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# THOUGHTS ON TEACHING REMEDIES FROM A PUBLIC LAW PERSPECTIVE

David I. Levine\*

I teach Remedies from a public law perspective. Not surprisingly, this orientation is reflected in the book I helped to prepare.<sup>1</sup> For the purposes of the first part of this short discussion-generating paper, I think I can best describe my orientation to teaching the course by illustrating how that philosophy plays out in the casebook and in the classroom. For the second part of this brief paper, I want to highlight a remedies-related case in which I have been deeply involved in San Francisco, and to discuss how I have tried to use the case in my teaching.

## A. *Teaching Remedies out of the Casebook*

What we tried to do in our casebook was to infuse the Remedies course with public law cases. The primary rationale was that remedies in public law cases are an important topic to society and in the modern practice of law. These cases are important to the development of the law of remedies in private law areas as well because the public law cases often provide some of the best examples of courts' articulating and applying general remedial principles to uncharted territory. (And they are lots of fun to teach.)

For example, the case we chose to use to start the course is *Bivens v. Six Unknown Named Agents*.<sup>2</sup> The opinions of the Justices provide a wonderful introduction to thinking about how a court can fashion a remedy where none has existed before. It also gets into the problem of the relationship between the judiciary and the legislature in terms of helping the students ponder which branch of government should be deciding how to enforce rights and with which particular remedies.

These general themes return in other guises. Thus, to take an example used to discuss tort damages, consider *Ayers v. Jackson Township*.<sup>3</sup> In

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<sup>1</sup> DAVID SCHOENBROD, ET AL., *REMEDIES: PUBLIC AND PRIVATE* (2d ed. 1996 & Supp. 1999).

<sup>2</sup> 403 U.S. 399 (1971).

<sup>3</sup> 525 A.2d 287 (N.J. 1987).

*Ayers*, over 300 residents sued because of contamination of their well water from a landfill operated by a public entity, the defendant township. For teaching purposes the case can be used to discuss non-pecuniary damages (particularly emotional distress and non-pecuniary harm for loss of use of land), as well as what to do about harms (such as exposure to poisoned water, asbestos or HIV) where the potential plaintiff will not know whether a disease will become manifest until some time in the future. I find it very helpful to bring the themes from *Bivens* back into the discussion of *Ayers*. For example, the *Ayers* court had to interpret a New Jersey statute which provided “no damages shall be awarded against a public entity . . . for pain and suffering resulting from any injury. . . .”<sup>4</sup> The New Jersey Supreme Court interpreted this statute in a perhaps less-than-obvious way by holding that the statute did not exclude an award for non-pecuniary “quality of life” damages (for discomfort and annoyance) but did preclude an award for the emotional distress resulting from knowledge that plaintiffs and family members had ingested contaminated water.<sup>5</sup> This result inevitably leads to in-class discussion about the relationship between the state court and legislature in selecting remedies.

*Ayers* also addresses the problem of whether to compensate plaintiffs for the enhanced risk claim because the testifying experts could not quantify the extent of the enhanced risk of cancer. The court preserved claims that may arise from plaintiffs who do incur cancer in the future by its interpretation of the state’s statute of limitations and claims preclusion rule.<sup>6</sup> The court also affirmed an award for medical surveillance.<sup>7</sup> The court acted over a dissent that would have compensated the plaintiffs for the physical injury already caused to their cells and genetic material.<sup>8</sup> This debate gives the students plenty of material to work out their own answers to the questions of how a court should proceed to create an adequate remedy in a developing area of tort law.

As another example of how I like to teach the course, consider a portion of the material the book places under the heading “Granting Less than Plaintiff’s Rightful Position: Balancing the Equities.”<sup>9</sup> The section leads with

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<sup>4</sup> *Id.* at 293 (quoting N.J. STAT. ANN. § 59:9-2(d)).

<sup>5</sup> *See id.* at 294-96.

<sup>6</sup> *See id.* at 300.

<sup>7</sup> *See id.* at 313.

<sup>8</sup> *See id.* at 318 (Handler, J., concurring in part and dissenting in part).

<sup>9</sup> SCHOENBROD, *supra* note 1, at 89-173.

a variation on the book's basic teaching problem, which is sprinkled through the casebook. In this variation, the problem posits that there is liability, but the plaintiff seeks an injunction and the defendant urges a damages remedy only.<sup>10</sup> Then the problem goes through a set of hypotheticals, changing the facts slightly each time, which are designed to get the students thinking about what sorts of factors might or should motivate a judge to balance the equities in favor of one party or the other. One way of teaching the material in the section is to focus exclusively on the problem and incorporate the following material into the discussion.

Another way of tackling the same issue is to discuss the text and cases following the problem more directly. First, we included a textual note on when injunctions are efficient.<sup>11</sup> This reflects the view that third year students can digest a little text on their own. Of course, for those with the desire, it is a good jumping off point for a little law and economics discussion. Next, the students read *Smith v. Staso Milling Co.*,<sup>12</sup> a Learned Hand opinion balancing the equities between the plaintiff, owner of a summer residence, and the defendant, owner of a slate rock mill, whose operations have been found to be a nuisance due to the resulting air and water pollution. Judge Hand affirms the prohibition on water pollution, especially because of the substantial nature of the injury, the deliberateness of the wrong, and the promises made to the plaintiff before the plant was built. The defendant is left to avoid further injury or to "make its peace with the plaintiff as best it can"<sup>13</sup> (i.e., to bargain in the shadow of the injunction). As far as the air pollution is concerned, Judge Hand leaves the prohibition in place but leaves open the possibility that the defendant can seek a modification of the decree if it can show that it is using the best available dust arresting technology available. This decision and the notes following the case allow discussion of what sorts of private and public interests are apparently going into the equity balancing equation.

This is all interesting enough, but then the next case in line is *Brown v. Board of Education II*.<sup>14</sup> *Brown II* is the opinion where the Supreme Court determined that the remedy for racial discrimination in public education would have to be solved locally by school authorities and district courts familiar with

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<sup>10</sup> *Id.* at 89-90.

<sup>11</sup> *See id.* at 90-93.

<sup>12</sup> *Id.* at 93-96 (reproducing *Smith v. Staso Milling Co.*, 18 F.2d 736 (2d Cir. 1927)).

<sup>13</sup> *Smith*, 18 F.2d at 738.

<sup>14</sup> SCHOENBROD, *supra* note 1, at 100-02 (reproducing *Brown v. Board of Educ.*, 349 U.S. 294 (1955)).

local conditions. The district courts were instructed that they were to be guided by “equitable principles,” “practical flexibility,” and “a facility for adjusting and reconciling public and private needs.”<sup>15</sup> Most notoriously, the courts were to be guided by the principle of “all deliberate speed.”<sup>16</sup> Even though the plaintiffs’ rights are derived from the Constitution, the Court invokes the traditional judicial power to balance the equities. The students can discuss what sorts of legitimate (and, as some have charged, illegitimate) considerations went into the Supreme Court’s emphasis on giving the plaintiffs less than their rightful position.

At some point in the discussion, I take advantage of the trans-substantive approach to Remedies and the deliberate juxtaposition of *Smith* and *Brown* by asking how Learned Hand might have written *Brown II*. Although both opinions are written using the language of traditional equitable principles, the “spin” is quite different. I ask the students to compare how Judge Hand dealt with the air pollution issue (defendant must comply with the injunction banning air pollution unless it can prove it has done all that is technologically possible) with Chief Justice Warren’s rather more indulgent view of the defendants’ task in ending segregation in the public schools. Although this is admittedly ahistorical, it does lead to some interesting speculation about what might have been had the Court’s invocation of equitable principles been framed a little differently in *Brown II*. One can then weave in the possibility, raised in the notes sandwiched between *Smith* and *Brown II*, of combining a balancing approach with the payment of some damages.<sup>17</sup> In the air pollution example, controlling the emissions entirely was arguably impracticable for the defendants to achieve, but it would be unfair to force the plaintiff to endure any pollution that would constitute a nuisance. Damages fill in the gaps. I ask whether an analogous approach might have worked in *Brown II* to speed up the initially desultory desegregation efforts. We’ll never know, but it can make for a rather intriguing class discussion.

### *B. Teaching Remedies from Experience.*

Since 1994, I have served privately as co-counsel for the plaintiffs in *Ho v. San Francisco Unified School District*.<sup>18</sup> The suit, brought on behalf of

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<sup>15</sup> *Brown II*, 349 U.S. at 300.

<sup>16</sup> *Id.* at 301.

<sup>17</sup> See SCHOENBROD, *supra* note 1, at 97 nn.4 & 98.

<sup>18</sup> 965 F. Supp. 1316 (N.D. Cal. 1997).

a class composed of all Chinese-American children eligible to attend San Francisco's public schools, challenged the constitutionality of a 1983 federal court consent decree mandating quotas on the assignment of children to all public schools in the city on the basis of their membership in one of nine recognized races or ethnicities. As one of the first suits brought on behalf of Asian-Americans against a court-ordered desegregation plan, it has generated considerable scholarly and popular attention.<sup>19</sup>

The case is somewhat complicated and involved. The challenged plan of quotas had been approved by the district court years earlier to resolve a discrimination suit brought by the local branch of the NAACP against the school district, *SFNAACP v. San Francisco Unified School District*.<sup>20</sup> The Chinese-American plaintiffs relied on *Martin v. Wilks*<sup>21</sup> as the basis for their contention that they had not been properly represented in the original suit. As a result, they could assert that the quotas approved by the earlier consent decree were unconstitutional under the Supreme Court's recent school desegregation and affirmative action opinions. The parties hotly disputed who bore the burden of proof in this challenge. The district court ruled initially<sup>22</sup> that the *Ho* plaintiffs had to shoulder the burden, at least at the summary judgment stage, of demonstrating the absence of material fact with respect to all aspects of the test announced by the Supreme Court for the termination of a school desegregation order.<sup>23</sup> On appeal, the Ninth Circuit ruled that the defenders of the plan, the school district and the local NAACP, had the burden of proof at trial. Under this ruling, they had to demonstrate that the racial classifications and quotas were narrowly tailored to correct the problems caused by the vestiges of earlier illegal segregation that could be proven to exist and were still necessary to address those lingering problems.<sup>24</sup> The parties settled on the eve of trial, and discarded the mandatory racial classifications and quotas, largely because the defenders of the consent decree could not meet that burden of proof.<sup>25</sup>

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<sup>19</sup> See David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 HARV. BLACKLETTER J. 39, 39-41 (2000) (citing commentary).

<sup>20</sup> 576 F. Supp. 34 (N.D. Cal. 1983).

<sup>21</sup> 490 U.S. 755 (1989).

<sup>22</sup> See *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316 (N.D. Cal. 1997).

<sup>23</sup> See *Freeman v. Pitts*, 503 U.S. 467 (1992).

<sup>24</sup> See *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998).

<sup>25</sup> See *SFNAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999) (approving settlement).

Those of you who are intrigued by the case will find that these published opinions make good teaching tools for Remedies. They can be used to address some questions, such as the burden of proof issue, still left open by the Supreme Court cases in this area. The Ninth Circuit opinion is particularly good as a basis for discussing affirmative action (particularly court-ordered quotas) as a remedy because of the unique circumstances that the bulk of the remedy's burden in this instance is being imposed on a group, Chinese Americans, who themselves have been the victims of discrimination at the hands of the government. One can use the case to address key questions such as:

First, who holds the "rights": individual persons or groups of persons? Second, what does "equality" mean: equal treatment or equal outcomes? Third, what do we expect the government to teach us: the importance of disregarding the characteristics that often are chosen as a basis for private discrimination, or the worth of a society in which persons of diverse backgrounds appear side by side? . . . [T]he conclusions we reach on these questions govern the choice of remedy.<sup>26</sup>

As one trying to wear two hats, as professor and advocate, it is a little trickier for me to discuss the case in class than it might be for any of the rest of the conference participants. Obviously the topic is one in which students hold strong feelings; if their views are not congruent with the views being taken by their professor-qua-advocate, they may feel especially uncomfortable in discussing the matter in class. Nevertheless, I have used one or another of the opinions in class without great difficulty. I try to maintain academic neutrality in the class discussion, talking about how one might argue one or another point. I have also conducted a seminar in public law remedies, which heavily focuses on the issues raised in the case, with the participation of colleagues from our civil justice clinic who have litigated race and gender discrimination cases from other perspectives. For purposes of our meeting, I thought it might be interesting to discuss how others have handled the problem of incorporating any outside work they may do—particularly controversial matters—into the Remedies course.

I would like to take this opportunity to thank our hosts for organizing this meeting. I hope it will be a very fruitful exchange of ideas and just the start

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<sup>26</sup> Frank H. Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103, 103-04 (1991).



of better communications among us all.

