditional course in constitutional law presents a special difficulty. I have already said that procedural background for the first-year course in constitutional law is wanting, either internally in the course, or in the civil procedure course. Given in the first year the constitutional law course does give substantive grounding to civil liberties, criminal procedure, and economic regulation courses in the second and third years. But even given in the first year, the constitutional law course cannot, as it is now taught, give to the students the sense of civil equitable jurisdiction of courts so necessary to an understanding of civil liberties, economic regulation, and even criminal procedure. This is because the first-year civil procedure course barely assists the students in evaluating the procedural incidents of a constitutional issue as it may be raised.

When constitutional law is offered in the second year, a fortiori the students will be unprepared for it, as he is for the course in corporations.

Finally, the first-year criminal law and civil procedure courses flounder for a related reason of some importance, and courses in criminal procedure may not entirely remedy this deficiency; none of these courses adequately conveys the sense of what a motion is, and the force of an order upon a motion. A motion is in every way analogous to a petition for specific relief, and the force of a court order cannot be understood without a comprehension of the court's powers, their reach, and their enforcement.

From the foregoing we may fairly conclude that much has been lacking in the first-year curriculum. An input from equity might not effect a complete cure, but there can be little doubt that a genuine need for such an input exists.

#### V. Directions for Change

It would be difficult, however, to maintain that reinstatement of the traditional equity course would best redress the balance. The same developments that have overtaken the rest of the first-year curriculum have confirmed that the old-style separate course in equity is not precisely what is needed. A brief examination of the tables of contents of some of the old casebooks may confirm this view.<sup>55</sup> While material on the history of equity and on the power of courts remain useful, we may no longer feel that this is the only place in which to think deeply about specific performance of contracts, marketable title, mutuality, estoppel, subrogation, and equitable servitudes.

What, then, assuming it is ever possible to accomplish such changes,<sup>56</sup> should we do to adjust the first-year curriculum to meet some of these problems? A number of possibilities suggest themselves.

Since the deficiency appears, as I have said, to be largely procedural, as a direct, and fairly economical, alternative, the first-year course in civil procedure could be overhauled to reflect modern litigation, with greater emphasis upon motions, injunctions and class relief. This would still permit a more intensive, theoretical study of equitable remedies in the prevailing advanced course, along with the arcana of such subjects as interpleader. It might be objected, however, that the basic civil procedure course is already crammed with inexpendable material. While there is some merit in this objection, much time is undoubtedly spent on materials that could be handled with greater dispatch. The civil procedure course should not be considered a clinical one; its aim is to show the student how substantive judge-made law arises, and to explore the nature and limits of court power, of a cause of action, of proof, of judgements. In this light, it may appear that much time is in fact spent on materials of only clinical, or narrow professional interest: sewer service, attorney's "work product" privilege, and so forth. Even where the concern is more fundamental, it appears that treatment could be somewhat curtailed without great loss. Compare the amount of time spent, in this day of long-arm statutes, on curious limitations upon jurisdiction of the person, with the amount of time spent on preliminary and permanent court orders, the framing of decrees, their scope and reach, of appeal therefrom, of contempt. Consider how little is taught in the first year of class actions, as compared with, for example, joinder of claims. Finally, existing materials are not adequately considered in light of contemporary procedural problems. The question, who is bound by a decree, and appears on the forefront of law when placed in the context of the class action. To take another example, study of appeals may gain perspective from consideration, as an alternative, on injunctions against proceedings.

Thus the civil procedure courses could probably grapple far more affectively with vital modern procedural issues than is now customary--provided the right casebooks were forthcoming.

A second, more intrusive, alternative could be to move a modern equity course, covering injunctions and class action, into the "required" category, or, more drastically, into the first year.<sup>57</sup> This is a less attractive solution where there would be significant overlap with the basic civil procedure course, of where six or more subjects are already required and room for a new course does not exist. These objections would apply as well to the proposal<sup>58</sup> to add a first-year course in remedies.

A further possibility, cumulative rather than alternative to the preceding suggestions, would be to reduce the present substantive law-side emphasis of the first-year curriculum by offering constitutional and/or administrative law in the first year. The serious difficulty of finding room for this should not be under emphasized, although it may be noted that a few law schools<sup>59</sup> already do offer at least one of these courses in the first year. The point of requiring this early study would be to lay a foundation in business regulatory and civil rights law, rather than to confine early study of public law to the course in criminal law, with an inevitable loss of the equitable civil jurisdiction of courts. At the same time, this early study could give a more realistic perspective by blancing the

law-side studies now overly-emphasized in the first year. It is unfortunate that the practice seems to have been not only to put these studies off to the second year, but to make them elective.<sup>60</sup>

Finally, and most radically, the existing first-year curriculum could be made to undergo a modest recategorization, which would allow for incorporation of newer sorts of cases among traditional course materials. "Public -and private- law issues in business counseling " and "Public -and private-law issues in the protection of personal rights and interests," might be -- or might suggest to the reader -- categories perhaps more attuned to what law really is about now than the existing categories of "torts" and "contracts."<sup>61</sup> Such a recategorization would have the advantage of exhibiting the modern unitary civil action from cases on the forefront of substantive, as well as procedural, law. Again, the change would require use of prepared materials until suitable casebooks became available: the course in civil procedure could, with adjustment already suggested, reflect this reconceptualization. But this more disruptive alternative requires an uncomfortable unsettling of comfortably settled arrangements.

Doubtless the best solution, even if it could be found, would not readily find conscious implementation. Curricula seem to be accretional, intractable, and dependant upon factors extraneous to a wise choice. Those in a position to affect first-year curricula as prospective casebook writers or as member of first-year committees or hiring committees, may recognize in the problem here touched upon the need for new approaches, or at least the desirability of discussion.

\*The writer acknowledges with gratitude the helpful comments of Professor David F. Cavers of the Harvard Law School.

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1 The unresolved conflict in legal educational goals between the scholarly and the professional will here be discreetly disregarded, partly in the interest of simplicity, and partly because new-style clinical programs do advance somewhat the latter goal, while new-style sociological jurisprudence makes its helpful input to the former. Meanwhile, the core curriculum has remained largely unchanged, so that both goals may be shortchanged where change is what is needed. See, generally, Stevens, Two Cheers for 1870: The American Law School, printed in *LAW IN AMERICAN HISTORY* 405-538, an annual publication of the Charles Warren Center for Studies in American History, Harvard University, FLEMING, DL, and BAILYN, B., eds. (Little, Brown 1971)

2 The term "important business" is used in awareness that ordinary torts and contract cases still crowd civil dockets, particularly in the state courts. See, e.g., Bergen, *Old Courts and the New Law*, 27 *Rec. Bar. C. of N.Y.* 13, 19 (1972).

3 See Section IV, *infra*.

4 The beginnings of the change are noted in Tefft, *A Note on the Role of Equity in the Curriculum of the Modern Law School*, 1967 *Duke L.J.* 552, 555 (1967). See also FISS, O., *INJUNCTIONS*, 415 et seq., 484 et seq. (Foundation Press 1972): and see *Developments in the Law--Injunctions*, 78 *Harv. L. Rev.* 975, 996 (1965). See Wright, *The Law of Remedies as a Social Institution*, 18 *U. Det. L.J.* 376 (1955).

5 E.g., Berger, Report on the Federal Judicial Branch, 94 S.Ct. 1, 8 (1973); Judd, Changing Trends in Federal Litigation--a Reflection of Current Public Issues, 43 N.Y.S.B.J. 445(1971).

6 Bergen, cit. supra note 2 at 21.

7 Sharing the function of litigation of important questions of public interest are, of course, agency-initiated or attorney generals' actions for similar relief, e.g., United States v. Greenwood Municipal Separate School District, 406 F.2d 1086 (4th Cir. 1969), cert. denied, 305 U.S. 907 (1969); c.f., e.g., 42 U.S.C. 2000b (1964), 2000c-6 (1972); and, in a somewhat particularized sense, pretrial motions for orders suppressing evidence in prosecutions. It should be noted that among alternatives to the class plaintiff in the use of a plaintiff concerned organization. E.g., United States v. Students Challenging Regulatory Agency Procedures, 93 S.Ct, 2405 (1973), particularly useful where the immediately aggrieved individuals are few in number and without funds, e.g., Western Addition Community Organization v. N.L.R.B., 42 U.S.L.W. 3457 (1974). See discussion, in National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d.689 (D.C.Cir. 1971).

8 "Indeed, what seems to have occurred is the intersection of two quite distinct developments--the growth of injunctive litigation involving group harm and the growth of the class action device..." FISS, op. cit. supra note 4, at 484.

9 E.g., Roe v. Wade, 410 U.S. 113 (1973) (state restrictions on abortion)

10 E.g., Hodgson v. Corning Glass Works, 474 F.2d. 226 (2d Cir. 1973 (sex discrimination in employment))

11 E.g., Brown v. Board of Education, 347 U.S. 483 (1954) (school board ordered to integrate educational system)

12 See numerous late cases arising under, e.g., 42 U.S.C. 2000a (public accomodation); 42 U.S.C. 3610 (fair housing); 42 U.S.C. 2000 (equal employment opportunity).

13 A good example of such a litigation is furnished in FISS, supra note 4 at 325-399. See also United States v. United Shoe Machinery Corporation, 391 U.S. 244 (1968).

14 Developments in the Law--Injunctions, cited supra note 4 at 1063 ff. FISS, supra note 4 at 74 ff.

15 And, to take a more sociological point of view, for empirical research.

16 It was the view of a commentator in the 1965 Harvard Law Review note cited note 4 at 996, that the merger of law and equity "created a setting in which the relative merits of equitable and legal relief can be weighed by a single court, free from the problems of deference to a competing judicial system." See also Sedler, Equitable Relief, but not Equity, 15 J. Legal Ed. 293(1963).

17 Cf., e.g., case cited note 10, supra (statutory provision); see generally FISS, cit. supra note 4, 703ff.

18 Of course these actions are not all "in equity". Just as there will be occasion when damages or other monetary award would provide the preferred remedy for broadly social harms, note 17 supra, there will be occasion when a class plaintiff seeks relief in the case

fo a purely "private" controversy (mass air accidents may furnish examples). Nevertheless public interest cases do cluster in equity, and certainly the use of the old equitable remedy of the class device, even on the law side, does tend to characterize public interest cases. The tone of new litigation is generally equitable in nature, not only because modern rules, taking their cue from federal rules, are derived from the old federal equity rules, but fundamentally because the free-wheeling powers of modern judges to order relief are appealed to. The defendant, if there is a monetary award, will be ordered to pay, often as part of a more comprehensive decree.

19 See Developments, cited supra note 3 at 996; H.R.Rep. No.914, 88th Cong., 1st Sess. 47-49 (1963); Note Statutory Extension of Injunctive Law Enforcement, 45 Harv.L.Rev. 1096 (1932). With respect to non-statutory expansion of the injunctive remedy, see examples given supra notes 9 and 11. In addition it should be noted that new remedies in damages have also increasingly been made available to vindicate civil rights, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961) ( 1983 Jurisdiction); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 359 (1971) (implied private right of action for damages under Fourteenth Amendment), and the public interest in shareholders' rights, e.g., *J.I. Case v. Borak*, 377 U.S. 426 (1964) (damages; rescission; violation of Securities Act).

20 E.g. sexually discriminatory conduct or legislation; certain conduct in the exchange of securities; certain techniques in the disposal of industrial wastes or the protection of agricultural production.

21 Note 12 supra for statutory examples; cases at notes 9 and 19 for judicial examples.

22 Note 18 supra.

23 15 U.S.C., 78ff.; e.g., *Borak*, note 19 supra.

24 Johnstone, *Student Discontent and Educational Reform in the Law Schools*, 23 J. Legal Ed. 225 (1970).

25 But see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); see, generally, Andrews, *The Class Action Bar: It's All Cat and Mouse*, *Juris Doctor* 18 (January 1974).

26 It should be noted that traditional tort practice, prior to the advent of automotive collision cases in great numbers, had involved in significant part employer liabilities for injured employees, which practice in turn had been greatly modified by the development of work-men's compensation laws.

27 Maitland's view that equitable principles applicable to contracts, torts and property, respectively, should be studied as parts of those subject matters, MAITLAND, F.W., *EQUITY, A COURSE OF LECTURES* [1909] (Cambridge University Press 1969), prevailed at Cambridge University until 1962, and has prevailed at the majority of accredited American law schools. Note 28, *infra*.

28 A 1967 survey of catalogs of all 115 law schools then accredited by the Association of American Law Schools revealed that equity in some form remained a required first-year course in only 11 of the 115 schools. Equity was a required course in the second or third year in only 19 of the 115, and was available as an elective in only 32. Fifty-three of these schools had scrapped any version of the separate course in equity altogether. Del Duca, Comment, *Continuing Evaluation of Law School Curricula: An*

Initial Survey, 20 J. Legal Ed. 309, 310, 323, 327,331 (1968). In 1955, 17 of over 100 law schools answering a questionnaire claimed to have eliminated separate courses in equity. Stevens, A Brief on Behalf of a Course in Equity, 8 J. Legal Ed. 422 (1956). In 1949, only eight of 108 law schools responding to a questionnaire claimed to have eliminated separate courses in equity. Orfield, The Place of Equity on the Law School Curriculum, 2 J. Legal Ed. 26 (1949).

29 Newman, Some Suggestions for a Course in Comparative Equity, 14 J. Legal. Ed. 343, 346 (1962); Stevens, Orfield, cited supra note 28; Tefft, supra note 4; but see Jackson, The Teaching of Common Law and Equity in the First Two Years of a Law Course, 9 J. Soc. of Pub. Teachers of Law 314, 319, 320 (1967).

30 Sedler, Equitable Relief, but not Equity, 15 J. Legal Ed. 293 (1963).

31 Stevens, supra note 28 at 423; Orfield, supra note 28 at 40; and see Newman, supra note 29 at 348; Tefft, supra note 4 at 553, citing Bordwell, The Resurgence of Equity, 1 U. Chi. L. Rev. 741 (1934).

32 Tefft, supra note 4, at 556; and for the view that a course in remedies should take the place of the separate course in equity, Sedler, supra note 30; this latter view, though meritorious, misses the point that damages today do not seem to create a broad alternative path to relief, but merely amount to a possible prayer for relief among others in a unified single form of action generally equitable in character. What is observed in this remark is, of course, a trend, and not a statistical fact.

33 Stevens, supra note 28 at 423.

34 Id., at 242; and see, arguing for a comparative-law course in equity, Newman, supra note 29 at 343, 346.

35 Cf., e.g., COUND, J., FRIEDENTHAL, J., & MILLER, A., CIVIL PRODECURE: CASES AND MATERIALS (2d ed. 1974), probably the latest such work at the time of this writing. Equity is dealt with briefly in a historical discussion on pleading reform: about as many pages are given to injunctions and contempt as are given to the equitable "clean up" doctrine; class actions are allotted a refreshingly generous 40 pages for this second edition: discovery and pretrial [properly] a more usual 90 pages..

36 The surveys cited supra note 28 failed to sort out the content of second and third year courses offered. The scheme outlined here is the one adopted at the Harvard Law School. The course in equitable remedies offered in the second and third years was a course taught originally by Dean Ames, then by Professor Chafee, and recently by Professor (now Judge) Kaplan. Dealing originally with numerous remedies only the then courts of equity had jurisdiction to afford, the course came in time to be limited to a study a complex multiparty joinder devices, with emphasis on class actions, and also of injunctions.

37 Steven, cited supra note 28, suggests that the separate equity course was felt to be obsolete after the merger of law and equity. At 426. See also Jackson, cited supra note 29.

38 Stevens, supra note 28, at 427, notes that the dismemberment of the course in equity made room, particularly in the first year, for courses familiar in our time.

39 *Id.*, It is commonly remarked that the retirement of the proponent of a particular course at a leading law school hastens the demise of that course. The example is sometimes given of the termination of the separate course on agency after the death of Professor Seavey. See Morris, Comment, 20 J. Legal Ed. 422, 424 (1969).

40 The Del Duca survey cited supra note 28 indicates that by 1967 almost half the accredited law school offered no courses in equity as such. Comparative figures for 1973 are not known.

41 Notes 30 and 31 supra.

42 For the view that a traditional equity course should be restored to the first year see Newman, Equity as a First Year Course, 21 J. Legal Ed. 314 (1969).

43 Cf., e.g., FIELD, R., & KAPLAN, B., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURES (ed. 1973), displaying a typical emphasis on law-side cases as well as very limited presentation on equity as such.

44 Compare the statistical showing required in contemporary antidiscrimination litigation, without regard to such tort notions as fault, cause or intent; compare the concept of no-fault accident insurance; compare developments in manufacturers' and retailers' liabilities. This is not to argue that these tort notions, together with fundamental contract notions like that of commitment, do not retain their interest, but only that they seem to be relevant in increasingly peripheral classes of cases.

45 The Del Duca Survey, cited supra note 28, shows that in 1966-1967, 95 accredited law schools required criminal law in the first year, while constitutional law was required in the first year in 30, and administrative law in two.

46 *Id.*

47 209 U.S. 123 (1908).

48 327 U.S. 678 (1946): reference must be made to the Bivens case, cited supra note 19, overruling *Bell v. Hood* as decided on remand in the district court.

49 MIANE, EARLY LAW, EARLY LAW AND CUSTOM 389, as quoted in MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 (1909). A serious study of modern consumer remedies will concern itself soberly and at length with Eisen, for example, supra note 25.

50 Cribbet, J., The Evolving Curriculum--a Decade of Curricular Change, 11 J.U. of Ill. 227 (1958).

51 The emphasis upon the action of law for damages is still probably fairly representative of the important business of courts in Australia, New Zealand and England. See Jackson, cited supra note 29. See generally, ABEL-SMITH, B, & STEVENS, R., LAWYERS AND THE COURTS 111-134 (Harvard University Press, 1967).

52 Del Duca, cited supra note 28 at 314, 315, lists six subject categories additional to those listed by the AALS in the annual inventory of law teachers published by West. Among these newer subjects, half appear to deal with new public law issues: (1) Civil Liberties; (3) Juvenile Law; and (6) Urban Renewal. Today such a listing might be expanded to include such courses as Women and the Law, Consumers' Rights, and Law

and the Environment. A Law and Society course listed regularly by the AALS was offered in the year surveyed by Del Duca in 25 law schools, in two of which the course was required.

53 Note 52 *supra*.

54 Cf., e.g. Note, Impact of Class Actions on Rule 10b-5, 38 U. Chi. L. Rev. 337 (1971)

55 See, for example, CHAFEE, Z. & SIMPSON, S., CASES ON EQUITY (2 Vols. 1934). The point holds substantially true for classic equity chapters in civil procedure casebooks. Cf. FIELD & KAPLAN, cited *supra* note 43.

56 The first year curriculum is referred to as the "holiest of holies" by Cohen, in *Toward Radical Reform of the Law School Curriculum*, 24 J. Legal Ed. 210 (1972).

57 Along the lines of the Harvard model outlined *supra* note 36.

58 Sedler, note 30, suggests a course covering a specific relief in its variousness as well as the remedy in damages, and including also the classic equitable remedies of rescission, restitution, and so forth.

59 Note 28.

60 *Id.* At Harvard a choice of an elective one-point course in these or similar subjects may be available electively in the second semester.

61 Other efforts along these lines have not fared well. See, generally, Stevens *cit. supra* note 1, with respect to the early reform effort at Columbia.

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