Remedies Unified in Nine Verses

Caprice L. Roberts

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Remedies Commons

Recommended Citation

Available at: http://digitalcommons.law.umaryland.edu/mlr/vol74/iss2/4

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
Poem

**REMEDIES UNIFIED IN NINE VERSES**

**CAPRICE L. ROBERTS**

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 field⁴
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 maladies⁷
(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 character trait embraced
It adjusts to serve justice (sometimes corrective) aiming to cure (souls).
Avoiding, in the ideal, palm-tree justice, with principled reason traced.

Endeavor to complete the merger of Law and Equity
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.

Remedies, with all its facets like Restitution, 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.
Lawyers and courts misperceive when remedies may and may not lie.
Efficient breach (underdetering advantage-taking, where a remedy ought redound).
Fear not for wise discretion and reasoned elaboration will properly gap-fill where justified.

Remedies, ideally shaped, serves and unifies rights as it goes
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.

© 2015 Caprice L. Roberts.

* Professor of Law, Savannah Law School. This work is the result of a decade of thoughtful, provocative conversations with Doug Rendleman, Doug Laycock, Andrew Kull, Elaine Shoben, JeanLove, Michael Allen, Candace Kovacic-Fleischer, and Andrew Wright. I also owe a debt of gratitude to Dan Dobbs for inviting me to join DOBBS ON REMEDIES as a coauthor, retracing his pioneering work and gaining a lifetime of insights. Thanks also to Judd Sneirson for sage counsel throughout the revision process. Sincere thanks as well to my research assistant Cameron C. Kuhlman for engaging in thoughtful dialogue on Remedies and unification and offering valuable feedback.

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”).


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


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.”).


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.

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.").


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).


17. See generally Caprice L. Roberts, Restitutionary Disgorgement As a Moral Compass for Breach of Contract, 77 U. Chi. 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 . . . .")