Symposium, Remedies: Justice and the Bottom Line Introduction to Part Two

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The Review of Litigation is pleased to present Part Two of the Symposium *Remedies: Justice and the Bottom Line*. This Symposium "is the fruit of an all-day workshop on Remedies at the 2007 Annual Meeting of the Association of American Law Schools."[1] Part One contains articles on damages, [2] injunctions,[3] and restitution.[4] Part Two presents articles on remedies as a field and reparations, and then revisits the field of damages. In Part One, Douglas Laycock, who served as chair of the planning committee for the workshop, provided an introduction to all the articles appearing in this Symposium.[5] He introduced the articles appearing in Part Two as follows:

> V. REMEDIES AS A FIELD
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> My own contribution to this Symposium will review the history of how remedies became a field.[6] The short explanation is that courses in damages, equity, and restitution were combined into a single course in remedies. But this consolidation took many

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1. Douglas Laycock, *Symposium, Remedies: Justice and the Bottom Line, Introduction*, 27 REV. LITIG. 1, 1 (2007). The program for the workshop is available at http://www.aals.org/am2007/wednesday/remedies.htm.

2. Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams, 27 REV. LITIG. 9 (2007); Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 REV. LITIG. 37 (2007).

3. Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63 (2007); Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99 (2007); Ross Sandler & David Schoenbrod, *From Status to Contract and Back Again: Consent Decrees in Institutional Reform Litigation*, 27 REV. LITIG. 115 (2007).

4. Candace Saari Kovacic-Fleischer, *Quantum Meruit and the* Restatement (Third) of Restitution and Unjust Enrichment, 27 REV. LITIG. 127 (2007); Emily Sherwin, *Unjust Enrichment and Creditors*, 27 REV. LITIG. 141 (2007).

5. *See generally* Laycock, *supra* note 1.

6. Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008).

years, with some of the key steps emerging in unpublished casebooks.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.[7] 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.

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

7. Russell L. Weaver & David F. Partlett, *Remedies as a "Capstone" Course*, 27 REV. LITIG. 269 (2008).

overthrow of native Hawaiian government.[8] 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.[9]

[DAMAGES REVISITED]

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 industries, such as Longshore Harbor Workers Compensation, and private medical insurance.[10] 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

8. Natsu Taylor Saito, *At the Heart of the Law: Remedies for Massive Wrongs*, 27 REV. LITIG. 281 (2008).

9. Laycock, *supra* note 1, at 7–8

10. Ellen S. Pryor, *Part of the Whole: Tort Law's Compensatory Failures Through a Wider Lens*, 27 REV. LITIG. 307 (2008).

> 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.[11]

Professor Laycock also explained how his own contribution to the Symposium unexpectedly grew in length and scope between the workshop and the publication process:

> 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 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.
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> 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

11. Laycock, *supra* note 1, at 3–4.

> editors graciously allowed it to remain in the Symposium.[12]

As part of its mission to serve as "a national forum of interchange of academic and practical discussion of various aspects of litigation,"[13] *The Review of Litigation* has historically emphasized remedies issues,[14] especially as they relate to the practice of litigation,[15] and will continue to do so in the future.[16] As Professor Laycock notes, "Litigators must deal with the primary right and also with the remedy . . . [and] would benefit from consulting remedies specialists more often than they do."[17] *The Review* is honored to present this important Symposium in print and thanks Professor Laycock and all the authors for their patience and guidance in bringing their contributions to *The Review*'s readers.

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12. *Id.* at 1–2.

13. Ronald Shur, *Editor's Preface*, 1 REV. LITIG., at iii (Winter 1980).

14. *See, e.g.*, Roy Ryden Anderson, *Market Based Damages for Buyers Under the Uniform Commercial Code*, 6 REV. LITIG. 1 (1987); Robert A. Prentice, *Reforming Punitive Damages: The Judicial Bargaining Concept*, 7 REV. LITIG. 113 (1988); David S. Cole, *A New Framework for Judicial Estoppel*, 18 REV. LITIG. 1 (1999).

15. *See, e.g.*, George P. Roach, *How Restitution and Unjust Enrichment Can Improve Your Corporate Claim*, 26 REV. LITIG. 265 (2007).

16. *See, e.g.*, T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. (2008) (forthcoming).

17. Laycock, *supra* note 6, at 167.