Justifying the Law-Equity Divide

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Samuel Bray, The System of Equitable Remedies, 63 **UCLA L. Rev.** 530 (2016).

The division between law and equity has a long and important history in Anglo-American jurisprudence, and one whose effects continue to resonate in American courts to this day. Indeed, whenever I teach remedies, I tell my students that this is an area of law where history still matters—that if they want to understand the difference between legal and equitable remedies, and to know the types of remedies that their clients might be entitled to in a given case, they need to be at least somewhat familiar with the history of the contest between the English courts of law and the Court of Chancery, which was responsible for developing and administering the rules of equity. Why? Because it was the battle over jurisdictional turf that took place between these courts hundreds of years ago that gave rise to a rule (i.e., the irreparable injury rule) that still operates whenever judges are called upon to decide whether an aggrieved party is entitled to an equitable remedy. Specifically, the irreparable injury rule requires that an aggrieved party seeking an equitable remedy (e.g., specific performance of a contract) must show that there is no adequate legal remedy (e.g., money damages) to put it in the position it would have occupied had the wrongdoer not committed its wrong (e.g., breach of contract).

Apart from this history, however, one wonders whether the irreparable injury rule (specifically), or the division between legal and equitable remedies (more generally), can be justified along more functional lines. Many commentators believe that it cannot. Professor Douglas Laycock, for instance, in strong and colorful language, has argued that "[a] rule designed to preserve the jurisdictional boundaries between two courts that have long been merged should die unless it serves some modern purpose."[1] In fact, Laycock has even claimed that the rule is largely dead, being more honored in the breach than in the observance.[2] But if this is true, one may ask (as my students sometimes do), why do professors still teach the irreparable injury rule, and why do courts still invoke it whenever a plaintiff seeks an equitable remedy? And, perhaps more importantly, since courts of law and equity have long been merged in most jurisdictions, what justification (outside of tradition) can there be for continuing to distinguish between legal and equitable remedies in such a manner? It is in providing an answer to these tough and persistent questions that Samuel Bray's article, The System of Equitable Remedies, makes an important contribution to the field.

Professor Bray argues that conventional wisdom—which maintains that "the distinction between legal and equitable remedies is outmoded and serves no purpose"—is wrong (P. 530), and that there are good reasons (though rarely articulated by courts) for continuing to distinguish between legal and equitable remedies (P. 533). Specifically, Bray argues that equitable remedies, far from operating as an antiquated counterpart to legal remedies, should be understood as an integrated system made up of three distinct but "logically connected" (P. 534) components: (1) the equitable remedies themselves (e.g., injunctions, constructive trusts), (2) the equitable managerial devices for administering these remedies (e.g., allowing courts to enforce injunctions via the contempt power or to modify and/or dissolve them to reflect changing circumstances), and (3) the equitable constraints to prevent such remedies from being abused (e.g., by allowing the purported wrongdoer to assert such equitable defenses as estoppel or laches).

Although it might seem difficult to justify the jurisdictional boundary between legal and equitable remedies when we are considering only the first-order problem of deciding what remedy to award an aggrieved party—after all, why should an injured party be required to satisfy the irreparable injury rule to get specific performance if that remedy would best protect the party's expectation?—Bray makes a strong case for doing so when we also take into account "the second-

order policy problems that arise from solving the first-order ones: i.e., the additional need to manage compliance and constrain abuse." (P. 534.) This is largely because courts cannot always afford complete relief to an aggrieved party by simply forcing the wrongdoer to perform a simple and clear-cut act (such as awarding a legal remedy like requiring a wrongdoer to pay money damages or return stolen property). Instead, courts sometimes must require the wrongdoer to perform (or refrain from performing) a more complex action that must be monitored and enforced over time if it is to be effective. Where this is so, courts must not only be given the power to select the most appropriate remedy for a given situation (component #1), but, for this remedy to be effective, courts must also be given the ability to select the most appropriate tools for monitoring the wrongdoer's compliance with the remedy (component #2) while preventing the aggrieved party from abusing these remedies (component #3). (P. 562.)

For instance, imagine a wrongdoer ("W") has inadvertently built a retaining wall trespassing on victim's ("V") property. Turning to the first component identified by Bray, it seems clear that there would be a number of instances in which it would be more appropriate to enforce V's rights with an equitable remedy like an injunction (forcing W to remove the retaining wall) instead of a legal remedy like money damages (forcing W to pay for the value of the land taken), in part because it seems inappropriate to force V to involuntarily sell part of his land to W, and in part because we don't know how much V would have charged W for the land in a voluntary transaction. This much is obvious.

Where Bray's article really shines is in showing us that, for the court's injunction to be effective, the court must be able to draw upon the equitable managerial devices (component #2) to effectively police W's behavior, due to the fact that a lot can go wrong between the time the order is issued and complied with. For instance, W might misunderstand the court's injunction as requiring him to remove only the retaining wall (but not the footings), or perhaps W might inadvertently destroy an original wall on V's property while removing the retaining wall. In either case, the equitable remedy can be effective only if the court retains the ability to manage W's compliance (e.g., through the power of contempt, or by making adjustments to the language of the injunction). Finally, turning to Bray's third component, it is important for the court to ensure that these remedies—which are extremely powerful, in no small part because they are enforced by the power of contempt—are not abused and "exploited by a wily litigant" (P. 572) seeking to use them in an inequitable fashion.

For instance, suppose V sat by and observed as W inadvertently built the retaining wall on V's property, and that the wall, once built, turned out to be very costly to remove. Despite W's wrong, wouldn't we want courts to take into account V's knowledge of W's action (component #3) before deciding upon the most appropriate remedy (component #1), especially since W may be found in contempt for failing to comply with a court order requiring W to remove the retaining wall (component #2)? In short, Bray convincingly shows that each component in the equitable system operates together, and must be considered together, if the equitable remedy awarded by the court is to be effective and just. As pithily summed up by Professor Bray, "the equitable remedies need the managerial devices; the equitable remedies and managerial devices need the constraints." (P. 534.)

In suggesting that we think about equitable remedies as part of a single system made up of these three logically related components, Professor Bray has not only provided a rational justification for the current system, but has helped explain why, even long after the merger between courts of law and courts of equity, the distinction between legal and equitable remedies remains alive and well. I, for one, have never thought about equitable remedies in quite this way before, and look forward to exploring this insight with my remedies students over the next semester.

Editor's note: for another review of *The System of Equitable Remedies* please see Caprice Roberts, Staying Power of Equity, also published today.

1. Douglas Laycock, **Modern American Remedies** 381 (4th ed. 2010). [?]
2. *See id.* at 391 ("My claim that the rule is dead can be stated less dramatically as a claim that whenever the choice of remedy matters to plaintiff, the rule is satisfied."). [?]

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