Recovering Equity

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Samuel L. Bray & Paul Miller, *Getting Into Equity*, 97 **Notre Dame L. Rev.** __ (forthcoming, 2022), available at SSRN.

I write to offer three cheers for *Getting Into Equity*, a rumination on the distinctive manner in which litigants invoke law and equity. To get into law, the authors explain, one asserts a cause of action, rooted in a Roman law conception of redress for a violation of one's rights. To get into equity, the suitor provides a narrative account of a grievance that raises an equity in her favor. Equity may act in relatively predictable ways, but it remains fundamentally discretionary in the hands of judges or chancellors who have been asked to correct an injustice. The authors persuasively argue that the distinction has survived (if barely) the fusion of law and equity in the Federal Rules of Civil Procedure.

One immediate takeaway (as my students like to say) seems straightforward: judges asked to do equity must conduct a more flexible, less rule-bound assessment of the nature of the grievance and should not insist on codified causes of action. That may suggest that the failure of Congress to create a statutory right to sue in favor of the United States should not prove fatal to its suit for injunctive relief against enforcement of the Texas anti-abortion statute, SB8. Rather, the extraordinary nature of SB8's enforcement regime and the apparent inadequacy of remedies at law for doctors who face a string of potential bounty-hunter proceedings might justify equitable intervention absent any statutory (or prior precedential) authority.

But for those of us struggling with puzzles like Ex parte Young (*EPY*) and Bivens, the paper offers a good deal more. Justice Harlan cited *EPY* in his *Bivens* concurrence, explaining that the right of action for constitutional wrongs had already been recognized (*EPY*) and the *Bivens* action simply offered an additional remedy (damages) in circumstances where no other remedy would suffice. Bray and Miller allow us to see that perhaps Harlan had things backwards: equity arises to complete or fulfill the common law, but the existence of an equity cannot give rise to the sort of rights that tort law customarily enforces. One might reason from a common law invasion (denial of substantive due process) to an equitable remedy (*EPY*) but not from equity (*EPY*) to a right of action, enforceable in a suit for money (*Bivens*).

So how can we tell when a federal court should recognize an equity? Just the other day in my federal courts class, I channeled the Justice Scalia of Armstrong v. Exceptional Child Center and the movie *Ghostbusters* in describing equity as a "free-floating phantasm." Bray and Miller would agree. They explain, apropos of the origin story, that "[e]quity was in the background, and it was always there." It does not require a statute to give it life; only a grant of jurisdiction and the federal courts have had that in abundance, under both Article III and the First Judiciary Act.

Yet the authors acknowledge that sometimes equity matures, from a body of grievance-based corrective justice to a set of supplemental rules that provide "first-order law," comparable to a common law or statute-based right of action. That has happened, Bray and Miller explain, as to certain equitable specialties such as trust law. But in the main, equity remains corrective, filling gaps in the common law and supplying remedies tailored to specific accounts of injustice. Equitable jurisdiction and equitable discretion go hand in hand.

But how can we tell when equity has matured, evolving from corrective to supplemental? Does the change occur when a doctrine of equity, like the action recognized in *EPY*, has been enshrined in a Supreme Court opinion? Perhaps not, as the Court there emphasized the equities. When the holding has been restated on numerous occasions? Perhaps not, as equities might vary from case to case. When the holding has withstood a call for a return to a discretionary, corrective justice regime? In the case of *EPY*, Justice Kennedy called in *Coeur D'Alene* for a return to a discretionary doctrine. But the Court (perhaps under the influence of a rule-focused Justice Scalia) rejected that call. And all signs

suggest that the Court prefers to do its constitutional business by declaring the law, a practice that it views as better suited to litigation brought for injunctive and declaratory relief than in suits for damages. Can we now think of *EPY* as supplemental, rather than corrective, and as a proper foundation for the sort of reasoning on which Justice Harlan based his *Bivens* concurrence?

One should mostly praise in a jot. If I were obliged to quibble, to season the praise so to speak, I would mention an item or two that the authors already know. True, the petition of right was addressed to the Crown's discretion, but by the time Blackstone wrote it had evolved (matured?) into a proceeding that was resolved on legal principles; the Attorney General granted a fiat if the claim was well-founded in law. And true, courts of law and equity were separate in many Anglo-American legal systems. But joinder was no stranger to Americans with knowledge of Scots practice, and joinder emerged early in the federal courts with law and equity conducted on different "sides" of the same federal courtroom. And true, bills of complaint were lengthy, no doubt a reflection as the article suggests of the need to narrate a grievance. But bills also offered sworn statements of fact on which the courts might proceed to do equity, especially if the respondent failed to make an effective answer. Quite a different procedural world from our modern, federal rule-based hybrid of notice and plausibility pleading.

Returning to the Federal Rules, one finds the choice of language there all the more striking in light of the authors' account of joinder and the cause of action. The formulation in Rule 8—the "claim for relief"—might encompass both the cause of action at law and the grievance in equity. Perhaps there is room in that phrase to accommodate the project of equity's recovery, a project to which the authors have contributed much scholarly energy and erudition.

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