

# Comparative Perspectives on Remedies

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GLOBAL PAPERS SERIES

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

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# Comparative Perspectives on Remedies

Views from Four Continents

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GLOBAL PAPERS SERIES  
VOLUME V

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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\*  
Steven I. Friedland\*\*

# Introduction: Comparative Perspectives on Remedies: Views from Four Continents

During 2015, the Remedies Discussion Forum met on June 16–17, 2015, at the Université Paris—Dauphine Faculty of Law (Paris, France), and on December 3–4, 2015, at the University of Louisville (Louisville, Kentucky).<sup>1</sup> As with prior forums, the goal of these fora was to bring together a small group of prominent remedies scholars to discuss matters of common interest. Participation was limited to twenty people and involved scholars from four continents.

The papers published in this book are “discussion papers” that were submitted to the fora, and which provided the basis for the discussions. The papers focus upon separate and distinct topics that set the parameters for the fora: “Important Recent Developments in Remedial Law”; “Comparative Perspectives on Remedies”; “Remedies in Public Law Cases” (which could include traditional public nuisance or cases involving larger issues such as climate change, racial discrimination, smoking, obesity, etc., or any other public law remedy); and “Remedies for the Breach of Amorphous Duties.” However, the papers encompass a range of perspectives on these topics.

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1. The forum was jointly sponsored by the University of Windsor Faculty of Law (Canada), the Emory University School of Law (U.S.), the Université Paris Dauphine Faculty of Law, the Washington & Lee University School of Law (U.S.), the U. Aix-Marseille Faculty of Law (France), the University of Paris I (Sorbonne) (France), and the University of Louisville’s Louis D. Brandeis School of Law (U.S.)

Professor Paul Zwier's article, *High Prices for US Drugs: A Case for a Single Payer System*, argues that "drug manufacturers are boldly taking advantage of their ability to charge exorbitant prices for necessary often life-saving drugs," and contends that this area provides an "example of a market where traditional legal remedies just do not work." As a result, he contends that the U.S. should look to Canada and European countries that use a so-called "reference pricing" for drugs. Reference pricing involves a compromise market pricing system that establishes drug prices at a level between the price that the market will bear and a price that provides a fair return on investment, as determined by the real costs of drug development, and its need (effectiveness) in the market. The goal is to strike a balance between moderating prices for patients who need the drugs, but nonetheless allow 'Big Pharma' to recoup the R&D costs needed to allow them to develop important new drugs. Reference pricing provides one method for dealing with the "perverse incentives that are created by the unique features of the health care market—the lack of transparency, the confused nature of payment systems, the monopoly effects of patents, often developed through research funded by the government, and the impact of end of life treatments that coerce from patients the payments of their life savings."

Professor David Capper's article, *Giving the Borrower Time—an Analysis of Section 36 of the Administration of Justice Act 1970 in a Contemporary Context*, examines section 36 of the United Kingdom Parliament's Administration of Justice Act 1970. That section provides that if a mortgagee of landed property containing a dwelling house seeks possession of the property, in most cases with a view to sale and realisation of the mortgagee's security, the court may suspend the possession order or otherwise adjourn the proceedings to give the mortgagor time to pay off arrears and otherwise get back on track in terms of paying the mortgage. He notes that the "world of house purchase is a very different one today" than when the law was adopted. At that time, people were only allowed to borrow the amount that they could afford to repay. As a result, house prices rose at a much slower rate, housing market crashes were largely unknown, and there was a plentiful supply of social housing for the homeless. He notes that recent times have involved a significant 'boom and bust' cycle in the housing market, resulting in negative equity, and a depletion in the quantity of social housing. Although Professor Capper seeks to demonstrate how section 36 might be used to "address the challenges of today," he ultimately concludes that "new legislation specifically addressing the needs of today may be what is required."

Professor Olivia Tambou's contribution is entitled *Remedies and European Personal Data Protection Law Reform: What Is New?* In that article, she notes that Europeans have become concerned about personal data violations, and

believe that they do not have sufficient protection. Professor Tambou suggests a remedial approach to this problem based on European personal data protection law involving the possibility of raising awareness regarding data protection violations, as well as providing more effective remedies for those violations, and providing advice to citizens regarding their rights through the creation of a multilingual website.

Professor Jason Bent's contribution is entitled *The Case for Split Recovery in "Immployment" Law (Ten-Foot Pole Not Required)*. In his article, he discusses the unclean hands doctrine as applied to a situation in which an illegal alien has been denied wages for work performed. Many courts deny the worker's claim for unpaid wages, citing the policy of immigration law to protect domestic workers from competition by illegal immigrants. He argues that courts should instead apply a "split recovery" model which does not provide the illegal worker with a complete recovery, but does not deny him any recovery. He contends that the "all or nothing" approach to the problem, which surfaces when the unclean hands doctrine is applied, "necessarily sacrifices one substantive policy at the expense of the other." He contends that the "legislative goals of federal immigration law do not necessarily require sacrificing the policy goals of employment law protections in every case. Where a remedy limitation is required to advance immigration policy, a better solution would be to impose a split recovery mechanism and avoid creating undesirable marginal incentives for employers to hire unauthorized workers."

The paper by Professor Mae Kuykendall and Mr. Sean McKinniss is entitled, *Utopian Visions of Easy Solutions to Problems of Leadership Dysfunction*. In that article, they begin by noting that "dysfunctional periods in nonprofit institutions inflict loss of productivity by the mission-driven professionals and waste resources by diverting member energies to deflecting bad policies and personal assault." They note that the solution of choice is usually a vote of "no confidence" against the leader who has created the dysfunction. They go on to note "the rich heritage of academic governance and how it is antithetical to modern organizational and leadership fads and philosophies. Governance in higher education is built upon collaboration and independence, not executive dictates or market-based management practices." They note that "the rise of neoliberal management philosophies, the encroachment of business and government into higher education, and the increasing blurriness of institutional missions" remain inappropriate for organizations built upon a tradition of collaborative self-government.

The article by professors Laetitia Tranchant, Francois Lichere & Guilhem Gil is entitled *Remedies for Breach of the Duty to Perform in Good Faith: An Overview of the French Legal System*. The article argues that, most of the time,

the main contractual duties of the public authority are twofold: to pay its contractor and to supervise its work. Both have become of utmost importance for the question of good faith or loyalty, especially in recent times. Their opinion is that there is currently a shift in French administrative law: good faith appears to be used nowadays as a way to control the contractual powers of the public contractor and therefore to sanction the non-performance of the contract by the public contractor.

The article by professors Duncan Fairgrieve, Arnaud Raynouard and Russell Weaver, entitled, *Remedies: Comparative Law Perspectives*, compares civil law systems and common law systems with regard to their handling of remedies. The article notes that common law systems tend to take a complex approach to rights and remedies. By contrast, civil law systems do not adopt such a rights-centric starting place. However, this dichotomy between the two systems is not absolute. In recent years, there has been a growing doctrinal interest in European remedies. Likewise, by contrast, in the United States, there are instances when a “rights” analysis dominates the discussion in a given case. In general, free speech is treated as a “preferred right” in U.S. jurisprudence, and therefore plaintiffs frequently find it difficult to establish a “right” to damages or injunctive relief for offensive or degrading speech.

Professor Ken Cooper-Stephenson’s contribution is entitled, *The Uncertain State of Mind Requirement for Constitutional Damages Claims*. In that article, he focuses on the “state of mind” required to recover damages for constitutional injuries. He concludes that, because of the diversity of rulings around the globe, it now seems unlikely that any universal international structure for the state of mind issue will develop for constitutional damages claims.” He notes that even “a four-fold tort-like umbrella appears unworkable, such as (1) strict liability; (2) simple negligence or “unreasonableness”; (2) gross negligence; (3) intent or “deliberate indifference”; or (4) “malice,” is insufficient to accommodate the wide range of rights being constitutionally protected around the globe, and the diverse fact-situations that give rise to claims.

Professor David Wright’s article, *Public Law and the Law of Remedies: The False Hegemony of Private Law*, suggests that most law is private law, with “remedies in public law as the exception.” As a result, he argues that it is common to attempt to divide the legal system into public and private parts. He argues that this approach is unsound because there are significant differences between public and private remedies, including the requirement of standing, and there are also remedial differences. He concludes that “remedially we must embrace the public law aspect of the subject.”



The final article, Professor Russell Weaver's *Free Speech Remedies: Comparative Perspectives*, examines the way that different societies provide remedies against freedom of expression. The article notes that "the U.S. and France approach speech issues from quite different premises that lead them to very different results." The article examines the underpinning of U.S. and French free speech principles, and the ideas and values that drive their quite different approaches to free expression. Whereas certain types of speech (e.g., Holocaust denial and speech that degrades human dignity) can be banned in France, they cannot be banned in the United States.

In sum, the articles included in this book present an interesting range of views about an array of important remedial topics.

