Staying Power of Equity

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

Let equity lure you with its sirens. Equity, first developed by the Court of Chancery, is vital to the law of remedies. It affects a range of rights, remedies, and defenses from public to private disputes. It cannot be forgotten, ignored, or fully merged. The trend, however, is to streamline equity. For example, Douglas Laycock has argued we should move beyond the law-equity divide, and Doug Rendleman has advocated fusion and functionalism for reasons that I separately have acknowledged: equity generates friction and confusion, especially regarding restitution and unjust enrichment. Sam Bray's *The System of Equitable Remedies* refutes this movement. Bray instead argues that equity remains distinct from law and comprises its own system that is pervasive, rational, and useful.

I agree: equity is alive and well in America. It is not simply federal and state constitutional rights to jury trials keeping the divide relevant. Federal and state courts keep equity in play in statutory and common-law cases—from ERISA to contracts, environmental law to trade secrets, and beyond. Equity soldiers on, despite law schools' dropping the Equity course and despite the merger of law and equity in almost all courts and the Rules of Civil Procedure. Complete merger remains elusive. Where law fails or falls short, the pull of equity is greatest. Equitable remedies are key where money substitutes provide inadequate protection. Bray bluntly states the need: "There must be some way for courts to compel action or non-action." Overall, Bray's work requires readers to stop and think before dismantling the distinct system of equity.

Equity raises fear in the minds of many. At worst, equity connotes unbridled, whimsical, illogical discretion that lingers too long with vast consequences to parties and nonparties. At its best, equity fosters fairness; the risk, however, is palm-tree justice. Equity also requires judicial oversight, which may be costly and challenging. Further, complete merger might streamline complex, arcane, and unnecessary barriers to equitable devices. But equitable discretion is vital to rights and remedies. Principled discretion is indispensable to the continued survival and success of equity. As to the fear of unbridled discretion, Rendleman articulates a path for judicial restraint in applying equity: "[a] judge's discretionary decisionmaking ought to yield to her attention to rules, precedents, and standards keeping her pragmatic eye on consequences."

Despite equity's pitfalls, Bray persuasively shows that equity is an interlocking system and, more importantly, a rational, useful one. He maintains that the "very act" of classifying remedies as legal or equitable "helps maintain the system of equitable remedies." Weaknesses, however, range from functional to substantive: equity maintains a divide that increasingly eludes modern understanding and potentially blocks relevant equitable doctrines and remedies from actions at law and vice versa. Henry Smith argues for equity to play a limited role guarding the formal rule of law against opportunism. Bray maintains that law-equity divide has "presumptive rationality" though rebuttable, as the utility of equitable concepts crossing the divide "is always open to argument." He rejects Laycock's characterization of the divide as "a dysfunctional proxy for a series of functional choices"; instead he sees a "good proxy." Bray emphasizes equity's essential function: "how judicial institutions help put a

wronged plaintiff back in his rightful position."

It is this fundamental thrust that (i) answers why full merger of equitable remedies is unsolvable given constitutional jury trial rights; (ii) provides a presumptive justification for a controversial line of Supreme Court cases that reinforce the distinction solely by appeal to tradition—what Bray provocatively explores elsewhere; and (iii) offers a fresh angle on the inadequacy-of-law prerequisite for equitable remedies, which despite Laycock's declaration of its death, Bray sees as "well established in judicial practice," reinforcing a "habit of classification" that aids the preservation of the system of equitable remedies.

Equity lives on in multiple dimensions: in the Supreme Court's original jurisdiction and *certiorari* docket, from fiduciary duties to intellectual property, and throughout state and lower federal courts. Bray's work focuses on courts' continued use and categorization of equitable remedies, including injunctions, specific performance, quiet title, constructive trusts, accounting for profits, and more. As Bray reminds readers, the interconnectedness of equitable doctrines causes equitable remedies to work more effectively. The system provides limits through "equitable managerial devices," such as contempt tools and devices to handle unexpected complexities, as well as "equitable constraints" that "guide the responsible exercise of judicial power." Still, as Bray foresees, skeptics wonder: if these equitable tools and restraints work so well, why not extend them to legal remedies? Isn't this especially apt now, because in a merged system, the judge will have knowledge of equitable doctrines that might aid a jury's application of legal remedies? Bray's defense of the imprecise line as "good proxy" is fair enough. But requiring a better rule is less compelling because the divide may fall through natural degradation, continued fusion, and increasing confusion. True, though the common law is not designed to effectuate dramatic change, we would be wise to bolster student, lawyer, and judicial understanding of equity's power and constraints.

Bray also forecasts a confusion critique for using the label "equity" but opts again to stick with what we've got. In the same vein, the *Restatement (Third) of Restitution and Unjust Enrichment* maintains use of the misunderstood word "restitution." It remains unclear if continued efforts to educate and clarify such concepts as equity and restitution can carry the water we hope. Still, in my opinion, both equity and restitution (its equitable and legal components) have staying power.

Bray helpfully details how equitable remedies remain distinct from legal remedies such as damages, mandamus, habeas, replevin, and some restitutionary relief. According to Bray, nonmonetary legal remedies that mimic equitable orders are not equitable because they are narrow, not open-ended or indeterminate. As Bray shows, courts cling to the distinction and numerous consequences flow. Equitable remedies remain the most powerful weapons for halting violative behavior, ordering corrective behavior, and deterring opportunism. To do so, judges need flexibility to "achieve the plaintiff's rightful position," as Bray aptly notes. With flexibility comes equity's potential for imperfect correlation between right and remedy. Though it will not satisfy tight doctrinal tracking, Bray sees bounding in the "habit and range of motion that is conducive to managing the parties." Either way, Bray helpfully defends why equitable range exists and remains necessary. Scholars should keep a close eye on principled reasoning to justify flexible expansions so the equitable remedy is sufficiently tethered to the right even if not precisely correlative.

Equity warrants deeper study. All combined, "the remedies and the remedy-related rules" constitute a system of equity in American law. Whether Bray convinces readers to reinforce the law-equity divide, he reminds us that such a distinct system of equity remains and convincingly demonstrates that if we forget the doctrines, lessons, and tools of equity, something meaningful will be lost.

Editor's note: for another review of *The System of Equitable Remedies* please see Marco Jimenez, Justifying the Law-Equity Divide, also published today.

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