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第三版 Third Edition

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MODERN AMERICAN REMEDIES

案例与资料

Cases and Materials

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总　序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出："为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。"

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要（Emanuel Law Outlines）美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼、语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析（Examples and Explanations）由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力的培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列（Casebook Series）覆盖了美国法学校院的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要（Casenote Legal Briefs）美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

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Preface to the Third Edition

The basic theory and structure of this book are described in the preface to the first edition. The five goals or purposes of the first edition are unchanged, and the pedagogical theory is unchanged. I have kept everything that worked.

There were significant organizational improvements in the second edition, and I have retained that edition's structure with only a little tweaking. I have moved qualified immunities from Chapter 10 to Chapter 4, and inserted one new daily unit, on restitution and contract, in Chapter 6. The book now contains 64 daily units of 15 to 20 pages each; these units are more fully described in the Teacher's Manual and in the preface to the second edition.

The principal changes in this edition are a thorough updating within each unit. I keep learning new things; this edition may have more information than its predecessors. Some units have been completely rewritten; some appear little changed; most have been revised to some extent in between these two extremes. In each unit, however much or little changed, I have cast a wide net for interesting and important new developments.

In some chapters, updating required reorganization. I have reorganized the structural injunction material in Chapter 3, reflecting important new cases and doctrinal change at the Supreme Court. I have imposed a manageable structure on the flood of decisions about immunity and retroactivity in Chapter 4. I have reorganized much of the restitution material in Chapter 6, reflecting new scholarship, my own rethinking, and the ongoing work on the *Restatement (Third) of Restitution and Unjust Enrichment.* There are smaller examples within individual units.

The most basic material is changed least, because the most basic principles change most slowly, and because I have tried to avoid the fallacy of believing that a recent example is necessarily better than a carefully selected older example. Even so, there are 23 new principal cases, and I believe that each is a clear improvement over the case it replaces. Some of these new

cases represent important doctrinal developments; some are simply better illustrations or better teaching vehicles than the cases they replace.

As in earlier editions, I have deleted citations and footnotes, and corrected obvious typographical errors, without notation. I have also generally standardized citation form inside cases and excerpts, and I have substituted full citations in places where the court used a short form referring back to an earlier citation that has been deleted. All other substitutions are indicated by brackets, and all other omissions are indicated by ellipses.

Douglas Laycock

April 2002

Preface to the Second Edition

The basic overview of this book is in the preface to the first edition. The five goals or purposes of the first edition are unchanged. The basic organizational structure is unchanged. The pedagogical theory is unchanged. The book has served my own teaching purposes, and the response of other teachers and of students has been gratifying. I have not eliminated things that worked.

Yet I think the book is much improved. The basic organizational structure now extends to the whole book. Part II of the first edition has been integrated into the basic structure from Part I, so the book is no longer divided into two parts. The new edition is much more focused than the old; experience has given me a more confident sense of what are the central points and of what can be omitted. Organization within chapters is stronger, and better labeled with subheadings. The cases are more finely edited; the notes contain more information.

Modern word-processing enabled me to work with a much clearer sense of length, so that units of material are uniformly fifteen to twenty pages long. These units are designed to be taught in a single day on the following assumption: that class discussion will focus on the most important points, usually using the principal cases or problems, and that much of the informational content in the notes will not be discussed in class. Instructors who want more depth and less breadth can easily teach two units a week instead of three, or one unit every two days. The Teachers' Manual will contain more information about these units.

The case selection has been improved by the simple technique of keeping the best and replacing the rest. Seventy-four principal cases are retained from the first edition; thirty-seven new cases have been added. Some of the new cases are authoritative statements of new developments; some are illustrative of recent trends; some are simply better teaching vehicles than

the cases they replace. Many of the cases dropped from the first edition are now used as illustrations in the notes.

Aside from the integration of the old part II, the most important conceptual revisions are in Chapters 4, 7, and 8. Chapter 4 has been generalized from a chapter about the irreparable injury rule to a chapter about all the reasons for choosing among different remedies. Chapter 7, on punitive remedies, and part B of Chapter 8, on attorneys' fees, incorporate the outpouring of new law on those issues from the Supreme Court of the United States.

As in the first edition, I have deleted citations and footnotes, and corrected obvious typographical errors, without notation. I have also generally standardized citation form inside cases and excerpts, and I have substituted full citations in places where the court used a short form referring back to an earlier citation that has been deleted. All other substitutions are indicated by brackets, and all other omissions are indicated by ellipses.

There are repeated citations to two new books in the field, each of which appeared in two versions. Some explanation here will simplify citation later. Dan Dobbs's treatise is now in its second edition and is an indispensable reference work. In this book, all citations to that treatise are to the full three-volume edition, Dan B. Dobbs, *Law of Remedies* (West Practitioner Series, 2d ed. 1993). There is also a one-volume abridgement, Dan B. Dobbs, *Law of Remedies* (West Hornbook Series, 2d ed. 1993).

All citations to my own book are to the book version, Douglas Laycock, *The Death of the Irreparable Injury Rule* (Oxford University Press 1991). This also appeared in an abridged version, Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687 (1990). This project attempts to restate the law for choosing among alternative remedies; in the course of documenting the proposed restatement, the book version collects more than fourteen hundred cases illustrating the full range of uses to which injunctions have been put in modern American law. The insights of that book are integrated into Chapter 4 of this one, alongside a more traditional account of the irreparable injury rule.

Douglas Laycock

March 1994

Preface to the First Edition

Why Another Casebook?

This didn't start out to be a casebook. I put together some materials to supplement another casebook, and they just kept growing. It gradually became apparent to me that the things that I wanted to do with my course couldn't be done with any of the other books on remedies. This book is designed to let me and other teachers so inclined do those things. Some features of this book appear in some other books, but I think its combination of features is unique. That is the only reason I would bring a new book to market.

Most important, the book reflects my belief that a course in remedies should not be a series of appendices to the substantive curriculum. It contains no chapters on remedies for particular wrongs or particular kinds of injury. Such chapters are important, but their place is in the substantive courses to which they pertain. This book attempts to explore general principles about the law of remedies that cut across substantive fields and that will be useful to a student or lawyer encountering a remedies problem in any substantive context.

Second, the book tries to integrate the study of public and private law remedies. Public law has spawned dramatic remedial innovations during the last generation, and no course should ignore them. But public law remedies are built on traditional private law remedies. If we study public law remedies alone, we tear them from their roots and from a set of principles that can help guide the vast discretion courts exercise in public law cases. And of course, ordinary torts and contracts remain the bread and butter for most litigators.

Third, as the title suggests, the book emphasizes problems of contemporary importance. I have tried to place contemporary issues in historical context, but I have not devoted much ink to issues that have been largely

mooted by recent developments. The merger of law and equity, the ambitious reach of modern American equity, the generous contemporary attitude toward measuring damages, the progress toward a general theory of restitution not based on procedural fictions—these and other less sweeping developments have reduced the significance of some issues that were important a generation ago.

Fourth, the book explores and tests the claims of the Chicago school of law and economics. It tries to do so in a way that is accessible to students who lack backgrounds in economics, that is fair to both sides, and that doesn't dominate the book. I believe that doctrine, fairness, and corrective justice are as important as economics and have given all these values equal treatment. But I think that the course in remedies is an especially important place to test the economic theory. One of that theory's central claims is that the law should and does encourage an optimal level of violations. If the law is serious about doing that, remedies must be primarily designed to provide the optimal level of deterrence. If remedies law does other things, and especially if it tries to eliminate violations without regard to their economic efficiency, the Chicago school has a problem.

Finally, this book tries to teach students as much as possible before class, so that class discussion has a strong base. I have tried to supply memorable cases, lots of structure, lots of leading questions, and lots of information. Most of the rest of this preface explains that pedagogical choice.

Some Notes on Pedagogy

This book is designed to teach basic principles and to help students think about difficult problems; it is not designed as a research tool. When there are highly visible decisions of the United States Supreme Court, I have made some effort to summarize the whole line of cases and make clear what "the law" is at that level. But most remedies law is not made at that level, and even when there are important Supreme Court cases, the states can make their own rules about remedies on state law claims. I have made no pretense of exploring all the resulting variations, or of presenting enough cases to enable a reader to determine what "the law" is on a particular point. However, I have been careful to ensure that principal cases are representative of dominant approaches and that any exceptions are plainly labeled as such.

The book's pedagogical theory is pragmatic. Most often, the notes ask questions of students, but sometimes they provide explanation, sometimes they summarize related cases, and sometimes they offer my own speculations. The style of the notes depends on the nature of the material being presented; I do not believe that any one of these approaches is intrinsically superior to the others.

Students may find that the notes raise more questions than they answer. But the questions are always leading questions. I ask questions because it

is important to encourage students to think for themselves, but the questions are leading because there is no reason to believe students can regularly produce answers out thin air. They must be given some raw material to think about. And the questions are always directed at important issues; I have carefully tried to avoid "hiding the ball." I believe what I said in reviewing another casebook: "Casebooks and instructors should channel [student] effort toward developing the most important skills and teaching the most important subject matter. We should bring students to the edge of insight as quickly and painlessly as possible. Then they should be asked to learn by the 'Socratic' method, but not before. The law has plenty of real difficulties for students to grapple with; it is never necessary to create artificial ones." Douglas Laycock, *A Case Study in Pedagogical Neglect*, 92 Yale L.J. 188, 202 (1982).

The selection and editing of the cases also reflect the decisions to direct students' attention to central issues and not to write a reference book. I have tried to select opinions that focus squarely on an important issue, are clearly written, and have memorable facts. I have deleted everything that is not germane to the issue, and everything that does not either advance the analysis or provide an interesting error that is useful for teaching purposes. The deletions are designed to focus students' attention on the central issue, without requiring them to wade through excess verbiage and wonder whether it matters. There will be plenty of opportunity to develop that skill after they have mastered basic principles.

I have applied the same principles to citations. I have collected illustrations, but not citations. That is, I have generally taken the view that if the facts are not worth developing, the case is not worth citing. I have included citations to cases that students might recognize. And I do try to provide one good citation—to a case or article that will lead to others—for each important point. Readers who want more citations for research purposes should follow up on those leads and check the principal cases in the original reporter. I have deleted citations and footnotes, and corrected obvious typographical errors, without notation; I have marked textual deletions with ellipses. Footnotes retain their original numbers.

A Note to Teachers

You may occasionally fear that a set of notes has left you nothing to talk about in class—that the notes have "given too much away." That is not the students' view, and that has not been my experience. I have taught some of the cases in this book as many as eight times. Often, I started with a bare case, continued to teach the case as the materials evolved through skeletal, incomplete notes, and finally, in the last year or two, taught the case with something like the complete set of notes finally included in the book. Almost without exception, the more the students knew at the beginning of class, the better the class discussion. I could not pull as many rabbits out

of hats, but many students never learn where those rabbits come from anyway. If teaching students is a higher goal than showing off, then extensive notes are a great advantage. If we want students to be thoughtful in class, we have to give them some advance notice of what to think about.

One of my colleagues who read the manuscript is not a remedies teacher. As a gifted teacher of contracts, she was quite familiar with the basic issues in damages, but knew almost nothing of injunctions. Her reaction to parts of Chapter 2 was that I had given too much away. Her reaction to Chapter 3 was that she didn't quite understand how everything fit together. The notes are just as leading in Chapter 3, but she came to Chapter 3 with a student's perspective instead of a teacher's. A leading question leads a teacher who already knows the answer much further than it leads a student who is trying to learn. Because of her reaction, I tightened the organization of Chapter 3. I didn't try to hide anything in Chapter 2.

One other important piece of advice: *Look at the teacher's manual*, even if you have never used one. I have tried to make it possible for you to tailor your own course the first time through the book, in the way you would tailor it the second or third time through. There are several sets of day-by-day assignments to choose from, each emphasizing different aspects of the course, and information on variations from those basic choices. There is advice on which cases to teach and which to skip if you want to sample more chapters than you can cover thoroughly. My views on how to teach particular cases are probably no better than yours, but I do know more about what's in this book. The teacher's manual tries to make that knowledge available to you.

A Note to Students

Most of my students have been enthusiastic about the notes, and I hope that you will be too. The notes provide much information and raise many questions. They are designed to help you learn a lot before you come to class. This allows class to start from a higher base; unprepared students will be at a greater disadvantage. Your teacher will probably pick a few of the issues raised by the cases and notes for further exploration in class. There won't be time to talk about every question raised in the notes; you are expected to think about some things on your own. Some teachers may assign whole sections to be read on your own, without class discussion. Reading alone is not as good as reading plus discussion, but reading this book should be a lot more helpful than reading a casebook written with a different philosophy.

I encourage you to take the questions in the notes seriously. They are all questions that you can answer or begin to answer with the information in the book and the hints in the leading questions. I have not tried to make leading questions do more than they can do. Where you need facts, I have given them to you; where there is a settled rule, I have told you about it.

If a series of leading questions seems to suggest inconsistent answers, all the suggested answers are fairly arguable and there is no consensus in the cases. Your thoughtful opinion on such questions is as valuable as the next person's. I would only mislead you if I presented my opinion as the "right" answer.

Finally, the headings in this book *are* part of the text. Chapters and sections and subsections all have headings; every set of notes has a heading. Those headings are intended to help organize the material for you and to signal the main focus of each set of notes and the accompanying cases. All the headings are listed in the table of contents, which is a detailed outline of the book. Read the headings and use them; don't ignore them.

Douglas Laycock

April 1985

Acknowledgments

A great many people contributed to this book, many of them in ways they little guess. Improvements in successive editions reflect my own growth as a scholar, and that growth is a product of interactions with my students and with many other lawyers and scholars at Texas and across the nation.

The book and I have benefited most from the extraordinary intellectual environment at The University of Texas Law School. Texas is a place where the benefits of intellectual diversity are fully realized, where one's assumptions may be challenged from the perspective of almost every imaginable theory about the law, where neither the traditional nor the avant garde is orthodox. Texas is a place where practice and metatheory are equally respected parts of scholarly agendas, where one's work can be criticized as insufficiently practical, insufficiently theoretical, or even both at the same time. To work in this place for two decades is to absorb vast amounts of new information and all sorts of new ways of looking at the law. To my colleagues at Texas, thank you. In specific suggestions and answers to my questions, and in other ways far too complex to ever trace, you have made me a better scholar and this a better book.

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