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Remedies Unified in Nine Verses

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Poem

REMEDIES UNIFIED IN NINE VERSES

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Consistency is not always "the hobgoblin of little minds"[1]
Walls tumble down 'tween East and West, unification at its best
"Treating like cases alike"[2] (*Justice, she is not blind.*)
While at the margins, putting artificial walls of rigid (doctrinal) boxes to rest.[3]

The beauty and magic of Remedies as a field[4]
Is that it nimbly navigates the nooks and crannies of the Law
Honoring tradition while enabling progress,[5] yielding a right-of-way
As necessary, pushing the boundaries of the Rule of Law.

Remedies carefully bends doctrine toward justice.[6]
Rather than thematic coherence for the law of Remedies throughout
Law's open edges—principles, factors, and totalities of Remedies buttress,
Rounding the rough edges, Remedies pours from a (non-unified) flexible spout.

A unified theory of Remedies,
This Author does not see or glean.
Other scholars have sought to cure such perceived maladies[7]
(Ironically a remedy in search of a non-existent problem except perhaps on Tatooine.)[8]

The variation of Remedies' applications and goals
Should be a majestic[9] character trait embraced
It adjusts to serve justice (sometimes corrective)[10] aiming to cure (souls).
Avoiding, in the ideal, palm-tree justice,[11] with principled reason traced.

Endeavor to complete the merger of Law and Equity[12]
Eradicate arcane anachronistic hurdles, we must.
(re)Envision so-called extraordinary equitable remedies, unneeded complexity;
Teach the doctrinal links and guiding principles so even SCOTUS gets the thrust.[13]

Remedies, with all its facets like Restitution,[14] is ripe for international collaboration.
Engaging in community dialogue about access to Remedies, its nature and scope;
Remedies demonstrating Law as artful craft, not robotic, algorithmic calculation.
Following global examples, logically extending remedy and underlying right to render hope.

Local and international examples of rights woefully without remedies abound.[15]
Lawyers and courts misperceive when remedies may and may not lie.[16] *But cf.*
Efficient breach (underdeterring advantage-taking, where a remedy ought redound).[17]
Fear not for wise discretion and reasoned elaboration will properly gap-fill where justified.

Remedies, ideally shaped, serves and unifies rights as it goes[18]
Where the wrong warrants, Remedies provides practical relief to end fights,
Gives the Law, like water, its essential and inherent flow
With normative goals in (her) sights, Remedies shapes substantive rights.[19]

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1. *See* RALPH WALDO EMERSON, *Self Reliance*, *in* ESSAYS AND ENGLISH TRAITS 66 (Charles W. Eliot ed., 1909) ("A foolish consistency is the hobgoblin of little minds, adored by little statesman and philosophers and divines."). *But see* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 587–88 (1990) (criticizing Emerson's disdain for consistency as well as any judicial or scholarly proponents of the same, and maintaining instead "[c]onsistency is the very foundation of the rule of law").

2. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 623–24 (1958) (positing that basic justice requires publicly announced, judicially enforced general rules that treat like cases alike). *But see* Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1, 4 (1974) (arguing "Hart's thesis regarding a necessary connection between general rules and a minimum of justice is mistaken, principally as a consequence of his misunderstanding the function of the principle of treating like cases alike").

3. Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 587 (2006) (lamenting American law's private law doctrinal rigidity and narrowness:

"[W]hy should the availability of disgorgement turn on whether the wrongful publication fit into a property box or a contract box?").

4. Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 162–64 (2008); *see also* Jeff Berryman, *Teaching Remedies in Canada*, 39 BRANDEIS L.J. 565, 565 (2001) ("Within common law Canada there are sixteen law schools. In all schools Remedies is taught as a distinct subject in the upper year curriculum."); Jeffrey Berryman, *The Law of Remedies: A Prospectus for Teaching and Scholarship*, 10 OXFORD U. COMMONWEALTH L.J. 123, 123–24 (2010) ("Clearly, throughout the Commonwealth the systematic study of the law of remedies has come of age . . . ."). *But see* Yehuda Adar & Gabriela Shalev, *The Law of Remedies in a Mixed Jurisdiction: The Israeli Experience*, 23 TUL. EUR. & CIV. L.F. 111, 115–21(2008) (lamenting that Remedies is not an established field in continental and common law jurisdictions beyond the United States).

5. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112–13 (1921) ("My analysis of the judicial process comes then to this, and little more: logic, and history and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired . . . . [T]he most fundamental social interest[] is that law shall be uniform and impartial . . . . Uniformity ceases to be a good when it becomes uniformity of oppression.").

6. Martin Luther King, Jr., How Long, Not Long (Mar. 25, 1965) ("How long? Not long, because the arc of the moral universe is long, but it bends toward justice.").

7. *See, e.g.*, Marco Jimenez, *Remedial Consilience*, 62 EMORY L.J. 1309, 1309 (2013) (maintaining that scholars have paid too little theoretical attention to a unifying theory of remedies and claiming to offer a novel unifying theory fitting all remedies under four principles: "restoration, retribution, coercion, and protection"); Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149, 2149 n.2 (1997) (examining "the gamut of remedies" available in light of the Calabresian framework); Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483, 483–84 (1990) (construing Remedies as a series of positive and negative incentive effects from an economic perspective). As Levmore and Stuntz concede, this work is significantly influenced and informed by Calabresi and Melamed's seminal article, itself arguably presenting a unified theory of Law. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089, 1093–94, 1096–97 (1972). *But cf.* Doug Rendleman, *Rejecting Property Rules-Liability Rules for Boomer's Nuisance Remedy: The Last Tour You Need of Calabresi and Melamed's Cathedral*, *in* REMEDIES AND PROPERTY (Russell Weaver & François Lichère eds., 2013) (advancing experience and a functional approach—flexible and pragmatic common law—over the lure of theory). For a positive expression of unified Remedies, see Adar & Shalev, *supra* note 4, at 111, 141 (praising the Israeli Draft Civil Code section, "Remedies for Breach of an Obligation," for seeking "to bring unity, coherence and simplicity to the law of remedies" by proposing "a unified and comprehensive statutory scheme for awarding remedies").

8. Tatooine is a (Star Wars) planet that amassed "a very bad reputation, often being viewed as the cesspool of the galaxy." WOOKIEEPEDIA, THE STAR WARS WIKI, http://starwars.wikia.com/wiki/Tatooine. For Remedies, this reputational pull (interpretation) is undeserved and is a corner from which we should not fight.

9. Honoring the historical roots of equity and equitable remedies, the Court of Chancery of England, the King.

10. Stephen A. Smith, *Remedies for Breach of Contract: One Principle or Two?*, *in* GREGORY KLASS & PRINCE SAPRAI, PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW (forthcoming 2014) (advancing a two-remedy model and maintaining that damages serve corrective justice as punishment serves retributive justice).

11. This phrase stems from the image of a wise one rendering justice under a palm tree, but has garnered a pejorative connotation of compromised, unmoored justice. *See* Barry Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 TUL. L. REV. 605, 607 (1962) ("This arouses the lawyer's habitual fear and dislike of 'palm-tree justice'—of unregulated discretion—and if the doctrine were indeed general in this sense the hostility would be justified; for unregulated discretion is ultimately the negation of law . . . . No system can undertake to remedy every unjust displacement of wealth . . . . In fact the principal problem . . . has been precisely that of defining the limits within which it operates. But . . . within those limits there is a single principle and a single remedy. It is unitary, by contrast with the complex and fragmentary character of the common law rules.").

12. DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE viii (1991) (calling for completion of the assimilation of equity); Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1033 (2011) (accord).

13. The Supreme Court frequently misinterprets the law of Remedies. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (construing the injunction factors in an overly narrow and flawed fashion), *as reprinted in* DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES: CASES AND MATERIALS 269–73 (8th ed. 2010); Mertens v. Hewitt Assocs., 508 U.S. 248, 255–56 (1993) (interpreting restitution narrowly as historically equitable); Aetna Health Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (regretting the Court's botched ERISA reasoning regarding federal "equitable" remedies and urging the Court or Congress to fashion a fresh remedial structure to cure the epic misconstruction and injustices that would otherwise flow to plaintiffs under existing jurisprudence), *discussed in* Roberts, *supra* note 11, at 1039 n.69 (finding the law of restitution misconstrued).

14. The law of Restitution and Unjust Enrichment has its own doctrine as well as remedies. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (2011) (explaining that the law of unjust enrichment and restitution provides an independent basis of liability with a corresponding remedy as well as the remedy for violations of other substantive bodies of law such as torts, contracts, and intellectual property).

15. *See, e.g.*, Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009) (denying habeas corpus relief despite a proven constitutional violation); Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (ruling that a court retains discretion to deny injunctive relief even in the face of a proven statutory violation), *as reprinted in* RENDLEMAN & ROBERTS, *supra* note 11, at 373–81.

16. *See, e.g.*, Rosetta Stone, Ltd. v. Google, Inc., 676 F.3d 144, 165–66 (4th Cir. 2012) (construing unjust enrichment narrowly based on a misperceived quasi-contractual bounding); *see also* Daniel Gervais, Martin L. Holmes, Paul W. Kruse, Glenn Perdue & Caprice Roberts, *Is Profiting from the Online Use of Another's Property Unjust? The Use of Brand Names As Paid Search Keywords*, 53 IDEA 131, 167–68 (2013) (critiquing the *Rosetta Stone* court's cursory treatment of unjust enrichment theory).

17. *See generally* Caprice L. Roberts, *Restitutionary Disgorgement As a Moral Compass for Breach of Contract*, 77 U. CIN. L. REV. 991, 992 (2009) (exploring a disgorgement remedy for opportunistic breaches of contract to prevent unjust enrichment and encourage promise keeping over myopic wealth maximizing); *see also* Eisenberg, *supra* note 3, at 587 (advancing disgorgement).

18. THE WAY OF LIFE ACCORDING TO LAOTZU 29 (Witter Bynner trans., Capricorn Books 1962) ("Man at his best, like water, Serves as he goes along . . . .").

19. CAPRICE L. ROBERTS, REMEDIES SHAPING RIGHTS (forthcoming manuscript).