Twenty-First Century Remedies

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Russell L. Weaver and Steven I. Friedland

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Edited by

Russell L. Weaver
Professor of Law & Distinguished University Scholar
University of Louisville, Louis D. Brandeis School of Law

Steven I. Friedland
Professor of Law & Senior Scholar
Elon University School of Law

Laetitia Tranchant
Professor of Law
University of Aix-Marseille Faculty of Law

Guilhem Gil
Professor of Law
University of Aix-Marseille Faculty of Law

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Carolina Academic Press
700 Kent Street
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Series Note

The Global Papers Series involves publications of papers by nationally and internationally prominent legal scholars on a variety of important legal topics, including administrative law, freedom of expression, defamation and criminal law. The books in this series present the work of scholars from different nations who bring diverse perspectives to the issues under discussion.

Russell L. Weaver* and
Steven I. Friedland**

Introduction

During 2018, the Remedies Discussion Forum met twice: First, in Aix-en-Provence, France, in June, and then in Louisville, Kentucky, in early December. For the Aix forum,[1] there were several different topics under consideration: "Property remedies" (which could be analyzed from a variety of perspectives), "Intersections in Private Law" which could focus on intersections between private law areas (*e.g.,* contract and tort, contract and fiduciary obligations) and other legal fields (*e.g.*, private law and public law, tort law and corporate law), and "Recent developments in remedies" which could involve recent remedial developments from the writer's own country. At the Louisville forum,[2] there were also three topics: "Recent developments in remedies" which could involve recent remedial developments from the writer's own country or "controversial" remedies such as attempts to impose nationwide injunctions; "Comparative perspectives on remedies" which allowed the author to focus on any comparative aspect of remedies; and "Remedies in free speech cases," par-

* Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law. Professor Weaver wishes to thank the University of Louisville's Distinguished University Scholar program for its generous support of his research agenda, and he wishes to specifically thank Dean Colin Crawford for providing support for this forum from his research support program.

** Professor of Law & Senior Scholar, Elon University School of Law.

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2. The authors wish to particularly thank Dean Colin Crawford for supporting this particular forum out of his dean's research development fund, and would also like to thank the Université Paris Dauphine PSL Research University (France), the Emory University School of Law (U.S.), the University of Paris I (Sorbonne) and IMODEV (France).

ticularly for fake news. The papers published here are "discussion drafts" which were submitted to, and discussed at, the fora.

Professors Partlett and Zwier's article, *Non-Disclosure Agreements, Liquidated Damages and Arbitration in Context: Contracts Drawn for Good or Evil*, was submitted at the Aix forum. It examines non-disclosure agreements (NDAs) that are used to settle sexual harassment claims with confidentiality and liquidated damages provisions. The authors note that, not only are such agreements becoming increasingly common, they have troubling societal implications, especially when they are used by politicians to keep information from the public. The article attempts to draw a bright line between those agreements which should be regarded as permissible, and those that ought to be regarded as unenforceable.

Professor John McCamus' *The Intersection of Restitution and Tort: A Comparative View* was also submitted at Aix. It explores the fascinating relationship between the causes of actions for tort and restitution. As he notes, the same set of facts might be subject to litigation under each theory, but the measure of recovery would be different under each theory. He begins by exploring the question of which torts can be waived, and then examines the question of whether restitution should be permitted in any tort case in which defendant's conduct has produced a profit, or when defendant set out to enrich himself. He also explores whether waiver should be focused on situations when disgorgement would discourage or deter wrongful conduct. He ultimately concludes that the focus should be on "whether the tortuous misconduct in question is of such a nature that the deterrence or disincentive rationale is engaged and disgorgement of the profit secured through the wrongful conduct is an appropriate form of relief." He also focuses on whether recovery must be premised on plaintiff having suffered a corresponding loss. He concludes by examining Birksian attempts to restructure restitution.

Professors Teresa Rodríguez de las Heras Ballell and Jorge Feliu Rey submitted their paper, *Digital Intermediary Liability or Greater Responsibility: A Remedy for Fake News?*, at the Louisville forum. Their article notes that digital intermediaries give perpetrators of "fake news" a way to effectively distribute disinformation, and regulators have inevitably turned their attention to those intermediaries in their efforts to control disinformation. They note that such intermediaries currently have a "safe harbor" and discuss the possibility that a change in liability rules might "radically transform the scenario." In the process, the analyze "alternative regulatory models" and the implications of those models.

Professors Katy Barnett and Sirko Harder authored a piece entitled *A Comparative Consideration of the Penalties Doctrine in England and Australia* which

was also submitted at Aix. Their article focuses on liquidated damages clauses, and the idea that such clauses should be designed to compensate parties for expected losses rather than to impose penalties for non-performance. England differs from Australia in determining which types of provisions trigger the so-called "penalties doctrine." However, the systems do not differ much in how they determine what constitutes a penalty. In general, Australia follows English law in terms of holding that most clauses will not be regarded as penalties when there is a "legitimate interest" to be protected, and the proposed detriment is proportionate to that interest.

Professor David Wright's article is entitled *Learning From Each Other: Can We Utilize Developments in Australian and American Constructive Trust Law to Assist Each Jurisdiction?* was also submitted at the Aix forum. Professor Wright emphasizes U.S. constructive trust is based on unjust enrichment principles while the Australia constructive trust is not based on those principles. He notes that the High Court of Australia has skeptically received unjust enrichment principles. As a result, he reviews the development of unjust enrichment principles in the U.S., through the restatements, and offers insights into how the law has developed in the U.S. He then contrasts the U.S. approach with the approaches taken in England and Australia, and discusses the need for the proprietary constructive trust in the U.S.

Professor Michael Kelly's *Musings on Volkswagen* focuses on Volkswagen's false claims concerning the emissions of its TDI Clean Diesel engine. In particular, he examines the Uniform Commercial Code's damage provisions as applied to this situation, which would ordinarily focus on the value of the product as delivered from the value as promised. He also examines the problem from an "unjust enrichment" perspective, as well as from the standpoint of whether punitive damages can be awarded.

Dr. Ines Gillich's article, *The So-Called "University Constitutional Dispute" Under German Administrative Law*, was also submitted at the Aix forum. It focuses on whether there are effective remedies for disputes between different bodies within a university. Because of the need for academic freedom, public universities have the right to self-administration. These disputes can arise in various contexts, including situations in which a university rejects a unit's hiring choice, a dean orders a faculty member to teach a higher number of hours, or a university-wide council decides to create a second vice-dean position within a particular unit. Even though such disputes are frequently referred to as "university constitutional disputes," they are not really "constitutional" disputes. She concludes that only in rare cases does the law fail to provide for a remedy in such disputes.

Professor Russell Weaver and Andras Koltay's article, *Remedies for False Speech*, was also submitted at the Aix forum and explores these issues from both U.S. and Hungarian perspectives. Writing about the U.S., Weaver notes that certain types of false speech (*e.g.*, perjury in judicial proceedings) may be prohibited. However, the U.S. Supreme Court has generally made it difficult to punish individuals for disseminating false speech, including the publication of defamatory falsehoods, and has also held that individuals cannot be prosecuted for falsely claiming that they have won the Congressional Medal of Honor. For example the Court has limited the ability of some defamation plaintiffs to recover civil damages absent proof that defendant knew that the defamatory statement was false or acted in reckless disregard for their truth or falsity. The Court has also made it clear that courts may not issue injunctions against allegedly defamatory statements. Such injunctions constitute impermissible prior restraints. Weaver then focuses on potential remedies for fake news, and concludes that there are few (if any) effective remedies.

Professor Koltay examines the problem of fake news from a Hungarian perspective. While Hungary does not rule out the possibility of criminal prosecutions for defamatory statements, it does permit courts to impose civil liability under certain circumstances. The Hungarian standard focuses on whether the publisher exercised sufficient "professional care." In addition "demonstrably false" statements are not protected under the Hungarian Constitution. Hungary distinguishes between facts and opinions, and permits the imposition of liability for "facts" because they can be verified as true or false. Hungarian law also contains a right to reply to false assertions of fact, and it prohibits Holocaust denial and "scaremongering."

Professor Russell Weaver's second article, *Remedies for Fake News*, continues the discussion began in his earlier article (*Remedies for False Speech*), but this article was submitted at the Louisville forum. This article focuses specifically on remedies that might be available against individuals who publish "fake news." The article begins by attempting to define the term "fake news," and analyzes various tort actions that might be used to sue someone who propagates fake news. As with the prior article, questions are raised regarding whether there any effective remedies.