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# Introduction: Third Remedies Discussion Forum

RUSSELL L. WEAVER\*

On November 7–8, 2004, the Washington & Lee University School of Law and the University of Louisville’s Louis D. Brandeis School of Law co-sponsored the third Remedies Discussion Forum held at the University of Louisville.<sup>1</sup> As with the first two forums, the purpose of this forum was to bring together a small group of prominent remedies scholars to discuss matters of common interest. The papers being published in this symposium are “discussion papers” that were submitted by the participants prior to the meeting and formed the basis for the discussions.

During the last decade, the United States Supreme Court has decided two important punitive damage cases: *BMW of North America, Inc. v. Gore*<sup>2</sup> and *State Farm Mutual Auto Insurance Co. v. Campbell*.<sup>3</sup> Because of the significance of these cases, it was decided that punitive damages should be one focus of the forum, and a number of the papers focus on that topic. Dean David F. Partlett asserts a “republican” basis for punitive damages and argues that “[j]udicial reforms should be directed at the strengthening of the jury to bring it into close conformity with its republican rationale as an institution that maximizes the freedom of citizens from domination.”<sup>4</sup> Other papers provide alternative analyses

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1. Both schools wish to express special thanks to LexisNexis for its financial support of the forum.

2. 517 U.S. 559 (1996).

3. 538 U.S. 408 (2003).

4. David F. Partlett, *The Republican Model and Punitive Damages*, 41 *SAN*

for punitives: Professor Michael Kelly examines and takes issue with the notion that punitive damages should be awarded to compensate society; Professor Colleen Murphy argues for a constitutional review of punitive damages that includes a comparison to criminal sanctions; and Professor Rachel Janutis examines multiple punitive damage awards. Finally, Professor John McCamus and Professor Jeffrey Berryman examine Canadian punitive damages law, and Professor Andrew Tettenborn focuses on England.

The second discussion topic was broadly stated: remedial developments during the second half of the twentieth century. Perhaps the most significant remedial development was *Brown v. Board of Education (Brown II)*,<sup>5</sup> and the growth and use of so-called structural injunctions. *Brown* was a landmark decision that Professor Doug Rendleman describes as “at once the twentieth century’s pivotal judicial event and the Warren Court’s paradigm decision.”<sup>6</sup> It is difficult to dispute that characterization as *Brown* led to a radical restructuring of public school systems in many states,<sup>7</sup> and ultimately led to structural decrees in a number of non-school cases.<sup>8</sup> Despite *Brown*’s significance, Professor Rendleman goes on to ask whether *Brown II* at fifty represents a golden anniversary or a mid-life crisis. My article analyzes the rise and development of structural remedies (particularly in reference to *Brown II*) and suggests some of the reasons why those remedies are in decline. Professor Tracy A. Thomas argues that the right to a remedy is a fundamental right and that strict scrutiny analysis must be used to justify the denial of a remedy. The next two papers focus on structural injunctions in specific contexts: Professor James Fischer examines the structural remedy as applied to enjoining elections, while Professor Candace Saari Kovacic-Fleischer analyzes employment discrimination remedies and suggests that employment analysis might be successfully employed in school desegregation cases. Finally, Professor Gary Davis and Professor Michael Tilbury examine the remedial development issues from an Australian perspective.

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DIEGO L. REV. 1409, 1411–12 (2004).

5. 349 U.S. 294 (1955).

6. Doug Rendleman, *Brown II’s “All Deliberate Speed” at Fifty: Golden Anniversary or Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1576 (2004).

7. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970); *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968).

8. See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978) (discussing prison conditions); *Baker v. Carr*, 369 U.S. 186 (1962) (discussing reapportionment).