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2014

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### Recommended Citation

David Partlett, *Remedies in a Wide-Angle Lens: Observations on Remedial Concilience*, 63 Emory L. J. Online 2053 (2014).

Available at: <https://scholarlycommons.law.emory.edu/elj-online/31>

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# REMEDIES IN A WIDE-ANGLE LENS: OBSERVATIONS ON REMEDIAL CONCILIENCE

*David Partlett\**

## ABSTRACT

*Professor Partlett notes that Professor Jimenez's article appears to be an orphan in American legal academic discourse. After a thoughtful analysis, Professor Partlett commends Professor Jimenez's work, but urges that both a broader, comparative view of remedies and a revival of the virtues of private common law method are overdue in this area of scholarship.*

## INTRODUCTION

Professor Jimenez has written an article on remedies that warrants close attention from his chosen audience: lawyers and judges. In addition, academics avid for scholarship on relatively unexplored tracts of the law ought to pay attention to this article's enlightening analysis. This area in American law has suffered from a lack of attention by academic writers. It is undertheorized and therefore appears to be lumpy and disjointed—a listing of topics without organizing principles. Most of our attention has been placed on the discrete fields of substantive liability, but the relationship between rights and remedies has been badly neglected. I blame the Realists and Oliver Wendell Holmes. We, in the United States, have seen remedies as a grab bag of tools available to courts to arrive at satisfactory enforcement of the interests invaded in any case. Here, Professor Jimenez has made a real contribution. While other scholars have pointed to the purposes of the various remedial tools, they have not looked closely at their interrelationships, their purposes, nor labeled them as carefully as has Professor Jimenez.

In Part I, I note that this article appears to be an orphan in American legal academic discourse. In fact, beyond these shores a rich vein of scholarship exists and has for a considerable time. This article would have drawn strength from that scholarship because of the theoretical sophistication that it exhibits. In this Part, I briefly describe the nature of the debate, its schools of thought,

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and its critical role in understanding the link between substantive rights and remedies. I express my leanings toward the flexibility of the common law method, rejecting formal rigid models. I note that Professor Jimenez has promised us more scholarship that is likely to tackle these topics.

In Part II, I turn directly to the article. I characterize it as falling squarely within the genre of common law pragmatism. He suggests that, in examining the law, one can discern that courts treat themselves to menus of remedial interests (i.e., protection, restoration, coercion, and retribution) that have a temporal and victim/wrongdoer aspect. This is an insightful analysis that clarifies thinking about how courts operate. I take up two ideas heavily promoted by Jimenez that run against the grain of most private law thinking. The first is his finding that the retributive interest is more important than has been conceded. The second is that the protective interest is prime; it is the one interest that rules them all.

In Part III, I argue that in considering remedies, we must attend to their interaction with substantive causes of action. Causes of action in private law are expressive of rights and interests. The selection of remedies will seek to undergird those rights and interests. In my view, the relationship is put into relief by focusing on the borderland between rights and remedies. I cite three examples.

In conclusion, I make a plea for the kind of scholarship in this article, but urge a broader, comparative view and a revival of the virtues of private common law method.

## I. REMEDIES IN THE WILDERNESS

For any area to have salience in the body of the common law, it must have a core of rules and principles built up around it over time. With Russell Weaver, I wrote some time ago that restitution had lost its place in the pantheon of private law because it lacked its academic champions and suffered from being crowded out by contracts and torts.<sup>1</sup> Restitution was seen as purely remedial, following from contract breaches or tortious wrongs. Unjust enrichment was a mere appendage to the dominant substantive private law.

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<sup>1</sup> David F. Partlett & Russell L. Weaver, *Restitution: Ancient Wisdom*, 36 LOY. L.A. L. REV. 975 (2003); see also Chaim Saiman, *Restitution in America: Why the U.S. Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99 (2008).

Remedies fell from favor as an academic subject and from law school course offerings.

Restitution is an example of how our memory has corroded. American law made a great early contribution by recognizing and articulating the law of unjust enrichment in the first *Restatement of Restitution*. That wisdom, like the One Ring in *The Lord of the Rings*, was lost. It was in use by those who didn't know its value. It was discovered elsewhere in the common law—for example, in English law where it enjoyed a revival and took its place firmly alongside the entrenched fields of common law.

Given its practical power, remedies is likely now to have a revival, and emerge again in the United States partly under the aegis of the *Restatement (Third) of Restitution and Unjust Enrichment*. In a world of legal education where stress is placed on training students for the practice of law, remedies forms a capstone to a legal education. It brings together much of the work covered earlier in the law curriculum, and, if well taught, it can ask the question of how lawyers go about seeking justice for their clients. If one is seeking to protect a constitutional or public right, or one arising in private law, students should know the law surrounding the remedies they may contemplate.

This practical task is fortified by strong theoretical grounding, as is given by Professor Jimenez. This type of article will bring remedies in from the wilderness. It is encouraging that Professor Jimenez promises that he will follow up his article with one that addresses the relationship between substantive rights and remedies.<sup>2</sup> It is that enquiry that will provide the deep dive into the structure of remedies promised at the outset of his article.<sup>3</sup>

My invitation here is to make a brief comment. I want merely to point out that even a modest dive into the structure of the private law cannot leave out the enlightening scholarship that is now a mark of other common law systems. In England and throughout the Commonwealth, private law has had an academic renaissance. In restitution, American scholars were far too insular, and failed to recognize the newly found ring.<sup>4</sup> In remedies, to date, we dared not tap the rich seam of foreign discourse. I expect that Professor Jimenez will provide that very deep dive when we see his contribution on the relationship of

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<sup>2</sup> Marco Jimenez, *Remedial Consilience*, 62 EMORY L.J. 1309, 1368 (2013).

<sup>3</sup> *Id.* at 1312.

<sup>4</sup> Partlett & Weaver, *supra* note 1, at 975.

remedies to substantive rights.<sup>5</sup> Thus, in the following sections, I describe the ways in which scholars have conceptualized the field of remedies, how it tracks a debate about the nature of the law of remedies and the inherent systematization of the common law. True clarity will flow from a strong grasp of the theoretical undergirding of the law. In our realist mist, our legal analysis of the law of remedies is wanting.

### A. *The Matrices*

Scholars in remedies have provided a number of matrices and schemas for categorizing remedies. The law of remedies can be conceptualized as secondary rights to support primary substantive rights. This approach is exemplified by Birks's classification or taxonomy of private law.<sup>6</sup> There is in this world no difference between the right and the remedy.<sup>7</sup> These are the monists.

The school that prevails is the dualist or modified dualists. The dualist would see a river between the right and the remedy, and the remedy is drawn from a grab bag to suit the exigencies of the day. Rights in contrast are ideal, and abstract.<sup>8</sup> Most, however, who have given thought to the relationship fall into a category that Berryman describes as the "integration model." These scholars are structurally dualist, but draw a closer nexus between the right and the remedy.<sup>9</sup> I take this opportunity to dub Professor Jimenez an integrationist, and indeed most private lawyers in the United States are so because we are influenced so heavily by the realist conception of the law. He impliedly criticizes a strongly dualist approach when he insists on the congruence between rights and remedies. At the same time, he accepts the dualist structure

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<sup>5</sup> Our reasons for neglecting this scholarly discourse are to be found in the roots and evolving norms of the American legal scholarly endeavor that has scorned doctrine and elevated policy and interdisciplinary—particularly empirical—scholarship. See David F. Partlett, *Être Juriste Universitaire aux États-Unis. Sur la Fabrique d'un Sacerdoce* [The Eras of American Legal Scholarship: The Making of a Priesthood], in *LE DROIT AMÉRICAIN DANS LA PENSÉE JURIDIQUE FRANÇAISE CONTEMPORAINE* [AMERICAN LAW IN CONTEMPORARY FRENCH LEGAL THOUGHT] 359, 362–63 (Pascal Mbongo & Russell L. Weaver eds., 2013).

<sup>6</sup> See Peter Birks, *Definition and Division: A Meditation on Institutes 3.13*, in *THE CLASSIFICATION OF OBLIGATIONS* 1, 23–27 (1997).

<sup>7</sup> See *Chase Manhattan Bank v. Israel British Bank* [1981] 1 Ch. 105 at 124 (Eng.) (Goulding, J.).

<sup>8</sup> Jeffrey Berryman, *The Law of Remedies: A Prospectus for Teaching and Scholarship*, 10 *OXFORD U. COMMONWEALTH L.J.* 123, 125–26 (2010).

<sup>9</sup> *Id.* at 126. For a matrix in the style of Professor Jimenez, but with elaboration, see Ken Cooper-Stephenson, *Principle and Pragmatism in the Law of Remedies*, in *REMEDIES: ISSUES AND PERSPECTIVES* (Jeffrey Berryman ed., 1991).

in writing an article that examines remedies as a discrete field. He has raised his flag, although we await his next article for an explication.

The article is careful to show us how rights that protect interests may be placed in one or more of the following boxes: protection, restoration, coercion, and retribution. He describes a temporal element (*ex ante* and *ex post*) and a point of view (victim and wrongdoer). The monist would reject this approach, while most Commonwealth scholars will perceive familiarity. The integrationist model accords with the dynamics and traditions of the common law. It is this model, I contend, that best fits our tradition. We need then to look at the system builders in the style of Roman law and then turn to the more convincing pragmatic structure of the common law. The divide is described in a wider compass by Isaiah Berlin in his famous tract, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History*. The hedgehogs “relate everything to a single vision, one system, less or more coherent or articulate . . . [A]nd on the other side, [are the foxes] who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some de facto way . . . .”<sup>10</sup> Most American remedies scholars are clearly foxes. But we need to understand the hedgehogs.

### *B. System Builders and the Common Law*

In the style of Birks, Rafal Zakrzewski also proposes an intricate taxonomy that addresses the questions of how remedies as rights are generated, what their content is, and what they confer on the claimant and require of the defendant. He draws a distinction between two classes of remedies: replicative and transformative. In the former, the focus is on the substantive right being replicated in the remedy. The central issue is the content of the remedy; as it is not fully charted by the right, it is “chosen by the judge from case to case.”<sup>11</sup>

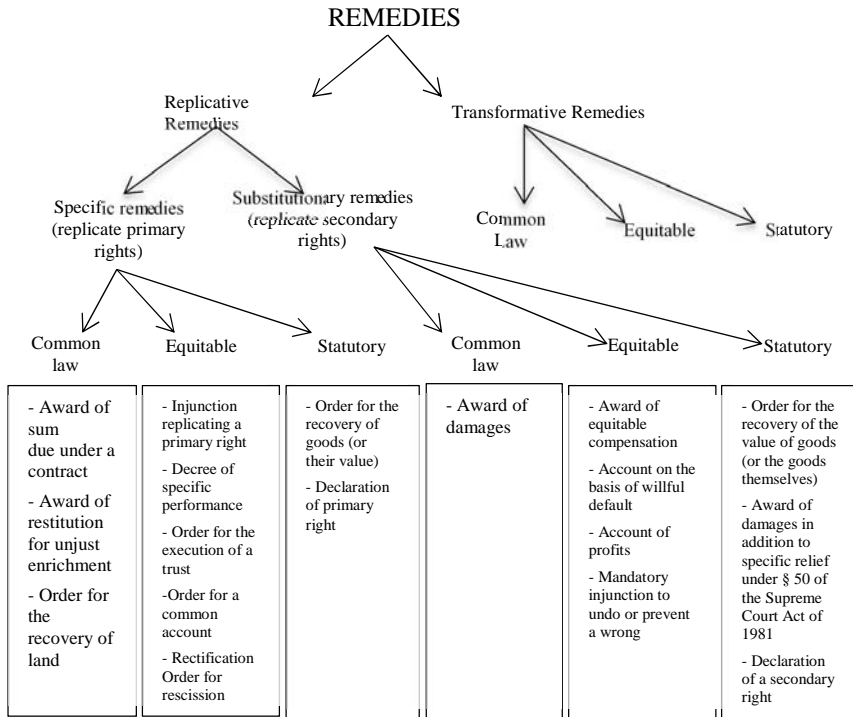
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<sup>10</sup> ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX 2* (Henry Hardy ed., 2d ed. 2013).

<sup>11</sup> See RAFAL ZAKRZEWSKI, *REMEDIES RECLASSIFIED* 82–83 (2005).

APPENDIX

The proposed taxonomy can be represented diagrammatically<sup>12</sup> as follows:



<sup>12</sup> *Id.* at 84 fig. 5.1.

This approach describes what can be called a law of court orders. It allows for, and is intended to, instill a rigor that stops courts from will-o'-the-wisp creating remedial rights and applying them with mysterious discretion. This intuitive law-making would contemplate a “world of perpetual volcanoes.”<sup>13</sup> The one American scholar to adopt the line of the law of court orders is Professor Zipursky.<sup>14</sup> He and Professor Goldberg have formulated a theory of tort law that accords with this approach: it is their civil recourse theory that must be accompanied by a firm and reflective theory of remedies.<sup>15</sup> One is reminded of the great debate in equity in the nineteenth century. Was equity to be cabined and disciplined as to look formal and law-like? Lord Eldon was the organizer and classifier who would reduce discretion. Lord Eldon’s conservative instinct was driven by a flawed conception of equity as unruly and unpredictable.<sup>16</sup>

The Birksian model-building has the same kind of claim that the critics of equity employed. It was that certainty and rigor have great value. Like cases are treated alike—a foundational tenet of a just legal system. For Birks, one needs a systematic theory, a map of the common law that will provide the discipline lacking in common law practice. This will rid us of the chaos of the common law, that no less than Oliver Cromwell noted when he described the common law of property as an “ungodly jumble.”<sup>17</sup>

This is, I venture, a caricature of the common law that does not recognize its inherent systemeticity.<sup>18</sup> The common law adheres cohesively through its disciplined practice of deliberate, practical reasoning; this is the artificial

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<sup>13</sup> Berryman, *supra* note 7, at 128 (citing Peter Birks, *Three Kinds of Objection to Discretionary Remedialism*, 29 U. W. AUSTL. L. REV. 1 (2000)).

<sup>14</sup> See Benjamin C. Zipursky, *Philosophy of Private Law*, in JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 624 (Jules Coleman & Scott Shapiro eds., 2002).

<sup>15</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2010).

<sup>16</sup> The notion of indeterminacy of the common law can be observed in contemporary law. Take the view of the tort of intentional infliction of emotional distress exhibited in Chief Justice Robert’s opinion in *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (finding that the parameters of the tort of intentional infliction of emotional distress were too uncertain to accommodate the First Amendment free speech protections, but not alluding to the long and detailed jurisprudence on the operation of the tort in the funeral setting). For some, “indeterminacy” is a feature of a complex legal system. See Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 4 (1992).

<sup>17</sup> ROBERT F. HORTON, OLIVER CROMWELL: A STUDY IN PERSONAL RELIGION 144 (1897); see Thomas Erskine Holland, *ESSAYS UPON THE FORM OF THE LAW* 171 (1870) (describing the common law as “chaos with a full index”). Professor Jimenez clearly has read Jeremy Bentham thoroughly. Bentham too had a dim view of the common law. He saw legislation as rational and responsive to his utilitarian measure.

<sup>18</sup> Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 COLUM. L. REV. 16 (2000).



reason of the law.<sup>19</sup> The system is denoted by public-mindedness in solving problems with a regard to justice, a reasoned discourse in shaping its rules and doctrines, a common endeavor by exercise of common practice, a forging of rules and principles in court, and a discourse disciplined by its focus on concrete cases tethered to past decisions and structured by (a) analogical reasoning, (b) mindfulness of the temporal aspect of law, and (c) a keen sense of its practical task of ordering and coordinating social interaction in the community.<sup>20</sup>

Most importantly, the law gives normative guidance over time to its subjects, providing, as Waldron says, “a unified realm of legal meaning and purpose.”<sup>21</sup> I suggest that the best scholarship in the common law realm shares these indicia of artificial reason. It strengthens our understanding of the law and reinforces its systemeticity. It will show within the discourse how doctrine can be changed to accommodate change over time. It will show the path of normative guidance: inconsistencies and coalescence. The Birkian model-building enterprise attempts, as Postema dubs it, an “*elegantia juris*” that smothers the expression of practical values concerning justice, integrity, or the rule of law.<sup>22</sup> It freezes the common law’s ability to change over time, constrained, as it is, by the terms of the system or taxonomy within which it operates.

As American scholars come to appreciate the field of law called remedies, we ought to perceive the inherent normative power of the common law rather than devise elegant frames of explication. I suggest that Professor Jimenez’s article exemplifies the common law approach—the way of the fox. The application of the law of remedies will be the stronger if we adhere to the principles of the common law and eschew elegant models that require a procrustean fit.

It will be abundantly apparent that this stream of scholarly debate must be absorbed and applied in the work that remedies scholars will undertake. If we undertake this task, the structure of our private law will be more certain and its foundations soundly based.

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<sup>19</sup> Gerald J. Postema, *Law’s System: The Necessity of System in Common Law*, N.Z. L. REV. (forthcoming 2014) (manuscript at 15), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2324438](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324438).

<sup>20</sup> *Id.* at 15–16.

<sup>21</sup> Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1722 (2005); see also Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 35 (2008).

<sup>22</sup> See Postema, *supra* note 19, at 24.

## II. PRAGMATIC THOUGHT

### A. *The Retributive Interest*

Professor Jimenez shows how the law of remedies provides vindication for a number of substantive rights in multiple ways within the labeled boxes. Retribution may be substitutionary or in kind. The law favors a judicial remedy rather than self-help in most circumstances.<sup>23</sup> He asserts that in breach of contract there lurks a retributive interest necessary “to make sense of numerous remedial decisions made by courts.”<sup>24</sup> Usually we eschew retribution as foreign to contract. He discusses Cardozo’s opinion in *Jacob & Youngs, Inc. v. Kent*.<sup>25</sup> This has usually been looked at through the lens of restoration, which is the measure that will make up for the lost expectation under a contract and will reflect the lesser economic waste. Thus if the cost of replacement or repair exceeds the loss of market value flowing from the breach, the law opts for the latter. But what if the breach is wrongful and willful? To keep the purity of the right–remedy nexus, the action is sometimes sounded in tort. This is the case with the breach of the covenant of good faith, which allows for the more capacious tort damages that would include punitive damages.<sup>26</sup>

But do contract damages allow for a retributive aspect? For a range of contracts, expectation damages will be inadequate; these are relational contracts and here the law allows for injunctions to ensure that the real losses are captured, thus reducing the agency costs inherent in the relationship that is established. Thus, as Jimenez recognizes, section 39 of the *Restatement (Third) of Restitution and Unjust Enrichment* contemplates disgorgement of profits in the case of opportunistic breach.<sup>27</sup> Intentionally taking advantage of another in a contractual relationship should lead to greater than expectation damages. I contend that the remedy here smacks more of deterrence than retribution. It is the prospect of the coercive remedy, *ex ante*, that helps focus the minds of the parties of the contract at the outset to appreciate the commitment; it acts like a liquidated damages clause. Expectation damages would not do the job in eliding the risks of entering relational contracts that provide the conditions for

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<sup>23</sup> Self-help is not regarded as a remedy by those adhering to the monist theory. See Zakrzewski, *supra* note 11, at 47–48.

<sup>24</sup> Jimenez, *supra* note 2, at 1328.

<sup>25</sup> *Jacob & Young, Inc. v. Kent*, 129 N.E. 889 (1921).

<sup>26</sup> See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (“[P]unitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence . . .”).

<sup>27</sup> Jimenez, *supra* note 2, at 1333 n.85.

exploitation. This is the reason why fiduciary obligations generate remedies that go beyond compensation.

I would use the same reasoning for the protection of property rights. In normal circumstances, the law does not contemplate that one person may take the property of another on condition that a court will later set the price through a damages award. I disagree with Jimenez who views the “Great Onyx Cave” cases<sup>28</sup> as drawing on retribution. They do not, I contend, punish bad behavior; rather they establish again a protective and coercive remedy that ensures that parties who wish to obtain property do so through the market. But I concede that it not always easy to distinguish retribution from deterrence, particularly when courts use loaded retributive rhetoric.<sup>29</sup> This is certainly the case with punitive damages. And for a court to vindicate, through a responsive remedy, the interest, serves a fundamental social purpose of channeling disputes to public process than individual vengeance.<sup>30</sup> In my view then, the retribution box is lightly populated in the case law. The examples are mainly, to use Jimenez’s nomenclature, *ex ante* protective.

### B. *The One That Rules Them All: “Protection”*

This last assertion takes me to an intriguing suggestion in the article. At the outset, we are told that the “protective interest seems to be the least appreciated and developed of the four remedial interests.”<sup>31</sup> We are given the promise that this is “arguably the most important.”<sup>32</sup> Later in the article, we are taken inside a judge’s head as she ponders the remedial boxes that are at play in establishing a remedy. The policies in one box influence those in the other boxes.<sup>33</sup> But the one to “rule them all”<sup>34</sup> is the “protective interest.” This interest “has the ability to descriptively unite what might otherwise seem like

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<sup>28</sup> Jimenez, *supra* note 2, at 1338–39.

<sup>29</sup> David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 800–01 (1996) (identifying retribution as a basis for punitive damages and identifying the close historical relationship between tort and criminal law as justifying its role). The restorative interest may also be found in punitive damages where the usual measure is not adequate to put the victim back in the position she enjoyed prior to the commission of the tort. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 389 (2003).

<sup>30</sup> See *Lamb v. Cotogno* (1987) 164 CLR 1, 9 (“It is an aspect of exemplary damages that they serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace.”).

<sup>31</sup> Jimenez, *supra* note 2, at 1314.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1367.

<sup>34</sup> J.R.R. TOLKIEN, *THE LORD OF THE RINGS: THE FELLOWSHIP OF THE RING*, at vii (Del Rey 2012) (1954).

idiosyncratic remedies accomplishing wildly different remedial goals and to normatively provide a foundation upon which all remedies might be based.”<sup>35</sup> This leads Jimenez to ask what is being protected and to foreshadow that answering this question will require an examination of the relationship between primary rights and secondary or remedial rights.

This will take us to my remarks earlier. Much depends on the meaning of this box. Certain remedies are directly designed to protect rights *ex ante*. Injunctions—both preliminary and permanent—do so directly. Other remedies do so indirectly. Restorative damages in personal injury cases protect victims against being injured at the hands of wrongdoers. What Jimenez does nicely in his article is show how remedies interlink. They do so to support interests or policies found in the substantive law. So to the extent that the law of torts is designed to effect an efficient allocation of resources, the remedies ought to conspire to that end. If this is what is to be protected, the project is what has occupied us over many years. Others who have distributive justice in mind would see that desideratum as prime. Those of a non-consequentialist mindset, corrective justice scholars like Ernest J. Weinrib, would look to remedies as secondary rights. Those rights must fit together within the ideal of corrective justice. The relationship between the substantive right and the remedy is causal. The law and economics framework is anathema to that analysis. The essential matter there is not interpersonal justice but the setting of a price for harm-creating activities.<sup>36</sup> For others, the interest is personal responsibility engendered through a right of civil recourse.<sup>37</sup>

This does not exhaust the rights and interests that are to be protected. Human dignity may be an ultimate right that at bottom is to be protected in private law.<sup>38</sup> It follows that if we are to put these fundamental goals and purposes in the protective box, the question is as large as the field of law. I believe that in the context of Jimenez’s article, the question should be more modest. The judge will ask herself not an ultimate question, but a very practical one. Given that courts identify rights intended to be protected, what remedies are available that will maintain those rights? Perhaps, again for pragmatic reasons, a court may refer a victim to his restorative remedial rights,

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<sup>35</sup> Jimenez, *supra* note 2, at 1367.

<sup>36</sup> Jimenez, like many scholars, treats corrective justice as a possible goal of private law. But corrective justice is not consequentialist and thus is not a goal but the essence of that body of law.

<sup>37</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1650 (2002).

<sup>38</sup> See Berryman, *supra* note 8, at 135–38.

i.e., damages. This would occur where an injunction is not ordered because the public interests militate against its issuance.<sup>39</sup> The word “protective” can in one sense be used for every remedy, but this is surely not what Jimenez wants to say. As Ronald Coase said, rights will conflict.<sup>40</sup> It takes two to tort; remedies will be shaped by society’s need to coordinate citizens’ activities one with another.

For example, in the case employed by Jimenez to show the force of the protective interest, *Pardee v. Camden Lumber*,<sup>41</sup> the interest that is balanced and also protected is that of lumber companies that were faced with a messy land registration system that discouraged investment.<sup>42</sup> The response of the earlier West Virginia courts, which was to grant a damages remedy for taking lumber by trespass, is entirely understandable. It was not the increasing value and scarcity of lumber, as the court opines, but rather the greater certainty in title to land that persuaded the court to grant the usual property-protecting remedy of injunction. This then supports private ordering because clear-cut property rights may be more certainly priced and therefore traded. To the contrary, even if property rights are well defined, courts may refer an aggrieved property owner to her restorative remedy. The U.S. Supreme Court in *eBay Inc. v. MercExchange, L.L.C.* controversially found that injunctive relief could not be presumed to protect the patent right there at stake.<sup>43</sup> Trumping that property right drawing its remedy from the protective box was the sense that patent trolls were inimical to the public interest.<sup>44</sup>

I would argue then that the four boxes interact, but the one that rules them all is not found in any one box. The shape of the remedy will depend upon the fundamental interests at play, which turn on the fundamental inquiry about the goals and purposes of the body of law in the circumstances of the case. No doubt protection of property is high on the scale of interests, but it is not supreme. Jimenez puts protection of property at the pinnacle. But property is a

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<sup>39</sup> See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 874 (N.Y. 1970). It is to be noted that this case misstates the applicable law. As Douglas Laycock nicely shows, the law did not mandate the issuance of an injunction upon a showing of a substantial interference with the right. Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT LAW 1, 18 (2012).

<sup>40</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

<sup>41</sup> 73 S.E. 82 (W. Va. 1911).

<sup>42</sup> Jimenez, *supra* note 2, at 1355.

<sup>43</sup> 547 U.S. 388, 392–93 (2006).

<sup>44</sup> For a critical appraisal of the Court’s decision, see Mark P. Gergen et al., *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203 (2012).

mechanism rather than a fundamental value.<sup>45</sup> It supports an exchange system and an efficient allocation of resources.<sup>46</sup> It may attach as a condition precedent to a fundamental value of human dignity. The identification of interests and values in substantive fields of private law is a very deep dive indeed. Jimenez's article begins what is the proper common law task, by way of argument, of providing normative guidance and the development of applicable principles. It establishes nothing more.

### III: THE BORDERLAND OF RIGHTS AND REMEDIES

One last matter ought to be raised when we consider Jimenez's article. Primary rights will interact in important ways with remedial rights. I make these three points briefly:

- A. Sometimes we find that elements of primary rights cross the border into remedial rights. The prime example is the defense of contributory negligence in tort. The move to comparative fault or comparative negligence has collapsed the defense with its carefully articulated conditions for application into a discretionary matter in remedy. Although some jurisdictions place some limits on the apportionment of damages, the law now is highly discretionary and in the maw of the jury. The capacity for review is limited. It really falls into the restorative *ex post* box of Jimenez's.<sup>47</sup>
- B. Remedial rights make a system of law work flexibly to promote justice. Often the law, for reasons of strong signaling of rights and obligations, will define those rights and obligations starkly with bright-line edges. Jimenez is a champion of property rights. But our law demands more nuance where justice is required. The interest in retribution is surely a manifestation of this.

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<sup>45</sup> See ROBERT STEVENS, *TORTS AND RIGHTS* (2007), for an articulation of the central roles of rights in tort law. Whether rights are so critical depends upon whether his thesis is an accurate description of the law. The explanation may be elegant, that is, internally consistent, without satisfying this condition.

<sup>46</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1119 (1972).

<sup>47</sup> James Goudkamp is careful to distinguish defenses from remedial principles like mitigation of damages and apportionment. See JAMES GOUDKAMP, *TORT LAW DEFENCES* 3–7 (2013). For a discussion of Goudkamp's dualist position of substantive tort liability and defenses, see Eric Descheemaeker, *Tort Law Defences: A Defence of Conventionalism*, 77 MOD. L. REV. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2395119](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395119), in which again one sees a discourse relating to private law not touched by American scholars.

For example, criminal law cannot punish all wrongdoing that is driven by malign intent. At least a part of punitive damages is designed to fill that deficit in punishment.<sup>48</sup> The equitable doctrine of clean hands performs this function in part. Again, but on the opposite side, take the famous case of *Regina v. Dudley and Stephens*,<sup>49</sup> where three survivors of a shipwreck killed and ate the fourth, a cabin boy, in the lifeboat.<sup>50</sup> They were held criminally liable for the boy's death under the preexisting rules of murder. But the sentences were light, responsive to the prevailing mores of the sea and the exigent circumstances. The law, with its need to provide moral normative guidance, was upheld but ameliorated in its remedial aspect. The discretion in remedies accommodates the remedial interests that Jimenez sets forth.

In civil law, the strict compliance with property and personal rights is upheld in the trespassory torts by the award of damages. Damages may be nominal where the tort was committed but resulted in no harm. The defendant's act, for example, may have invaded the plaintiff's bodily integrity, constituting battery, but may have caused no harm or even provided a benefit. The rights of the plaintiff are vindicated in holding that she may recover nominal damages. At the other pole, if the defendant's actions show an arrogant disregard for the plaintiff's rights, the court may award punitive or exemplary damages. The remedies provide the safety value for an injustice that might flow in strict enforcement of rights.

Another important example of the law softening hard property rights through remedies in the civil context is seen in the famous case of *Vincent v. Lake Erie Transportation Co.*<sup>51</sup> Here the defendants in the context of a sudden tempest in Duluth trespassed on the defendant's dock and tied its boat thereto. The cost of not taking this step would have been great. The boat, tossed in the storm, was likely to have crashed into other craft in the harbor. The

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<sup>48</sup> See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003) (applying Illinois law).

<sup>49</sup> 14 Q.B.D. 273 (1884).

<sup>50</sup> A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE* 238–51 (1984).

<sup>51</sup> 124 N.W. 221 (Minn. 1910).

mooring of the boat, however, caused damage to the plaintiff's dock. The court found that the trespass was privileged upon the defendant paying compensation for the loss. It follows that the defendant is allowed to take property upon the payment of a court-imposed price.

What would allow a bypassing of the iron rule that a property owner may exclude others? It is that injustice may flow from standing on property *in extremis* where the conditions for market exchange are suspended because of an emergency for which the parties are not responsible. Here, the court will substitute the bargain that would have been forged between the parties had they been able to negotiate in advance. Although the *Vincent* rule is much debated, it does show how rights and remedies can interact to reach solutions. The *Vincent* rule is also supported by the restitution principle that in contexts where it is unrealistic to depend on private ordering through markets, an intervention by a person to render help may be regarded as the bestowal of a benefit for which the advantaged person may be required to provide restitution. Thus, providing necessary medical services to an unconscious person entitles the rescuer to restitution.<sup>52</sup>

It is in remedies that the space is found to bring ameliorative justice to the law, while the substantive law announces normative guidance. Murder is not hedged by utilitarian considerations.<sup>53</sup> Note how this amelioration of harshness acts just as the Chancellor's equity jurisdiction functioned to soften the strict application of the common law.<sup>54</sup>

- C. One last example of the relationship of this borderland between substantive rights and remedies is the breach of a right that finds no corresponding traditional remedial right. Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>55</sup> for

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<sup>52</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–22 (2010).

<sup>53</sup> The moral dilemmas are well known through the thought experiment of acting to throw a switch to divert a train to avoid the deaths of five people when the act will certainly cause the death of another person. Phillipa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 23 (1978); Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

<sup>54</sup> Take here the right in equity in relief of forfeiture.

<sup>55</sup> 403 U.S. 388 (1971).



example, the court may admit a clear breach of a person's constitutional rights by federal government officials yet not grant a remedy. To be afforded a remedy depends upon congressional intention and judicial deference to the Executive. In *Ashcroft v. Iqbal*,<sup>56</sup> the Court denied a remedy for an individual right of action to vindicate by a damages claim protection from "intentional, religiously-based mistreatment at the hands of the federal government."<sup>57</sup> Iqbal went without compensation, that is, without restoration of his rights. In the Second Circuit Court of Appeals case *Arar v. Ashcroft*, a Canadian citizen was specially rendered to Syria while transiting in JFK airport in New York.<sup>58</sup> He complained that the Attorney General and other U.S. officials had violated the Torture Victim Protection Act and his Fifth Amendment substantive due process rights based on his treatment in Syria.<sup>59</sup> Focusing on the *Bivens* claim, the Second Circuit left it to Congress to decide if a remedy were appropriate.<sup>60</sup> State secrets and foreign affairs counseled hesitation in founding a private remedy. The *Bivens* action generates in remedial rights a null set when military matters and torture are in play.<sup>61</sup>

In these cases, public policies are at play: courts are reluctant to second-guess high public officials on national security matters. It matters not that the executive offices are judges in their own cause. In these cases, rights shadow no remedy. The issue is whether the very right to bring the action itself through exercise of a court's jurisdiction opens up an informal remedy, a way of petitioning government to recognize injustice in rights violations.<sup>62</sup> The right then is taken seriously although productive of no judicial remedy. Government cannot "deep six" violations of rights; the matter is aired in the court's discourse of the published opinion. Other informal remedies—much neglected by remedies scholarship—

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<sup>56</sup> 556 U.S. 662 (2009).

<sup>57</sup> James E. Pfander, *Iqbal and Constitutional Torts: Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN ST. L. REV. 1387, 1400 (2010).

<sup>58</sup> *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 581.

<sup>61</sup> See also *Vance v. Rumsfeld*, 701 F.3d 193, 195 (7th Cir. 2012). For an in-depth discussion of *Vance*, see Katrina Carmichael, Comment, *The Unconstitutional Torture of an American by the U.S. Military: Is There a Remedy Under Bivens?*, 29 GA. ST. U. L. REV. 1093, 1094–95 (2013).

<sup>62</sup> In *Arar*, the Canadian government provided compensation. 585 F.3d at 590.

may follow, namely apology, making amends, or governmental action to compensate.<sup>63</sup> There is a large stream of scholarship about truth commissions and other mechanisms that relate to the intractable problems of societies like South Africa that transition from repression of rights to democracies. Here restitution is often impossible; instead, the measure of justice is more in the hearing of voices in the process.<sup>64</sup>

## CONCLUSION

In the end, the major contribution of Professor Jimenez is to publish a piece of scholarship that provides a theoretical framework to a private law tract and provides a guide for courts serious about bringing order to the field. This is all too rare in American scholarship. More of us in this neck of the woods need to join the international and transnational conversation about private law. The law of remedies will be strengthened through such engagement.

How much more will be accomplished once the rich vein of comparative discourse is tapped?<sup>65</sup> I am interested to know if Professor Jimenez agrees with me about his pragmatic dualist approach. How far will he adopt the law of court orders approach? What is his reaction to the schema above proposed by Zakrzewski? How does his thesis accommodate the borderland of substantive right and secondary remedial right? One of the fundamental weaknesses of American law is to ignore the richness and cohesion of the common law. The Supreme Court has often given short shrift to the common law.<sup>66</sup> In the rush to

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<sup>63</sup> Robyn Carroll, *Beyond Compensation: Apology as a Private Law Remedy*, in *THE LAW OF REMEDIES: NEW DIRECTIONS IN THE COMMON LAW* (Berryman and Bigwood eds., 2010). Apology is commonly found in defamation cases in Commonwealth nations. The efficaciousness of apology is pointed out by RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 41–47, 86, 87 (1987). For a discussion of remedies promoted by 2006 uniform defamation law in Australia, see Andrew Kenyon, *Six Years of Australian Uniform Defamation Law: Damages, Opinion, and Defence Meanings*, 35 U.N.S.W. L.J. 31 (2012). The pressure for compensation depends on a democratic process that is subject to political tempers.

<sup>64</sup> See Bernadette Atuahene, *Can You Hear Me? The Importance of Being Heard in Processes Designed to Remedy Past Wrongs*, *LAW & SOC. INQUIRY* (forthcoming) (on file with author) (setting forth the process surrounding recompense for wrongfully taken land).

<sup>65</sup> See Lionel Smith, *Peter Birks and Comparative Law*, 43 *REVUE DE DROIT DE L'UNIVERSITÉ DE SHERBROOKE* 193 (2013) (extolling the virtues of comparative law in the law school curriculum).

<sup>66</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011); see also David F. Partlett & William W. Gill, *A Tale of Two Ironies: In Defense of Tort*, 25 *PAC. MCGEORGE GLOBAL BUS. & DEV. L.J.* 343 (2012). Courts elsewhere have taken the purposeful step of protecting rights within the common law tradition. See *Lange v. Australian Broad. Corp.* (1997) 189 CLR 520 (Austl.); and *Reynolds v. Times Newspapers Ltd.*, [2001] 2 AC 127 (H.L.) (appeal taken from N. Ir.), where the defense of qualified privilege in defamation was given greater scope in affording space for free speech.

legal scholarship of an interdisciplinary stamp, common law doctrine has been ignored to the detriment of the law.<sup>67</sup> Legal scholars have a duty to explicate the law more thoroughly for the benefit of our courts and the corpus of the law in a world of growing complexity and transnational dimensions. It is salutary to welcome this article in the pages of the *Emory Law Journal*.

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<sup>67</sup> Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 65 WASH. & LEE L. REV. 993, 1003–06 (2008).