

Symposium
Remedies: Justice and the Bottom Line
Introduction

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I. INTRODUCTION

This Symposium is the fruit of an all-day workshop on Remedies at the 2007 Annual Meeting of the Association of American Law Schools. Thirty-seven scholars and practicing lawyers, organized by subject matter into eleven panels, made oral presentations on a diverse array of remedies issues. Many of the speakers were remedies specialists; others had worked on remedies issues as they arose in torts, contracts, civil rights, civil procedure, or alternative dispute resolution. Most of the speakers provided outlines, and these outlines are available online.¹

The planning committee for the workshop invited speakers to submit publishable papers, but we did not require it. About half the speakers promised papers, but lawyers and academics lead busy lives, and in the end, only eleven written papers were actually delivered. But these eleven papers are, in my judgment, a fascinating lot.

As chair of the planning committee, I exhorted authors to keep their papers short. Short papers attract more readers, and a symposium of eleven or more papers would look unmanageable to most law reviews if each paper were long. Most of the papers in this Symposium are indeed short and easy to read. The authors of these

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1. ASSOCIATION OF AMERICAN LAW SCHOOLS, ANNUAL MEETING—WORKSHOP ON REMEDIES: JUSTICE AND THE BOTTOM LINE (2007), is available in hard copy in the Tarlton Law Library at The University of Texas School of Law, and online at <http://www.aals.org/am2007/wednesday/remedies.htm>.

short papers are to be commended. Their brevity made this Symposium possible, and they saved room for other authors who could not follow instructions so well.

The most egregious offender of length limits was me, the one exhorting others to keep it short. Of course I did not plan it that way. When we submitted the Symposium to law reviews in the spring of 2007, *after* the oral presentations at the workshop, I still had no idea what I had undertaken. What I knew of how remedies became a field was short and simple, enough to fill one segment of an informal talk introducing the workshop, but what I knew at that point barely scratched the surface. When at last I began to convert that short talk into a footnoted article, I discovered a vast array of archival materials that cast new light on the topic. Fearing that no one would retrace my steps in those archives, and that interview subjects would not live forever, I decided that I should report whatever I found. The resulting manuscript grew disproportionately long, but the editors graciously allowed it to remain in the Symposium.

The title of the original workshop and of this Symposium is *Remedies: The Bottom Line of Justice*. That title, which requires no explanation to litigators, was an attempt to communicate the essential importance of remedies to academics in other fields. The remedy is what the client gets, the practical payoff of litigation, the bottom line of justice. Even when the client cares about the precedent, the precedent is important because it will lead to the grant or denial of remedies in future cases, and because the deterrent effect of those remedies, or the prospect of not having to worry about any more remedies, will guide the defendant's behavior. Without the prospect of an effective remedy, a claim of right is meaningless. Too much remedy overdeters and overcompensates; too little remedy underdeters and undercompensates.

Remedies is a vast field; every successful legal claim must end in a remedy, and the scope and extent of that remedy will often be disputed. These eleven papers cannot survey the entire field; rather, they examine a sample of important problems in the effort to provide the right remedy at the bottom line.

The Symposium will appear in two parts. This issue contains Part One: Damages, Injunctions, Restitution. The next issue will contain Part Two: Remedies as a Field; Reparations.

II. DAMAGES (INCLUDING PUNITIVES)

Keith Hylton reviews the Supreme Court's efforts to impose constitutional limits on punitive damages, using economic analysis to reach conclusions that some will find surprisingly pro-plaintiff.² He distinguishes between socially useful conduct that causes harm, where we should require individuals and firms to internalize the costs of their conduct, and conduct that is always undesirable or amounts to a nonconsensual taking from others, where we should try to eliminate all gains from the whole pattern of undesirable conduct, to the end of entirely deterring it. Because most conduct deserving of punitive damages is in this latter category, it is quite relevant to consider how many times the defendant committed the same wrong and how many of those victims will sue; punitives based on the entire course of conduct may be appropriate. Professor Hylton also predicts that the Court's campaign against punitive damages will eventually lead to constitutional limits on compensatory damages for pain and suffering.

Jennifer Wriggins investigates the relationship between tort damages and race.³ It is not all that surprising that white plaintiffs get more money than black plaintiffs. But to suspect such disparities is one thing; to document them is another. With careful research in both reported opinions and old press accounts, Professor Wriggins has retrieved evidence of disparities, both flagrant and subtle, in the century after the Civil War. She has collected more recent empirical studies showing that race still matters in jury verdicts for damages. She argues that the contemporary quest to make damage remedies more consistent should be informed by examples from the racial history of tort law. She also highlights a forgotten Fifth Circuit case in which a common law tort suit for damages provided an important desegregation remedy at the height of the civil rights movement.

Ellen Pryor assesses the law of compensatory damages for personal injuries in light of its interaction with our many other compensation schemes: workers' compensation, Social Security disability insurance, Medicare, Medicaid, programs for particular

2. Keith N. Hylton, *Reflections on Remedies and Philip Morris v. Williams*, 27 REV. LITIG. 9 (2007).

3. Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 REV. LITIG. 37 (2007).

industries, such as Longshore Harbor Workers Compensation, and private medical insurance.⁴ These multiple programs present important issues of coordination. Recent legislation limiting tort recoveries, and changes in medical insurance practices, have affected these coordination issues in ways not yet fully understood. Payment of settlements often awaits further litigation on these coordination issues; repeal of the collateral source rule may not have repealed anything in many states; federal Medicaid law requires new hearings not provided for in any state's tort law; and managed care creates fundamental ambiguity about the cost and value of medical services. Professor Pryor offers an eye-raising introduction to these issues. Because of a miscommunication concerning deadlines, her work will appear in the next issue, in Part Two of this Symposium.

III. INJUNCTIONS

Doug Rendleman reviews the equitable discretion of the trial judge in injunction cases,⁵ with special attention to the Supreme Court's startling decision in *eBay Inc. v. MercExchange, L.L.C.*,⁶ where the Court substantially rearranged the standards for granting permanent injunctions without appearing to realize it had changed anything. Recognizing that there can be sound reasons for limiting or refusing injunctive relief, Professor Rendleman would treat those reasons as in the nature of affirmative defenses to plaintiff's prima facie entitlement to an injunction ordering defendant to obey the law. My own view is that his proposal states what the law has been in practice for a long time,⁷ and that the Court's opinion has now moved formal doctrine further from reality than it was before. Litigators and trial judges would be much better off if the *eBay* opinion could have been assigned to Professor Rendleman.

Tracy Thomas reviews prophylactic injunctions, by which she means, as a first approximation, injunctions that go beyond

4. Ellen S. Pryor, *Part of the Whole: Tort Law's Compensatory Failures Through a Wider Lens*, 27 REV. LITIG. (2008) (forthcoming).

5. Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63 (2007).

6. 126 S. Ct. 1837 (2006).

7. See generally DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991) (showing that in practice courts deny requests for injunctions only when there is good reason to do so).

merely ordering cessation of illegal conduct and order practical steps to prevent the illegal conduct from recurring.⁸ She shows that prophylactic relief is granted in both public law and private law cases and that it did not end with the appointment of more conservative judges. Defending the practice against charges of judicial activism, she argues that prophylactic relief is an essential judicial tool that can be appropriately tailored to the wrong. She would add prophylactic injunctions to Owen Fiss's famous listing of preventive injunctions, reparative injunctions, and structural injunctions; she thinks we can communicate more clearly if we recognize four kinds of injunctions instead of three.

While agreeing that prophylactic relief is sometimes needed, Ross Sandler and David Schoenbrod argue that judges should take a much more cautious approach in institutional reform litigation against government defendants.⁹ Reprising and expanding on themes in their earlier book,¹⁰ they argue that public officials often consent to relief that goes well beyond curing the underlying violation. Courts then enforce the consent decree too rigidly, inappropriately treating the plaintiff class as holders of contractual rights rather than as holders of more limited constitutional or statutory rights. Consent decrees, when treated as contractual obligations, limit legitimate policy choices of subsequently elected officials, encourage private bargaining over public policies, and produce interminable judicial control of governmental decision making. Professors Sandler and Schoenbrod argue that consent decrees should be more narrowly framed when entered and that they should be much easier to modify and terminate.

8. Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99 (2007).

9. Ross Sandler & David Schoenbrod, *From Status to Contract and Back Again: Consent Decrees in Institutional Reform Litigation*, 27 REV. LITIG. 115 (2007).

10. ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003).

IV. RESTITUTION

Restitution is a powerful source of rights and remedies, often overlooked or poorly understood by lawyers and judges. The *Restatement (Third) of Restitution and Unjust Enrichment*, now far advanced in the drafting, is restating this law in accessible language, largely eliminating the old vocabulary derived from the writ system. Two papers in this Symposium react to that project, explaining and evaluating two of the most important restitutionary remedies.

Candace Kovacic-Fleischer clarifies the confusion over the claim to be paid the reasonable value of goods or services provided to a defendant who accepts them in the absence of a valid contract or a valid price term.¹¹ She argues that the key question is not whether the claim is in contract or in restitution, and not whether a contract is implied in fact or implied in law. The key question is whether the defendant requested the goods or services. If so, defendant should pay the market value; if not, either plaintiff has no claim, or her claim is limited to her cost or to the personal benefit to defendant, whichever is less. And this is basically what the draft *Restatement* recommends, although Professor Kovacic-Fleischer has some suggestions for further clarification.

Emily Sherwin is more critical of the draft *Restatement's* treatment of constructive trusts in bankruptcy.¹² A plaintiff with a valid claim in restitution, who can show that defendant's unjust enrichment is embodied in an identifiable asset, may recover that asset ahead of defendant's unsecured creditors. The draft *Restatement* proposes to restate this rule, subject to some newly clarified equitable limitations. It argues that defendant's creditors are unjustly enriched when they are paid out of assets to which the restitution plaintiff has a claim to specific restitution.

Professor Sherwin is unconvinced. She argues that the justice of a creditor's enrichment depends on the nature of the unsecured claim, the nature of the restitution claim, and a balancing of interests that would be unworkable in real litigation. Forced to choose a bright line rule, she would give priority to the creditors. She recognizes the draft *Restatement's* proposal as a plausible

11. Candace Saari Kovacic-Fleischer, *Quantum Meruit and the Restatement (Third) of Restitution and Unjust Enrichment*, 27 REV. LITIG. 127 (2007).

12. Emily Sherwin, *Unjust Enrichment and Creditors*, 27 REV. LITIG. 141 (2007).

alternative, and its proposed limitations on restitution claims as a practical improvement, although she thinks those limitations lack any explanation within the *Restatement's* theoretical framework.

V. REMEDIES AS A FIELD

My own contribution to this Symposium will review the history of how remedies became a field.¹³ The short explanation is that courses in damages, equity, and restitution were combined into a single course in remedies. But this consolidation took many years, with some of the key steps emerging in unpublished casebooks. “Remedies” also meant the forms of action, and it meant civil procedure, and each of these meanings lasted well into the second half of the twentieth century. The AALS Section on Remedies dealt with civil procedure and evidence for fifty years, until modern remedies teachers took over the section in 1972. To help me make sense of what I found in the archives, I interviewed the surviving founders of the field—John Cribbet, Kenneth York, John Bauman, and Dan Dobbs—and both the archives and the interviews are summarized here.

This emergence of the remedies course flowed seamlessly into a proliferation of remedies courses, with different emphases and distinct but overlapping coverage choices. Considering the many options for teaching the remedies course, Russell Weaver and David Partlett propose that we think of it as a capstone course that helps students pull together the rest of the curriculum.¹⁴ Because the remedies course is inherently transsubstantive, students can be asked to solve problems that cut across the lines that separate courses in the rest of the curriculum, to focus on the needs of the client rather than on doctrinal categories, and to evaluate choices among causes of action and choices among remedies. Such a course should be offered in the third year, when students have taken most of the other courses.

13. Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. (2008) (forthcoming).

14. Russell L. Weaver & David F. Partlett, *Remedies as a “Capstone” Course*, 27 REV. LITIG. (2008) (forthcoming).

VI. REPARATIONS

Natsu Taylor Saito considers the problem of remedies for massive wrongs that tend to escape the ordinary legal process. Famous examples in American history are African-American slavery, the seizure of Indian lands, Japanese internment, and the overthrow of native Hawaiian government.¹⁵ She resists the common tendency to say that legal remedies are impractical in such cases and that victims must look to the political process. This reaction leads to a perverse de facto principle: the greater the wrong, the lesser the remedy. She argues that only if there is full legal process, including an assessment of damages, can we even know the extent and magnitude of the wrong. And she argues that statutes of limitation and similar rules designed to regulate the workings of the legal system should be modified as necessary where they prevent the legal system from even considering the most egregious wrongs.

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The other members of the planning committee for the workshop that led to this Symposium were Jean Love at Iowa (now at Santa Clara), Mari Matsuda at Georgetown, Thomas Rowe at Duke, and Catherine Sharkey at Columbia. We got substantial assistance from the professional staff at the AALS and from a proposal submitted by an earlier group of remedies scholars who took all the initiative: Russell Weaver at Louisville, James Fischer at Southwestern, and especially Michael Allen at Stetson, who reportedly pulled the laboring oar. I am grateful to everyone who helped with the workshop and the Symposium, but most especially to the authors who contributed the excellent papers that follow.

15. Natsu Taylor Saito, *At the Heart of the Law: Remedies for Massive Wrongs*, 27 REV. LITIG. (2008) (forthcoming).