Announcing the "Clean Hands" Doctrine

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This Article offers an analysis of the "clean hands" doctrine (unclean hands), a defense that traditionally bars the equitable relief otherwise available in litigation. The doctrine spans every conceivable controversy and effectively eliminates rights. A number of state and federal courts no longer restrict unclean hands to equitable remedies or preserve the substantive version of the defense. It has also been assimilated into statutory law. The defense is additionally reproducing and multiplying into more distinctive doctrines, thus magnifying its impact.

Despite its approval in the courts, the equitable defense of unclean hands has been largely disregarded or simply disparaged since the last century. Prior research on unclean hands divided the defense into topical areas of the law. Consistent with this approach, the conclusion reached was that it lacked cohesion and shared properties. This study sees things differently. It offers a common language to help avoid compartmentalization along with a unified framework to provide a more precise way of understanding the defense. Advancing an overarching theory and structure of the defense should better clarify not only when the doctrine should be allowed, but also why it may be applied differently in different circumstances.

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> *[A] universal rule guiding and regulating the action of equity courts in their interposition on behalf of suitors for any and every purpose, and in their administration of any and every species of relief.*
>
> — John Norton Pomeroy[1]

INTRODUCTION

The clean hands doctrine spans every conceivable controversy. Its application effectively eliminates rights. A number of state and federal courts no longer restrict unclean hands to equitable remedies or preserve the substantive version of the defense.[2] It has also been assimilated into statutory law.[3] In the federal court system alone, the availability and scope of the defense is a debated topic with divided results.[4] Adjudication of state law shows similar case conflicts.[5] What is more, the defense has taken on a life of its own. It is reproducing

[1] 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 397 (Spencer W. Symons ed., Bancroft-Whitney 5th ed. 1941) [hereinafter EQUITY JURISPRUDENCE].

[2] *See generally* T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L.J. 509, 527-41 (2010) [hereinafter *A Process-Based Theory*] (examining the accumulating legacy of court decisions that invoke the defense to defend the litigation process); T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63, 73-99 (2010) [hereinafter *Limiting Legal Remedies*] (analyzing cases applying the defense against legal remedies).

[3] *See* T. Leigh Anenson, *Equitable Defenses in the Age of Statutes*, 37 REV. LITIG. 529, 529 (2018) [hereinafter *Age of Statutes*] (evaluating the methodology of the U.S. Supreme Court in providing the scope of equitable defenses in federal legislation); T. Leigh Anenson, *Statutory Interpretation, Judicial Discretion, and Equitable Defenses*, 79 UNIV. PITT. L. REV. 1, 1-59 (2017) [hereinafter *Statutory Interpretation*] (revealing an assumption of equitable defenses under silent statutes and analyzing issues of judicial authority and competence).

[4] *See* CGC Holding Co., LLC v. Hutchens, No. 11-CV-01012-RBJ-KLM, 2016 WL 3078986, at *5 (D. Colo. Apr. 29, 2016) (commenting that there is "no definitive law at the circuit court level as to whether the equitable defense of 'unclean hands' could bar a civil RICO damages suit, and that such appellate law as does exist is mixed"); *see also* Steven Ferrey, *Inverting the Law: Superfund Hazardous Substance Liability and Supreme Court Reversal of All Federal Circuits*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 633, 669 (2009) (noting conflict in the circuits over the availability of equitable defenses under certain CERCLA provisions). Recent cases reaching the Supreme Court for decision have involved circuit splits on the availability and application of equitable defenses. *See, e.g.*, SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., 137 S. Ct. 954, 959-67 (2017) (laches in patent law); Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1972 (2014) (laches in copyright law).

[5] *See* discussion *infra* Part V.

and multiplying into more distinctive doctrines, thus magnifying the defense's impact.[6]

Despite its approval in the courts, the equitable defense of unclean hands has been largely disregarded or simply disparaged since the last century.[7] For almost a generation, equity has not been earmarked for separate study in the United States.[8] Law students are rarely offered a dedicated course in equity.[9] Outside of the few states that retain some separation of law and equity,[10] it is not tested on state bar exams.[11]

[6] The unclean hands defense has transformed into a number of different doctrines in intellectual property law. These include, among others, copyright misuse, patent misuse, and inequitable conduct in the patent process. The employee misconduct defense in state and federal law is said to stem from the doctrine as well. *See* Anenson, *Statutory Interpretation*, *supra* note 3, at 10-11 n.27 (listing doctrines derived from the unclean hands defense). The U.S. Supreme Court has also identified habeus corpus as derived from the clean hands doctrine. *See* Munaf v. Geren, 553 U.S. 674, 693 (2008). In addition, the California Supreme Court announced that the defense of recrimination in divorce law is a derivative of the unclean hands defense. *See* DeBurgh v. DeBurgh, 250 P.2d 598, 605 (Cal. 1952).

[7] *See* T. Leigh Anenson & Gideon Mark, *Inequitable Conduct in Retrospective: Understanding Unclean Hands in Patent Remedies*, 62 AM. U. L. REV. 1441, 1525 (2013) ("Equity is not lost, for it continues in a steady stream of precedents, but it has ceased being understood."); Anenson, *Statutory Interpretation*, *supra* note 3, at 47 (observing that equitable defenses "have been largely ignored, undervalued, or simply uncharted over the last one hundred years").

[8] *Compare* Robert S. Stevens, *A Brief on Behalf of a Course in Equity*, 8 J. LEGAL EDUC. 422, 422 (1955) (criticizing trend of law schools that do not offer a separate course in equity), *with* Wesley Newcomb Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537, 537-38 (1913) (agreeing with Frederic Maitland's view to eliminate a separate course in equity so as not to preserve the distinctiveness of equity).

[9] *See* Jerome Frank, *Civil Law Influences on the Common Law: Some Reflections on Comparative and Contrastive Law*, 104 U. PA. L. REV. 887, 895 n.43 (1956) ("In several of our leading law schools there is now no course on 'equity.'"); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 272 (explaining that "equity was taught as a separate course until the 1950's").

[10] Today, six states (Delaware, Illinois, New Jersey, South Carolina, Tennessee, Mississippi) retain separate courts (or divisions) of law and equity. *See* T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455, 456 n.5 (2008) [hereinafter *Treating Equity Like Law*]; *see also* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 538 (2016) [hereinafter *System*] (noting that Georgia distinguishes equity for trial and appellate jurisdiction and that Iowa has unified courts that administer what the state constitution calls "distinction and separate jurisdictions" for law and equity). South Carolina, for instance, has special masters-in-equity courts in certain counties which are a division of the circuit court. S.C. CODE ANN. § 14-11-10 (2018). Illinois separates law and equity in Cook County. *See Chancery Division*, CIR. CT. COOK COUNTY, http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/ChanceryDivision.aspx (last visited Feb. 10, 2018) (noting that the Chancery Division of the

Contrary to other countries of the common law that share an English heritage, practicing attorneys do not specialize in the subject of equity (or even its closest counterpart, remedies).[12] There is no continuing legal education on the subject.[13] Academics, who no longer teach the subject, rarely write about it.[14] As a result, there are no experts in the field.[15]

Circuit Court of Cook County is established pursuant to General Order 1.2, 2.1 (b) [amended, effective Jan. 1, 2008] of the General Orders of the Circuit Court of Cook County and is divided into two sections: General Chancery Section and the Mortgage Foreclosure/Mechanics Lien Section); *see also* Roger L. Severns, *Equity and Fusion in Illinois*, 18 CHI.-KENT. L. REV. 333, 358 n.79 (1940) (surmising that in Cook County the designation of certain judges as chancellors for the term, made the separation probably more complete there than elsewhere in the state). New Jersey has separate divisions of law and equity in the same court. *See* N.J. REV. STAT. § 4:3-1(a)(1) (2018). Delaware, Tennessee, and Mississippi continue to have courts of chancery. DEL. CODE ANN. tit. 10, § 341 (2018); MISS. CONST. art. VI, § 159; TENN. CODE ANN. § 16-11-101 (2018).

[11] *But see* Doug Rendleman, *Remedies: A Guide for the Perplexed*, 57 ST. LOUIS U. L.J. 567, 572 (2013) [hereinafter *Remedies*] (noting that Virginia and Delaware continue to test equity on the bar exam).

[12] Barristers in Australia, for example, still specialize in the area of equity.

[13] *See ABA CLE*, AM. B. ASS'N, https://shop.americanbar.org/eBus/abaacademy.aspx (last visited Dec. 15, 2017) (listing continuing legal education topics that do not include equity or remedies).

[14] *See* Zechariah Chafee, Jr., *Foreword* to SELECTED ESSAYS ON EQUITY iii (Edward D. Re ed., 1955) [hereinafter SELECTED ESSAYS ON EQUITY] ("The absence of a collection of leading articles on Equity has long been a serious lack among law books."); T. Leigh Anenson, *Public Pensions and Fiduciary Law: A View from Equity*, 50 U. MICH. J.L. REFORM 251, 272 (2017) [hereinafter *A View from Equity*] (explaining that American equity scholarship waned after the merger of law and equity); discussion *infra* Part IV. My scholarship is the exception, along with the research of a few other academics like Caprice Roberts with expertise in unjust enrichment. I have studied the operation of one or more equitable defenses across state and federal statutory and common law as well as in various business contexts. *See generally* T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 633-35 (2007) [hereinafter *Pluralistic Model*] (analyzing equitable estoppel); T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 24-53 (2005) [hereinafter *Role of Equity*] (explaining the function of assorted equitable defenses in unfair competition cases). Other academics have analyzed equitable defenses although it has not been the focus of their research agenda. *See generally* Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 253-64 (1991) [hereinafter *Contract Enforcement*] (explaining the purpose of equity in the context of contract enforcement); Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201, 1202 (1990) (exploring both positive and normative perspectives to defend equitable defenses). Most American scholars studying equity come from the field of remedies. Arguably the two most prominent in that field, Doug Laycock and Doug Rendleman, have made major contributions to equity jurisprudence. In the Commonwealth, which shares the United States legal

Equity is also judge-made law. The method of creating equity, like the common law, gives it extraordinary vitality with an ability to adapt to new situations. The rules are formed to fit the very facts that call for their application. Equity is often lauded as the superior of the two systems because its doctrines provide a greater capacity for change and its principles afford more emphasis on ethics.[16] This is the bright side.

But ad hoc innovation has a dark side too. The age of statutes has brought with it a sensitivity to separation of powers concerns.[17] The fear is that judges can too easily aggrandize themselves at the expense of the political branches.[18] Equitable discretion has its detractors for other reasons as well. Some claim equitable doctrines are too

tradition, equity is the domain of private law scholars. Equity is a separate subject along with other areas of judge-made law: contracts, torts, and property. In the United States, equity sits somewhat uncomfortably between the fields of private law, jurisprudence, remedies, and increasingly, the federal courts. My research on equitable defenses aims to fill a critical gap in this area.

[15] The lack of interest in equity from American scholars is changing. *See generally* Henry Smith, *Fusing the Equitable Function in Private Law*, *in* PRIVATE LAW IN THE 21ST CENTURY 173, 175 (Kit Barker, Karen Fairweather & Ross Grantham eds., 2017) [hereinafter *Fusing the Equitable Function*]. There is also, of course, a cadre of excellent judges in Delaware and a few other states who devote their energies and compassion to adjudicating equity. *See* Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1402 (2016) [hereinafter *Stages of Equitable Discretion*] ("Delaware Chancery, the nation's premier business court, will be with us for the foreseeable future."); discussion *supra* INTRODUCTION and note 10. In trust law, a quintessential area of equity, there is internationally recognized scholar John Langbein.

[16] *See* T. Leigh Anenson & Donald O. Mayer, "*Clean Hands*" *and the CEO: Equity as an Antidote to Excessive Compensation*, 12 U. PA. J. BUS. L. 947, 1008-09 (2010) (arguing that history teaches that courts can utilize unclean hands to stop strategic misbehavior and simultaneously affect future social change); discussion *infra* Part I. *See generally* Garrard Glenn & Kenneth R. Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 759-63 (1945) (reviewing the history of equity to demonstrate that the traditional theory of the equitable process can help solve modern problems). Equity's inherent adaptability was once praised as a positive, creative force in the law. *See* Ralph A. Newman, *The Hidden Equity: An Analysis of the Moral Content of the Principles of Equity*, 19 HASTINGS L.J. 147, 147 (1967) [hereinafter *The Hidden Equity*] (describing and endorsing equity as a creative force in the law); Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 179-81 (1937) (predicting that the future of equity is good and certain because it is a flexible tradition for allowing growth in the law).

[17] *See* Anenson, *Statutory Interpretation*, *supra* note 3, at 19-39 (analyzing an authority objection to the inclusion of equitable defenses in silent federal statutes including separation of powers concerns).

[18] *Id.* at 23; *see* Mary Siegel, *The Dangers of Equitable Remedies*, 15 STAN. J.L. BUS. & FIN. 86, 88 (2009) ("[E]quitable doctrines allow courts not only to create law, but also to empower that law to supersede statutes that legislatures have created.").

subjective.[19] The legal community is also increasingly suspicious of equitable decision-making power and skeptical of a judge's ability to weigh and balance consequences.[20]

Others complain that discretionary defenses adversely affect conduct rules.[21] Discretion obviously cuts both ways.[22] A certain amount of leeway is effective to prevent misbehavior without undermining legitimate expectations and chilling desirable behavior.[23] Somewhat

[19] *See* Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 538 (2010) (equating discretion with the whim of judges); *cf.* Alastair Hudson, *Conscience as the Organising Concept of Equity*, 2 CANADIAN J. COMP. & CONTEMP. L. 261, 264-65 (2016) (discussing the debate whether equity results in a subjective versus objective inquiry arguing that conscience is an objective, workable inquiry); Irit Samet, *What Conscience Can Do for Equity*, *in* JURISPRUDENCE: AN INTERNATIONAL JOURNAL OF LEGAL AND POLITICAL THOUGHT 13, 13-35 (2012) (arguing that the conscience-based categories of equity are not a threat to the rule of law).

[20] *See* Anenson, *Statutory Interpretation*, *supra* note 3, at 19-20 (describing but not endorsing the view). *See generally* Goldstein, *supra* note 19, at 490-515 (discussing the history of equitable balancing).

[21] *See* Emily L. Sherwin, *Introduction: Property Rules as Remedies*, 106 YALE L.J. 2083, 2088 (1997) (claiming equitable defenses do not operate as conduct rules because they remain uncertain until the dispute is adjudicated (citing Sherwin, *Contract Enforcement*, *supra* note 14, at 304-05)); *see also* Anenson & Mayer, *supra* note 16, at 991 (describing the concept of acoustic separation where conduct and decision rules can operate in tandem and fulfill the policy functions of both precepts, but rejecting the theory in public or quasi-public claims (citing Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630-34 (1984))).

[22] *See* Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitations and the Doctrine of Laches*, 1992 BYU L. REV. 917, 952 (suggesting that trial judges undervalue rules in favor of standards such that appellate courts should provide a shorter discretionary leash); Rendleman, *Stages of Equitable Discretion*, *supra* note 15, at 1409 ("The definition and operation of discretion will remain contested and elusive."). Whether we take "the bitter with the sweet" or decide that the costs outweigh the benefits depends on any given situation. Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power — a Case Study*, 75 NOTRE DAME L. REV. 1291, 1315 (2000).

[23] Anenson, *A View from Equity*, *supra* note 14, at 264; *see* Henry E. Smith, *Why Fiduciary Law Is Equitable*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261, 278 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter *Fiduciary Law*] (explaining the idea is to keep the law "unpredictable enough to keep opportunists guessing but without destabilizing the law"); Lionel Smith, *Fusion and Tradition*, *in* EQUITY IN COMMERCIAL LAW 19, 38 (James Edelman & Simone Degeling eds., 2005) [hereinafter *Fusion and Tradition*] ("Complexity is not always worse than simplicity, if the complexity adds analytical power or permits the enforcement of additional normative standards."). Opacity has the virtue of providing for richer forms of moral and democratic relations as well as adding analytical power and normative force. Seana Valentine Shiffron, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1214 (2010) (asserting that ambiguity provides for richer forms of

shadowy rules are necessary to prevent wrongdoers from securing a road map for how to get around the law.[24] Unlike Goldilocks and the three bears, however, it will continue to be controversial whether judges are getting the amount of opacity and discretion "just right."[25]

Additionally, judicial lawmaking is not orderly. As a result, decisional rules may lack the philosophical foundation necessary to achieve their purposes or accommodate existing social objectives. Against a backdrop of uncertainty and conflicting authorities, jurists must find and separate the general from the exceptional as well as understand how the controversy before the court relates to an overarching organizational scheme.

Confusion over classification often yields an inadequate analysis of the legal issues involved along with its faulty presentation. Equitable doctrines and principles have not avoided these and other unfortunate outcomes.[26] Recent attention has focused on the judicial failure to interpret history accurately.[27] In fact, the latter has been a constant criticism of the United States Supreme Court over the last few decades.[28]

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moral and democratic relations).

[24] *See* Anenson & Mayer, *supra* note 16, at 974-79; Anenson, *A View from Equity*, *supra* note 14, at 262-63.

[25] *See, e.g.*, Rendleman, *Remedies*, *supra* note 11, at 578-79 (advising of his uneasiness with a high degree of equitable discretion).

[26] *See* Anenson, *Age of Statutes*, *supra* note 3, at 533-34 (citing cases and other authorities for the proposition that judicial opinions neglect to provide a clear explanation of equity law issues because they have not properly characterized or evaluated the problem); *see, e.g.*, Anenson & Mark, *supra* note 7, at 1445 n.11 (noting that Zechariah Chafee's seminal work on unclean hands was missed by counsel, and accordingly, not considered by the Federal Circuit in *Therasense, Inc. v. Becton, Dickinson & Co.*, 593 F.3d 1289 (Fed. Cir. 2010)); Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 526 (1982) ("Over the years . . . the courts have demonstrated confusion and vagueness in their discussions of equity and statutory violations . . . ."). In *Park 'n Fly v. Dollar Park & Fly*, 469 U.S. 189, 202-05 (1985), for example, the Supreme Court found that federal court authority did not encompass a substantive challenge to the validity of the mark, but clarified that neither the court of appeals nor counsel relied on the power to grant or deny equitable relief to support the decision. *Id.*

[27] *See* Anenson & Mark, *supra* note 7, at 1525 n.554 ("In attempting to answer questions of equity, members of the Supreme Court have disagreed over the existence or relevancy of a particular custom, been mistaken as to what it is or means, and divided when traditional principles purportedly deviate from practice.") (collecting academic writing); *see, e.g.*, Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1001-02 (2015) [hereinafter *New Equity*] (reviewing literature on the Supreme Court's historical blunders in equity jurisprudence).

[28] Anenson, *Age of Statutes*, *supra* note 3, at 565 ("Scholars have already accused the Supreme Court of indulging in several historical inaccuracies associated with

The common law escaped the worst pitfalls of judge-made law. In the early twentieth century, the legal community began to develop and clarify other subjects in the private law sphere through *Restatements of the Law*.[29] The aim of the American Law Institute was to simplify the law to the rules and principles that are to guide the conduct of clients and litigants.[30]

Equity did not receive the benefit of this laborious process.[31] Rather, its ideas and doctrines continued to develop without such systemization solely through the medium of reported decisions.[32] The merger of law and equity only added to the confusion and concealed the evolution of equity.[33]

Today, the sheer volume of cases and increasing complexity of controversies would make the organization of equity jurisprudence a monumental task.[34] Over time, it becomes difficult or even impossible to evaluate the path of judicial lawmaking or to appreciate the social and economic significance of the circumstances. These and other influences can lead to rulings that fall short of the wisdom to guide the growth of the law.

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equitable principles in its decisions.").

[29] *See* discussion *infra* Part IV (identifying which subject areas of the *Restatements* address the clean hands doctrine).

[30] *See, e.g.*, Harlan F. Stone, *Some Aspects of the Problem of Law Simplification*, 23 COLUM. L. REV. 319, 334-35 (1923).

[31] *See* Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 266 (2008) [hereinafter *How Remedies Became a Field*] ("In the late 1980s, the American Law Institute considered a *Restatement of Remedies*, which would have ensconced the field even more firmly in the legal establishment."); *id.* at 172 (explaining that there is a *Restatement of Restitution* that is considered part of the law of remedies); Lionel Smith, *Common Law and Equity in R3RUE*, 68 WASH. & LEE L. REV. 1185, 1187 (2011) [hereinafter *Equity in R3RUE*] ("The law that comes from Equity has not been as thoroughly theorized as the common law.").

[32] *See* discussion *infra* Part IV (discussing that while there were multi-volume treatises summarizing American equity jurisprudence, the last edition of these extended works was published in 1941).

[33] *See* Anthony Mason, *Fusion* ("The unsatisfactory and confused state into which the law in this area has fallen is little short of a disgrace." (quoting Lord Millett, *Equity — The Road Ahead*, 6 KING'S C. L.J. 1, 10 (1996))), *in* EQUITY IN COMMERCIAL LAW, *supra* note 23, at 11, 14; discussion *infra* Part IV (discussing the merger of law and equity); *see, e.g.*, Anenson, *Limiting Legal Remedies*, *supra* note 2, at 115-16 (discussing court confusion on the issue of allowing the clean hands doctrine to bar damages).

[34] Exactly who would undertake this assignment presents a conceptual conundrum as well. Equitable defenses are often associated with remedies, but they are also part of private law. Yet the American legal world divides remedies and private law into different domains where they have developed more or less independently. As such, scholars with unique outlooks and techniques of appraisal tend to study one subject or the other.

This Article begins to navigate the field of equity. It operates under the assumption that the concept of equity has a common core; that is, there is some benefit to exploring equitable doctrines as they operate across-the-board.[35] It has implications for theory and practice. Tracking the trail of unclean hands affords a unique window into the defense and its application. This study considers and correlates cases across state and federal law. The attempted synthesis erects a groundwork to evaluate the doctrine and its operation. In particular, it provides a basis to assess the defense's derivation into subject-matter specific species of the doctrine and to distinguish the maxim from other related defenses.[36] It also establishes a foundation to analyze the defense's appropriateness in damages actions.[37] The latter role of the clean hands doctrine in limiting legal relief has been fifty years in the making and has stimulated a world-wide discussion.[38]

The objective, however, is not necessarily to solve any of these particular problems. While commentary and analysis is offered where appropriate, the main focus is on gathering and cataloguing the data for better understanding of the law of equity and its administration. Because much less preliminary work has been done on equitable doctrines than those of the common law, the task of restating its principles and precedents is even greater. Thus, there is no pretense of providing a panacea or even possessing a talisman to divine the future. Rather, in sketching a profile of the unclean hands defense, the purpose is to examine the material out of which a solution, or set of solutions, can be worked.

The Article does offer a conceptual contribution along with a concrete, doctrinal one. Prior research on unclean hands divided the

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[35] *See* Anenson, *Age of Statutes*, *supra* note 3, at 536-37; Anenson & Mark, *supra* note 7, at 1512 (arguing that a better understanding of equitable defenses involves a deeper and wider frame of analysis); *see, e.g.*, *id.* at 1450-52, 1504-05, 1511-12 (endorsing a trans-substantive approach to understanding equitable remedies and defenses).

[36] The unclean hands defense and other kindred defenses like estoppel, illegality, or *in pari delicto* are not a complete match. *See* Anenson, *A Process-Based Theory*, *supra* note 2, at 566-69 (comparing defenses of *in pari delicto* and unclean hands); *id.* at 561 (explaining that the defense "is broad enough to extend beyond illegality"); Anenson, *Role of Equity*, *supra* note 14, at 51-52 (explaining that unclean hands is broader in application than the defenses of equitable estoppel and waiver); *see also* discussion *infra* Parts V and VI.

[37] *See generally* Anenson, *Treating Equity Like Law*, *supra* note 10, at 476 (arguing in favor of fusion on a case by case basis).

[38] *See* Anenson, *Limiting Legal Remedies*, *supra* note 2, at 66 (outlining the "fusion wars" in other countries of the common law); *see, e.g.*, *id.* at 73-99 (tracing the integration of the clean hands doctrine into damages actions in the United States).

defense into topical areas of the law.[39] Consistent with this approach, the conclusion reached was that it lacked cohesion and shared properties.[40] This research sees things differently. It offers a common language to help avoid compartmentalization along with a unified framework to provide a more precise way of understanding the defense. Advancing an overarching theory and structure of the defense should better clarify not only when the doctrine should be allowed, but also why it may be applied differently in different circumstances.

Part I introduces the clean hands doctrine and its underlying philosophy. Part II travels back in time and across the globe to identify the defense's origins. Parts III and IV trace the development of the unclean hands defense in American decisions as well as its discussion in American literature. Part V analyzes the elements of the defense and delineates the relationship between them. Part VI reviews the role of discretion in determining the clean hands doctrine. The Article concludes that the equitable defense of unclean hands plays an important role in private law, remedies, and increasingly, the federal courts. An exposition of the defense should enhance understanding of this impenetrable equitable principle in a way that appreciates the law as an intelligible whole.

I. PHILOSOPHY OF EQUITY AND UNCLEAN HANDS

The familiar maxim of equity that "he [or she] who comes into equity must come with clean hands" is "one of the elementary and fundamental conceptions of equity jurisprudence."[41] Because the defense operates as a part of the whole of equity jurisprudence, arriving at a working definition of equity seems like a good place to begin. An exact expression of equity, however, does not come easy.[42]

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[39] Chafee examined a total of eighteen different groups of cases considering unclean hands. *See* Zechariah Chafee, Jr., *Coming into Equity with Clean Hands*, 47 MICH. L. REV. 877, 881 (1949) [hereinafter Chafee I]; Zechariah Chafee, Jr., *Coming into Equity with Clean Hands*, 47 MICH. L. REV. 1065, 1091-92 (1949) [hereinafter Chafee II]; discussion *infra* Part IV.

[40] Chafee I, *supra* note 39, at 878 (concluding that unclean hands "is really a bundle of rules relating to quite diverse subjects").

[41] Anenson & Mark, *supra* note 7, at 1450 (quoting POMEROY, EQUITY JURISPRUDENCE, *supra* note 1, § 397).

[42] *See* Bray, *System*, *supra* note 10, at 536 ("Equity means many different and overlapping things."); Hila Keren, *Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity*, 2 CANADIAN J. COMP. & CONTEMP. L. 53, 101 (2016) (noting that "the legal tradition captured by the term equity is rich, diverse, and much contested among scholars"); Newman, *The Hidden Equity*, *supra* note 16, at 147 ("In the common law system we are not only uncertain as to just what equity is, but as to

Our English heritage of equity is a system of rules that developed in a separate medieval court.[43] As history rolled along, equity intervened across vast areas of the law that defied simple summaries of its contents. Equity became a complex system. And "[c]omplex systems have many features."[44] "Equity" like "jurisdiction" is a "coat of many colors."[45] For this reason, academic writing has hesitated to offer or endorse a "just so" account of equity.[46] In fact, it is understandable that jurists most steeped in the vagaries of equity, and well-versed in its multitude of doctrines and principles, would insist that the subject is indescribable.[47] But some general theorizing is useful to set the stage for understanding unclean hands.

Equity can be seen as a system and a process,[48] along with other impressions.[49] The sense of equity as a system sees it as an

just what to do with it, whatever it may be.").

[43] For a discussion of the historical evolution of the separate judicial systems and the role of the chancellor, see Anenson, *A View from Equity*, *supra* note 14, at 261 n.52; T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 378 n.4 (2008) [hereinafter *Triumph of Equity*].

[44] P.G. Turner, *Equity and Administration*, *in* EQUITY AND ADMINISTRATION 1, 5 (P.G. Turner ed., 2016).

[45] United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting); *see* Bray, *System*, *supra* note 10, at 68 (calling equity jurisdiction an old and imprecise term).

[46] Keren, *supra* note 42, at 56 ("[A]s an old concept that survived centuries of use by different humans in a variety of countries and cultures, equity cannot possibly have a simple meaning.").

[47] *See* R.P. MEAGHER ET AL., MEAGHER, GUMMOW AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES 3 (4th ed. 2002) [hereinafter MEAGHER, GUMMOW AND LEHANE'S EQUITY] ("Equity can be described but not defined. It is the body of law developed by the Court of Chancery in England before 1873."); John L. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 CATH. U. L. REV. 59, 61 (1961) ("Probably no other term [equity] has so consistently evaded definition by legal writers.").

[48] *See generally* Philip A. Ryan, *Equity: System or Process?*, 45 GEO. L.J. 213, 215-17 (1957) (describing equity from different perspectives such as functional or historical). In the twentieth century, the merger(s) of law and equity inspired conversations about what equity is or could be. More recently, Professor Henry Smith has also characterized equity as a "system," although his depiction limns the system-process dichotomy. Drawing on systems theory from institutional economics, he emphasizes equity's role in preventing the exploitation of the common law's ex ante formal rules. *See generally* Smith, *Fusing the Equitable Function*, *supra* note 15 (noting the overcrowding and normative issues).

[49] *See generally* Turner, *Equity and Administration*, *supra* note 44, at 4 (summarizing a series of essays explaining equity's facilitative role). Form and substance are other dimensions to consider equity and its integration into common law and legislation. *See* Anenson, *Limiting Legal Remedies*, *supra* note 2, at 107 ("[T]he post-merger trend of adopting unclean hands into the law establishes that courts are no longer satisfied that traditional differences in form support different treatment in

interlocking web of precepts.[50] One of the earliest accounts grounded these ideas in fraud, accident, and things of confidence.[51] Contrast the foregoing focus on equity's internal identity with a relational model.[52] The process perspective stems from the instinct that equity is more than a recitation of its rules.[53] Rather, the process school of thought emphasizes equity's flexibility in maintaining the integrity of the law.[54] This perspective then focused not on what it is, but why and how it is.

Scholars contemplating equity often emphasize the traditional means by which ancient chancellors decided cases in contrast to judges of the common law.[55] A core concept of equity originated with the Aristotelian idea that the law would fail due to its generality.[56] The cleansing power of equity calls for ex post discretion by courts to prevent and remedy the problem.[57] It is the reason why many of its doctrines remain fuzzy around the edges.[58] The need for some level of

substance."); Samuel L. Bray, *Form and Substance in the Fusion of Law and Equity* 1 (UCLA Sch. of Law, Public Law Research Paper No. 17-07, 2016) (elaborating on what those two terms mean).

50 *See* Ryan, *supra* note 48, at 214-15.

51 Anenson, *A View from Equity*, *supra* note 14, at 261-62; *see* discussion *infra* Part V and notes 206–08.

52 A later classification scheme described equity's structure as exclusive, auxiliary, and concurrent jurisdiction. MEAGHER, GUMMOW AND LEHANE'S EQUITY, *supra* note 47, at 450. Because there is overlap between the categories, the tripartite scheme has not been entirely satisfactory. While this scheme classifies equity in relation to the common law, it still centers on the nature or content of equity rather than its purposes.

53 The intuition was that a historical description of equitable doctrines and principles is incomplete. Ryan, *supra* note 48, at 217-23.

54 *Id.* at 217 (advising of equity's "built-in dynamicism"). Blackstone described equity as the "soul" of the law. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 6 (9th ed. 1866) (citing 3 WILLIAM BLACKSTONE, THE COMMENTARIES ON THE LAWS OF ENGLAND 222 (4th ed. 1876) by stating "[e]quity, in its true and genuine meaning, is the soul and spirit of all law; positive law is construed, and rational law is made, by it"). This comports with Maitland's justification of equitable intervention on the grounds that equity came not to destroy the law, but to fulfill it. JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE 47 (1901).

55 *See generally* Rendleman, *Stages of Equitable Discretion*, *supra* note 15, at 1428-31.

56 *See* Anenson, *Statutory Interpretation*, *supra* note 3, at 26-27.

57 Smith, *Fiduciary Law*, *supra* note 23, at 264-65 (explaining that equity cannot be too predictable because opportunists will anticipate it and evade it as well as invent new ways of engaging in such behavior); *see* Anenson, *Age of Statutes*, *supra* note 3, at 564-66 (discussing judicial discretion as a component of equitable defenses).

58 *See* Anenson, *Age of Statutes*, *supra* note 3, at 548-49 (describing how the original impetus for an equitable solution was that common law judges crafted their doctrines like glazed earthenware from a kiln while historic equity, in response,

open-endedness also tells us why standards, rather than rules, generally accompanied an equitable approach.[59] Certainly, the equitable model of decision-making has been a distinguishing mark of equity.[60] As Zechariah Chafee, Jr. explained, equity is a "way of looking at the administration of justice."[61]

In evaluating its doctrines and defenses, judges apply moral norms in highly contextualized situations.[62] Lawyers and lay persons alike consider "equity" to be a synonym for fairness.[63] Early equity tradition reflected the prevailing belief that litigants have ethical responsibilities that equity can help discharge.[64] After all, as a practical matter, equity historically was a source of new common law rules.[65]

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emerged like molten glass from a furnace); Smith, *Fusion and Tradition*, *supra* note 23, at 31 (advising that the idea of discretion has deep historical roots in equity).

[59] *See* Anenson, *A View from Equity*, *supra* note 14, at 264 (explaining that equity also employed ex ante rules in the service of combatting opportunism); *see also* Anenson & Mark, *supra* note 7, at 1514-17 (discussing how rule-based precepts can be under-inclusive for equitable doctrines aimed at preventing the unconscientious abuse of rights). The discretionary aspect of many equitable doctrines, including defenses, is related to the discussion about the preferred form of the law as rules or standards (or something in between). *See generally* Anenson, *Pluralistic Model*, *supra* note 14, at 642-43 (discussing rules and standards in the context of equitable doctrines).

[60] *See* Anenson, *A View from Equity*, *supra* note 14, at 261; Sherwin, *Contract Enforcement*, *supra* note 14, at 307 ("The legal model of enforcement is conduct-oriented and rule-based. The equitable model is better suited to remedial goals and particularistic [sic] decisionmaking.").

[61] Chafee, SELECTED ESSAYS ON EQUITY, *supra* note 14, at iii.

[62] *See id.* at xii (commenting that equity courts "mainly clothed moral values with legal sanctions"). *See generally* Anenson, *A View from Equity*, *supra* note 14, at 261 n.51 (explaining that early chancellors were church officials trained in Canon and moral law).

[63] Anenson & Mayer, *supra* note 16, at 975-76; *see* SNELL'S PRINCIPLES OF EQUITY 5-6 (Robert Megarry & P.V. Baker eds., 27th ed. 1973) [hereinafter SNELL'S TWENTY-SEVENTH EDITION] (noting that, in modern English statutes, provisions relating to what is "equitable" are usually construed to mean what is fair). When the Court of Chancery developed in the fifteenth century, the rules which were administered in that court came to be known as "equity" due to its derivation from the Latin *aequitas* meaning levelling. PHILIP S. JAMES, INTRODUCTION TO ENGLISH LAW 29 (8th ed. 1972). For judicial correlation of equity with basic fairness, see, for example, Clark II v. Teeven Holding Co., Inc., 625 A.2d 869, 878 (Del. Ch. 1992) ("The use of the term 'equitable principles' . . . is merely equivalent to the words 'principles of fairness or justice.'"); Rauscher v. City of Lincoln, 691 N.W.2d 844, 846 (Neb. 2005) ("Equity is determined on a case-by-case basis when justice and fairness so require.").

[64] Anenson & Mayer, *supra* note 16, at 1008; *see* Dezell v. Odell, 3 Hill 215, 225 (N.Y. Sup. Ct. 1842) ("It is a question of ethics.").

[65] *See* Anenson & Mayer, *supra* note 16, at 1009 ("The experience of equity is evidence of this dynamic and reflective process. Over hundreds of years, equity has

Professor Lionel Smith reminds us that equity systematically enforced certain ethical ideals like good faith in contrast to the common law.[66] Unclean hands shares this interest.[67] There are other core values supporting equitable defenses including promoting fair play, protecting weaker parties, and preserving the integrity of the justice system.[68] They rest on maxims obligating litigants to follow the golden rule or, like unclean hands and others, prevent them from taking advantage of their own wrong.[69] Equity is often associated with mercy as well.[70] Circumstances giving rise to the application of equitable principles are a mixed bag of manners, mores, and machinations.

It is not surprising that equity is often theorized in conscience-based terms.[71] Roscoe Pound famously explained that equity intervened to

made inroads in the law and resulted in its modification and amenability to notions of fairness and justice."); Hohfeld, *supra* note 8, at 567 n.23 (explaining that equity resulted in "a liberalizing and modernizing of the law" (quoting Roscoe Pound, Address to the Law Association of Philadelphia: The Organization of Courts (Jan. 31, 1913))).

66 *See* Smith, *Fusion and Tradition*, *supra* note 23, at 32-36 (explaining differences in underlying moral norms like respect for other people's obligations and the justiciability of motive).

67 POMEROY, EQUITY JURISPRUDENCE, *supra* note 1, § 397 (stating the maxim "is based upon conscience and good faith").

68 Anenson, *Pluralistic Model*, *supra* note 14, at 663.

69 *See* Anenson, *Treating Equity Like Law*, *supra* note 10, at 461 (relating rationales of unclean hands); Anenson, *Triumph of Equity*, *supra* note 43, at 388 (explaining rationale for estoppel as doing unto others as you would have them do unto you); Anenson, *Statutory Interpretation*, *supra* note 3, at 11 n.31 (describing doctrine of *in pari delicto* prevents parties to a common illegal scheme from profiting from their own wrongdoing); Stephen A. Smith, *Form and Substance in Equitable Remedies*, *in* DIVERGENCES IN PRIVATE LAW 321, 336 (Andrew Robertson & Michael Tilbury eds., 2016) [hereinafter *Form and Substance*] ("The clean hands bar is based on the same principles that underlie the traditional common law doctrine of illegality.").

70 *See, e.g.*, Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944) (explaining equity's qualities of mercy and practicality that allow for a nice adjustment to reconcile the public interest and private need); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 85 (1993); *see also* Leonard J. Emmerglick, *A Century of New Equity*, 23 TEX. L. REV. 244, 254 (1945) (grounding equity in the *epicia* of Aristotle and in the Roman *clementia* or "clemency").

71 *See* Keren, *supra* note 42, at 347 ("[Equity is the] insistence that judicial discretion should be applied with conscience in mind, and that the legal outcome must deter exploitation of the law while promoting fairness, moral behavior, and social justice."). The notion of conscience (as well as whose conscience) has been a key in understanding equitable intervention through the ages. *See* DENNIS R. KLINCK, CONSCIENCE, EQUITY, AND THE COURT OF CHANCERY IN EARLY MODERN ENGLAND vii (2010) ("One cannot delve very far into judicial equity without encountering the notion of 'conscience.'"); Samet, *supra* note 19, at 32 (explaining that conscience in

prevent an unconscientious use of rights.[72] Equitable defenses are often justified in this manner.[73] More recent scholarship emphasizes equity's role as a second-order safety valve in combatting opportunism.[74] Equitable defenses like unclean hands partake of this attitude as well.[75]

The purposes of equity, and its defenses in particular, were to stop strategic behavior and safeguard the court.[76] In this vein, the maxim of

equity does the job of justifying liability and defining its border); *see also id.* at 20 (explaining that medieval conscience came from God and was therefore uniform). *See generally* Anenson, *Pluralistic Model*, *supra* note 14, at 660 (discussing the notion of conscience in equity). The maxim is grounded on the historical concept that a court of equity represents the collective conscience of the public. *See id.* at 660 (discussing the institutional idea of conscience in Chancery).

[72] Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 226 (1914); *see also* MEAGHER, GUMMOW AND LEHANE'S EQUITY, *supra* note 47, at 451 (explaining that equity prevents the unconscientious use of legal rights); Tiong Min Yeo, *Choice of Law for Equity* (explaining how the "[u]nconscientiousness in the exercise of legal rights provides the reason for the intervention" of equity), *in* EQUITY IN COMMERCIAL LAW, *supra* note 23, at 147, 157; Anthony Mason, *Equity's Role in the Twentieth Century*, 8 KING'S C. L.J. 1, 1 (1998) ("[E]quitable principles were shaped with a view to inhibiting unconscientious conduct and providing for relief against it.").

[73] *See* DOUG RENDLEMAN, COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT 269 (2010) [hereinafter COMPLEX LITIGATION] (discussing equitable defenses and explaining that every edition of Pomeroy maintained that the Chancellor could refrain from granting relief on the ground that the conduct violated the court's conscience); Anenson, *Pluralistic Model*, *supra* note 14, at 662 (outlining how estoppel prevented unconscionable conduct and withheld aid to the wrongdoer); Anenson & Mark, *supra* note 7, at 1450-51, 1522.

[74] *See* Dennis Klimchuk, *Equity and the Rule of Law*, *in* PRIVATE LAW AND THE RULE OF LAW 247, 247 (Lisa M. Austin & Dennis Klimchuk eds., 2014) (describing equity as anti-opportunism in preventing the exploitation of the generality or strictness of the law). *See generally* Smith, *Fusing the Equitable Function*, *supra* note 15 (underscoring equity's bi-level structural quality that intervened to solve unforeseeable problems of complexity and uncertainty and stressing equity's transforming role in preventing the exploitation of the common law's ex ante formal rules).

[75] *See* Anenson, *Role of Equity*, *supra* note 14, at 62-63 (discussing how equitable defenses prevent gamesmanship and hypocrisy at the expense of the court, the law, and other litigants); Anenson, *Statutory Interpretation*, *supra* note 3, at 5-6 ("Famous for its appeal to history and high-minded ethical ideals, equity should also be remembered for its practicality — its function.").

[76] *See* Anenson, *Statutory Interpretation*, *supra* note 3, at 3-4; *see also* Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 237 (2012) (explaining injunctions as correcting for party opportunism); Smith, *Fiduciary Law*, *supra* note 23, at 262-63 (asserting anti-opportunism as a general theory of equity). For court protection purpose, see HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 26, at 59-69 (2d ed. 1948) (discussing court protection purpose of

"he [or she] who comes into equity must come with clean hands" developed to "protect the court against the odium that would follow its interference to enable a party to profit by his own wrong-doing."[77] It follows that the defense serves two fundamental purposes. It protects judicial integrity and promotes justice.[78]

The application of unclean hands protects judicial integrity "because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system."[79] Thus, the court acts to protect itself and not the opposing party.[80] Court sensitivity to its own administration can be seen as well in the willingness to raise the defense *sua sponte*.[81] Safeguarding the sanctity of the legal system may also be the reason why so many federal courts sitting in diversity instinctively apply federal law without an *Erie* analysis to determine the applicability of unclean hands in cases seeking legal relief.[82]

The application of unclean hands pursuant to the court protection purpose defends the judicial process in two ways. First, it protects judicial integrity, "because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system."[83] The Supreme Court of the United States has

unclean hands).

[77] N. Pac. Lumber Co. v. Oliver, 596 P.2d 931, 939-40 (Or. 1979) (quoting MCCLINTOCK, *supra* note 76, at 63).

[78] *See* Manown v. Adams, 598 A.2d 821, 824-25 (Md. Ct. Spec. App. 1991), *rev'd on other grounds*, 615 A.2d 611, 612 (Md. 1992); Maldonado v. Ford Motor Co., 719 N.W.2d 809, 818 (Mich. 2006).

[79] Kendall-Jackson Winery Ltd. v. Superior Court, 90 Cal. Rptr. 2d 743, 749 (Cal. Ct. App. 1999); *see also* Mas v. Coca-Cola Co., 163 F.2d 505, 511 (4th Cir. 1947).

[80] *See* Gaudiosi v. Mellon, 269 F.2d 873, 881 (3d Cir. 1959); Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists, 39 Cal. Rptr. 64, 96 (Cal. Ct. App. 1964).

[81] *See* Am. Ins. Co. v. Lucas, 38 F. Supp. 896, 921 (W.D. Mo. 1940) ("A court of equity is so jealous in guarding itself against such misuse that it will, *sua sponte*, apply the maxim whenever it discovers the unconscionable conduct."), *aff'd sub nom.* Am. Ins. Co. v. Scheufler, 129 F.2d 143 (8th Cir. 1942); Anenson, *A Process-Based Theory*, *supra* note 2, at 534 n.95 (citing cases); *cf.* Anenson, *Pluralistic Model*, *supra* note 14, at 666-67 (explaining that courts have raised the equitable defense of estoppel of their own accord and have considered it for the first time on appeal to protect the integrity of the judicial process).

[82] *See, e.g.*, Smith v. Cessna Aircraft Co., 124 F.R.D. 103, 105-07 (D. Md. 1989); Anenson, *A Process-Based Theory*, *supra* note 2, at 535 n.96 (citing cases).

[83] *Kendall-Jackson Winery*, 90 Cal. Rptr. 2d at 749. The court protection purpose was aptly expressed by the court in *Gaudiosi*, which noted:

> [C]ourts are concerned primarily with their own integrity in the application of the clean hands maxim. Courts in such situations act for their own protection and not as a matter of "defense" to the defendant. Public policy

described wrongdoing that has a similar negative effect on the judicial process as "a 'flagrant affront' to the truth-seeking function of adversary proceedings."[84] Second, the doctrine of unclean hands is applied to defend against misconduct that actually interferes with the court process in the present case.[85] This kind of unclean conduct has a more tangible relation to court procedure and is exemplified in myriad forms of litigation misconduct.[86]

Used in this way, the defense serves a real as opposed to a representative role in protecting the judicial responsibility. Notably, both its concrete and symbolic aspects preserve the forgotten function of ancient equity in maintaining the sanctity of law and its processes.[87] In this regard, it seems that equity serves an expressive function for courts.[88] Judges are acting as guardians of the court's integrity as well

> not only makes it obligatory for courts to deny a plaintiff relief once his "unclean hands" are established but to refuse to even hear a case under such circumstances.

Gaudiosi, 269 F.2d at 882.

[84] ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 323 (1994) ("False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a 'flagrant affront' to the truth-seeking function of adversary proceedings.").

[85] *See, e.g.*, Maldonado v. Ford Motor Co., 719 N.W.2d 809, 818 (Mich. 2006).

[86] There are related instrumental concerns for the deterrence of future deviance during the litigation process or, correspondingly, the encouragement of candor and correct behavior by litigants and ethical conduct by their attorneys. *See* Anenson, *A Process-Based Theory*, *supra* note 2, at 538-39; *Maldonado*, 719 N.W.2d at 819 (commenting on the trial court's "gate-keeping obligation" to sanction misconduct to deter others in the future). A more targeted societal goal is court control over its own proceedings. *See* Anenson, *A Process-Based Theory*, *supra* note 2, at 539. Courts seldom distinguish between the deterrence and moral duty aspects in addressing unclean hands. *But see* Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co., 544 F. Supp. 242, 246 (D.S.C. 1981) (noting the plaintiff's contractual and moral duty to maintain accurate records).

[87] *See* Anenson, *Role of Equity*, *supra* note 14, at 63 (analyzing equitable defenses in the context of unfair competition that highlight equity's forgotten role in maintaining the integrity of the law); Keith Mason, *Fusion: Fallacy, Future or Finished* (noting ancient equity's role in thwarting chicanery in the common law process), *in* EQUITY IN COMMERCIAL LAW, *supra* note 23, at 41, 53, 75; Hohfeld, *supra* note 8, at 556, 560-61 (citing examples). Equity intervened when the law was inadequate. One way the law was inadequate was when offenders were strong enough to interfere and suppress the legal process. *Cf.* Willard Barbour, *Some Aspects of Fifteenth Century Chancery*, 31 HARV. L. REV. 834, 857 (1918) (explaining that the Chancellor was a great judge who had power and prestige due to the confidence of the king and who was not influenced by bribes or threats).

[88] *See* Anenson, *Statutory Interpretation*, *supra* note 3, at 52.

as preserving equity's primary corrective ideal in maintaining the law's continuity and coherence.[89]

In addition to its court protective qualities, courts advocate "justice" in applying unclean hands.[90] The clean hands doctrine promotes justice by preventing "a wrongdoer from enjoying the fruits of his [or her] transgression"[91] or, put differently, making the wrongdoer litigant "answer for his [or her] own misconduct in the action."[92] Similar to comparative negligence and other defenses used in actions seeking damages, courts considering unclean hands recognize that the fault of both parties is an important consideration in the judicial settlement of disputes.[93]

The objective of unclean hands to prevent unfair advantage-taking by wrongdoers is said to rest on moral values such as *in delicto*, *tu quoque*, and even retribution.[94] The former *in delicto* norm concerns

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[89] *See* Anenson & Mayer, *supra* note 16, at 974 (commenting that the application of equitable defenses reinforces equity's function in maintaining law's integrity).

[90] *See, e.g.*, Am. Ins. Co. v. Lucas, 38 F. Supp. 896, 921 (W.D. Mo. 1940) (noting that lack of precedent does not restrict a court of equity from dismissing cases for unclean hands as a matter of "justice" or "natural justice"), *aff'd sub nom.* Am. Ins. Co. v. Scheufler, 129 F.2d 143 (8th Cir. 1942); Kendall-Jackson Winery, Ltd. v. Superior Court, 90 Cal. Rptr. 2d 743, 749 (Cal. Ct. App. 1999) (declaring that unclean hands promotes justice); Rauscher v. City of Lincoln, 691 N.W.2d 844, 852 (Neb. 2005) ("Equity is determined on a case-by-case basis when justice and fairness so require."); *see also* Ohio State Bd. of Pharmacy v. Frantz, 555 N.E.2d 630, 633 (Ohio 1990) (indicating that justice is the objective of equity). The concept of justice is not a matter on which courts typically reflect in any depth. *See* Anenson, *A Process-Based Theory*, *supra* note 2, at 537. Here, and elsewhere, I have tied it to the idea of taking advantage of one's own wrong. *Id.*

[91] Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945); *see also* Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933); Fairway Developers, Inc. v. Marcum, 832 N.E.2d 581, 585 (Ind. Ct. App. 2005) ("The purpose of the unclean hands doctrine is to prevent a party from reaping benefits from his misconduct.").

[92] *Kendall-Jackson Winery*, 90 Cal. Rptr. 2d at 748.

[93] *See* Anenson, *A Process-Based Theory*, *supra* note 2, at 528. Chafee explained:

> [T]he clean hands maxim is not peculiar to equity, but is simply a picturesque phrase applied by equity judges to a general principle running through damage actions as well as suits for specific relief. This principle is that the plaintiff's fault is often an important element in the judicial settlement of disputes, as well as the defendant's fault.

Chafee II, *supra* note 39, at 1091-92.

[94] *See* Ori J. Herstein, *A Normative Theory of the Clean Hands Defense*, 17 LEGAL THEORY 171, 195-96, 199-200 (2011). The notion of punishment is anathema to equity. *See* Pappas v. Pappas, 320 A.2d 809, 811 (Conn. 1973) ("It is applied not by way of punishment but on considerations that make for the advancement of right and

situations where the claimant is involved or responsible for the same wrong as the respondent.[95] The latter retributive norm relates to settings where the claimants' inequity is the reason they are denied the right to be heard.[96] The norm of *tu quoque* denies standing to attribute blame to one who also committed the same wrong regardless of the merits of the claim.[97] Because the clean hands doctrine is personal to the plaintiff, courts often declare that it may not be invoked against third parties or subject to attribution. In other words, "it is irrelevant whether anyone other than [the one seeking equitable relief] acted with unclean hands."[98]

Reasonable people may disagree on which of the two primary policies of the clean hands doctrine are paramount or nested within others.[99] The two goals are also not entirely separable.[100] The maxim of unclean hands "derives from the unwillingness of a court of equity, as a court of conscience, to lend the aid of its extraordinary powers to a plaintiff who himself is guilty of reprehensible conduct in the controversy and thereby to endorse such behavior."[101]

justice." (citing Johnson v. Yellow Cab Co., 321 U.S. 383, 387 (1944))); Andrew Burrows, *Remedial Coherence and Punitive Damages in Equity* (analyzing controversy over whether punitive damages are available in Australia for equitable wrongs and explaining that there is no notion of punishment operating under the labels or concepts of equity), *in* EQUITY IN COMMERCIAL LAW, *supra* note 23, at 381, 391-92. For a discussion of an early period when Chancery partook of a criminal nature where the remedy was punishment of the offenders, see Barbour, *supra* note 87, at 856-57.

95 *See* Herstein, *supra* note 94, at 193-95 (claiming that unclean hands also embodies the moral norm *in delicto* that deals with wrongful provocation or inducement (i.e., "you started it" or "you made me do it" or "it is your fault")).

96 *See* Herstein, *supra* note 94, at 199-200.

97 *See id.* at 195-98; *id.* at 195-96 (reviewing philosophical literature ascribing moral value to *tu quoque*). Professor Nicholas Cornell recently argued that the defenses of unclean hands and unconscionability are both concepts where the court denies relief to those who lack moral standing to complain. *See* Nicholas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131, 1163 (2016) (recasting contract law, including its defenses, based on an inability to complain rather than a lack of voluntary agreement).

98 Heidbreder v. Carton, 645 N.W.2d 355, 371 (Minn. 2002) (quotations omitted).

99 *Compare* Anenson, *A Process-Based Theory*, *supra* note 2, at 526-41 (emphasizing court protection purpose of unclean hands), *with* Herstein, *supra* note 94, at 208 (expressing skepticism of the court protection justification of unclean hands but not ruling it out entirely).

100 *See* Anenson, *A Process-Based Theory*, *supra* note 2, at 539.

101 Union Pac. R.R. Co. v. Chicago & Nw. Ry. Co., 226 F. Supp. 400, 410 (N.D. Ill. 1964). *See also* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 1 (1950) [hereinafter SOME PROBLEMS].

In summary, the equitable defense of unclean hands depicts the values and reflects the logic of equity. It has lofty goals still relevant today. Modern trial judges, just like medieval Chancellors, use the defense to defend both litigants and courts.[102] As evidenced by its present application in a multitude of cases, the doctrine of unclean hands continues to be legally and socially significant.[103]

Because the law (particularly equity) is a past dependent institution,[104] the next section outlines the origins of the defense. The story of the clean hands doctrine begins several thousand miles across the Atlantic — and a few centuries from today.[105] Its birth coincided with the founding of the United States of America.[106] The principle on which it rests, however, dates many generations beyond.[107]

II. ORIGINS OF THE UNCLEAN HANDS DEFENSE

The familiar maxim in equity of "he who comes into equity must come with clean hands" has served the justice system more than three centuries. It is a British legacy. English barrister Richard Francis first coined a conception of the clean hands doctrine in his book "Maxims of Equity" published in 1728.[108] His version, derived from equity cases, articulated the standing doctrine as "[h]e [or she] that hath committed iniquity shall not have equity."[109]

Chief Baron Eyre of the English Court of Exchequer subsequently adopted the defense as "unclean hands" in *Dering v. Earl of Winchelsea*

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102 *See* Anenson, *Statutory Interpretation*, *supra* note 3, at 6.

103 *See* Anenson, *Limiting Legal Remedies*, *supra* note 2, at 73-99 (identifying and reviewing unclean hands decisions resulting in ineligibility of legal relief); *infra* Part III.

104 *See* OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) ("The law embodies the story of a nation's development."); Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 573 (2000) ("Law is the most historically oriented, or if you like the most backward-looking, the most 'past dependent,' of the professions.").

105 *See* discussion *infra* Part II.

106 *See* CHAFEE, SOME PROBLEMS, *supra* note 101, at 5 ("[Unclean hands] is exactly as old as the United States Constitution.").

107 *See* discussion *infra* Part II.

108 *See* Roscoe Pound, *On Certain Maxims of Equity*, *in* CAMBRIDGE LEGAL ESSAYS WRITTEN IN HONOUR OF AND PRESENTED TO DOCTOR BOND, PROFESSOR BUCKLAND AND PROFESSOR KENNY 259, 263-64 (1926); *see also* Chafee I, *supra* note 39, at 881-82 (noting that the phrase was repeated in 1749 by "a gentleman of the Middle Temple" in his *Grounds and Rudiments of Law and Equity* and again in 1793 by John Anthony Fonblanque).

109 RICHARD FRANCIS, MAXIMS OF EQUITY 6 (Richmond: Sheppard and Pollard, Printers, 1st Am. ed. 1823) (1728) (second maxim). For a history and overview of the maxims of equity, see generally PETER W. YOUNG ET AL., ON EQUITY §§ 3.1-3.9 (2009).

at the end of the eighteenth century.[110] Historically, the departments of Exchequer and Chancery conducted the civil service of England with Exchequer as the fiscal department and Chancery as the secretarial department.[111] Exchequer had equity powers.[112]

The general principle underpinning the clean hands doctrine dates to antiquity. Commentators have traced the genesis of unclean hands to Chinese customary law and to the Roman period of Justinian.[113] In civil law countries without a separate body of law called "equity," a kindred idea can be found in the recognition of wrongdoing for an abuse of right.[114]

Therefore, this country has taken a few hundred years to digest all the equity it swallowed. And the change is irreversible. The next section does not so much attempt to rescue authentic English equity as to track its trajectory in America.

III. DEVELOPMENT OF THE DEFENSE IN AMERICAN DECISIONS

Courts have been shooting off decisions on the defense of unclean hands like Roman candles since the American Revolution.[115] There were approximately two hundred state and federal cases mentioning this equitable doctrine before the Civil War and more than eight hundred cases before the turn of the twentieth century.[116] Today, despite its containment to mainly actions in equity, cases considering the doctrine already tally in the tens of thousands.[117]

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110 Dering v. Earl of Winchelsea, (1787) 29 Eng. Rep. 1184, 1186 (ultimately rejecting the defense because the alleged unclean hands of a surety in encouraging the debtor to add to his debt were not sufficiently connected to the controversy in his suit for contribution against other sureties).

111 *See* FREDERIC W. MAITLAND, EQUITY: A COURSE OF LECTURES 2 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936).

112 *See* JAMES, *supra* note 63, at 25 (explaining that Exchequer became the earliest of the common law courts and, over the course of time, acquired a wide jurisdiction in equity).

113 *See* RALPH A. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 31, 250 n.19 (1961) [hereinafter EQUITY AND LAW].

114 *See* Anenson, *A View from Equity*, *supra* note 14, at 262 n.60 (asserting that the prevention of an abuse of right is the motto of many equitable defenses).

115 Anenson, *Limiting Legal Remedies*, *supra* note 2, at 63.

116 The data was generated by a Westlaw legal database search of "clean hands" or "unclean hands" in the database "all cases" on February 22, 2017.

117 A Westlaw legal database search of "clean hands" or "unclean hands" in the database "all cases" on August 5, 2017, yielded more than 10,000 cases (which is the limit of the search engine).

The United States Supreme Court endorsed the doctrine of unclean hands early in our nation's history.[118] In fact, the Court has considered the defense in every decade but one since the founding of the country.[119] This means that judges were considering the clean hands doctrine during the major events shaping American history. The Supreme Court's opinions during the Industrial Revolution, for example, discussed unclean hands as a condition of equitable intervention and the discretion to refuse aid from "time immemorial."[120] By the twentieth century, the Supreme Court invoked unclean hands, explaining: "This is the doctrine of the highest court of England, and no court has laid it down with any greater stringency than the Supreme Court of the United States."[121] Around the same time, lower federal courts announced that "the [unclean hands] maxim is of so ancient an origin that extended analysis of its scope and effect would seem unnecessary."[122] The clean hands doctrine was well settled by the time of the Great Depression.[123]

The defense then became a "bone of bitter controversy" in at least four decisions after Pearl Harbor.[124] One of those decisions, *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.* is still the leading case on the unclean hands defense throughout the country.[125] The Supreme Court explained the rationale of unclean

[118] The United States Supreme Court first recognized the doctrine of unclean hands in 1795 in *Talbot v. Jansen*, 3 U.S. 133 (1795). By 1831, the Court referenced that the defense was "well settled." Cathcart v. Robinson, 30 U.S. 264, 276 (1831).

[119] A Westlaw legal database shows there are roughly one hundred United States Supreme Court cases concerning unclean hands. Reasonable people may disagree on an exact count. Especially in the early decisions, the Court sometimes announced the principle (i.e., no one should take advantage of their own wrong), but not the doctrine (clean hands) or failed to distinguish between the discretionary denial of equitable relief in general versus the specific denial of relief on the basis of the unclean hands defense. *See infra* note 339.

[120] *See* Haffner v. Dobrinski, 215 U.S. 446, 450 (1910); Pope Mfg. Co. v. Gormully, 144 U.S. 224, 236 (1892).

[121] Clinton E. Worden & Co. v. Cal. Fig Syrup Co., 187 U.S. 516, 535 (1903) (quoting Cal. Fig Syrup Co. v. Frederick Stearns & Co., 73 F. 812, 817 (6th Cir. 1896)).

[122] Keystone Driller Co. v. Gen. Excavator Co., 62 F.2d 48, 50 (6th Cir. 1932).

[123] *See* Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945) (explaining that the clean hands doctrine is "far more than a mere banality"); Olmstead v. United States, 277 U.S. 438, 483 (1928) (Brandeis, J., dissenting) (calling the unclean hands defense "settled").

[124] Chafee I, *supra* note 39, at 878.

[125] *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 938 (4th ed. 2010) [hereinafter REMEDIES] (noting that the decision is the leading Supreme Court case on unclean hands). Moreover, *Precision Instrument* has been given precedential value by

hands: "That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abetter of iniquity.'"[126] In another seminal case, the Court declared:

> [T]hat whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.[127]

State courts adopted the doctrine with similar alacrity. Five state supreme courts had cases concerning the defense of unclean hands in the post-Revolutionary War period before the nineteenth century.[128] Even prior to English recognition of the doctrine in *Dering v. Earl of Winchelsea*, the Superior Court of Connecticut in 1785 acknowledged the principle although it did not use the phrase "clean hands" or "unclean hands."[129] The Supreme Court of Judicature of New Jersey was the earliest court in the United States to announce the maxim.[130] Citing Lord Kenyon for the idea that "those who come into a court of justice must come with clean hands," the court upheld a plea that a bond sued on was obtained by fraud.[131] With more states entering the

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the Supreme Court in subsequent unclean hands cases. *See, e.g.*, S&E Contractors v. United States, 406 U.S. 1, 15 (1972) (citing *Precision Instrument*, 324 U.S. 806; Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)). State courts likewise rely on the same decision in understanding and expanding unclean hands and related doctrines. *See, e.g.*, Kendall-Jackson Winery, Ltd. v. Superior Court, 90 Cal. Rptr. 2d 743, 749 (Cal. Ct. App. 1999) (citing *Precision Instrument*, 324 U.S. 806 in extending the defense to legal remedies).

126 *Precision Instrument*, 324 U.S. at 814 (quoting Bein v. Heath, 47 U.S. 228 (1848)).

127 Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244-45 (1933).

128 In certain cases, the defense was raised by counsel as then reported in the court opinions. *See* Owens v. Whitaker, 1 Ky. 123, 140 (Ky. Ct. App. 1795); Moncrieff v. Goldsborough, 4 H. & McH. 281, 282 (Gen. Ct. Md. 1799); Mason v. Evans, 1 N.J.L. 182, 186 (N.J. Sup. Ct. 1793); Ward v. Webber, 1 Va. 274, 278 (Va. 1794). The General Court of Maryland was a precursor of sorts to its highest court today. There were also several state supreme court cases concerning unclean hands immediately thereafter as well. *See, e.g.*, Mitchell v. Smith, 4 Yeates 84, 84 (Pa. 1804); Barnard v. Crane, 1 Tyl. 457, 473 (Vt. 1802).

129 *See* Little v. Fowler, 1 Root 94, 94 (Conn. Super. Ct. 1785).

130 *See* Mason, 1 N.J.L. at 186.

131 *Id.* at 186. Prophetically, the court appears to have relied on the defense in a law (not equity) case. *See id.* at 182-83 (action of debt on bond). The availability of fraud

union by the mid-century mark, the defense of unclean hands continued its popularity in American jurisdictions.[132]

Fast forward to the present, the coverage of unclean hands comprises myriad forms of misbehavior barring an assortment of state and federal claims.[133] It bears repeating that the defense has also been the basis of other doctrines and morphed into more specific defenses in several fields.[134] Courts have additionally read the defense into state and federal legislation without the explicit approval of the legislature.[135] Furthermore, in contrast to other countries of the common law, the defense of unclean hands no longer bears the birthmark of an equitable defense.[136] Historically, the defense applied to all equitable relief, but only equitable relief.[137] At least in certain jurisdictions like California, however, it is no longer an equity-only defense.[138] This means that the clean hands doctrine has the potential to preclude the entire lawsuit because it disqualifies claims seeking legal relief like damages.[139]

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as a defense to actions at law had been subject to numerous conflicting decisions in the inferior federal courts. *See* Edwin H. Abbot, Jr., *Fraud as a Defense at Law in the Federal Courts*, 15 COLUM. L. REV. 489, 504 (1915); *see also* James W. Beatty, Recent Decision, *Federal Procedure — Juries — Attacking Release for Fraud in Action at Law*, 53 MICH. L. REV. 288, 290 (1954) (discussing whether fraud is legal or equitable for purposes of jury trial).

132 *See, e.g.*, Conrad v. Lindley, 2 Cal. 173, 175-76 (1852) (equating unclean hands defense with a lack of good faith in seeking specific performance of a contract); Charles William Luther, Note, *Plaintiff Granted Injunction Despite Unclean Hands*, 7 HASTINGS L.J. 92, 93 (1955–56) (noting that California courts readily adopted the clean hands doctrine at an early stage in their judicial history); *see also* Chafee I, *supra* note 39, at 878 (relating that "the maxim is involved in scores of cases"); *cf.* Hohfeld, *supra* note 8, at 550 (noting maxim of unclean hands to be of "slight importance" compared to other equitable doctrines).

133 *See* Anenson, *Limiting Legal Remedies*, *supra* note 2, at 63-64.

134 *See* Anenson & Mark, *supra* note 7 (tracking the defense of unclean hands to inequitable conduct); discussion *supra* INTRODUCTION.

135 *See generally* Anenson, *Statutory Interpretation*, *supra* note 3, at 5, 10-19 (identifying an assumption of equitable discretion to invoke unclean hands and other equitable defenses in legislation); discussion *supra* INTRODUCTION.

136 *See* Anenson, *A Process-Based Theory*, *supra* note 2, at 573 (discussing how the defense is no longer contained in cases seeking equitable remedies).

137 *See* Anenson, *Age of Statutes*, *supra* note 3, at 568 ("A modern issue for equitable defenses, particularly those like laches and unclean hands that operated exclusively against equitable relief, is whether they may be extended to bar actions seeking damages.").

138 *See* Anenson, *Limiting Legal Remedies*, *supra* note 2, at 74-78 (analyzing fifty plus years of decisions).

139 *See id.*

IV. DISCUSSION OF THE DEFENSE IN AMERICAN LITERATURE

With a notable exception in the middle of the twentieth century, the defense of unclean hands has been overlooked (and underestimated) by legal scholars.[140] This is true despite its significance to commercial and other relations since the inception of the country.[141] Equitable defenses like unclean hands are universally available.[142] They potentially apply in every area of the law, common law and statute, and prevent a remedy for a violation of the law.[143] As such, courts can vary the value of rights by the liberal or restrictive interpretation and application of defenses that negate liability.[144]

Before the twentieth century, there were less than a dozen law review articles mentioning the clean hands doctrine in the United States. Other than a one-sentence Note in the *Harvard Law Review*, these articles were devoted to particular areas of law dealing with subjects such as trademark, fraudulent conveyance, and bankruptcy.[145]

The advent of American equity treatises placed the defense of unclean hands within that subject matter and, accordingly, across subjects. Joseph Story and John Norton Pomeroy are the Mount Rushmore of equity scholars in the United States. Story began publishing his *Commentaries on Equity Jurisprudence* in 1839.[146] The

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[140] *See* Hohfeld, *supra* note 8, at 550 (noting maxim of unclean hands to be of "slight importance" compared to other equitable doctrines).

[141] *See generally* Anenson & Mayer, *supra* note 16, at 974 (outlining how the unclean hands defense can be used to remedy excessive executive pay in the United States); Anenson & Mark, *supra* note 7 (analyzing inequitable conduct defense in patent law from its origins in the clean hands maxim).

[142] *See, e.g.*, SARAH WORTHINGTON, EQUITY 34 (2d ed. 2006) (explaining the doctrine potentially arises in the resolution of any dispute regardless of subject matter and effectively cancels existing legal rights); Anenson & Mark, *supra* note 7, at 1450. Again, the unclean hands defense has been available against all equitable claims and remedies, but until recently, *only* equitable claims and remedies.

[143] *See, e.g.*, Anenson, *Age of Statutes*, *supra* note 3, at 529-30 (outlining subject areas where the U.S. Supreme Court has recognized equitable defenses).

[144] Anenson, *Statutory Interpretation*, *supra* note 3, at 8.

[145] *See, e.g.*, Note, *Equity — No Relief to Wrong-Doer — Limits of Principle*, 5 HARV. L. REV. 151, 151 (1891); Note, *Property — Fraudulent Conveyance — Notice by Possession*, 11 HARV. L. REV. 554, 554 (1898); Note, *Trade-Marks — Assignability of Orchestra Name*, 11 HARV. L. REV. 131, 131 (1897).

[146] JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA (1st ed. 1835–36) [hereinafter FIRST EDITION]; *see* Gary L. McDowell, *Joseph Story's Science of Equity*, 1979 SUP. CT. REV. 153, 156 (explaining that Story wrote his commentaries to cultivate equity as a science that was "completely fenced in by principle" in response to the codification movement where inherited English equity was "epitomized as obnoxious"); Smith, *Equity in R3RUE*, *supra* note 31, at 1188 (relating Story's work as part of a vocation to lead judges,

first ten editions made no specific mention of unclean hands.[147] Published in 1873, the eleventh edition referenced the doctrine in a footnote.[148] The fourteenth (and last) edition is the first time that the unclean hands defense gets attention above line in the text. Published in 1918, long after Story's death, this edition contains five sections on the unclean hands defense totaling six pages.[149]

Less than a decade after Story discovered the clean hands doctrine, American equity scholar John Pomeroy devoted eleven pages to the defense in his first edition of "Equity Jurisprudence" published in 1881.[150] His fifth and last edition, published in 1941, dedicates eight

rather than to follow them). At the time of publication, Story had been an Associate Justice of the United States Supreme Court for more than twenty years.

147 *See* Chafee I, *supra* note 39, at 884. These books did, however, pay attention to other kindred maxims, such as: "He [or she] who seeks equity, must do equity." *Id.* The fourth edition of the treatise is the last edition in which Story actually worked. *Id.* at 884 n.27; *see* JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA (4th ed. 1846).

Other treatises during the same time period offer little or nothing on the clean hands doctrine. *See* Chafee I, *supra* note 39, at 884; *see also* HERBERT BROOM, SELECTION OF LEGAL MAXIMS xxv, xxvi (1845) (not referencing unclean hands). For example, Spence's equity treatise offered one sentence on the clean hands doctrine. GEORGE SPENCE, 1 EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 422 n.f (1st ed. 1846). Similarly, George Tucker Bispham's treatise outlined eight lines of text without any citation to the unclean hands defense. GEORGE TUCKER BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY 48-49 (1st ed. 1874). Bispham's second to last edition, published more than fifty years later, contains four pages on the maxim with ample citations along with additional references under implied trusts, specific performance, and injunctions. *Id.* at 70-73, 154, 605, 642 n.4, 719 n.5 (The Banks Law Publishing Co., 10th ed. 1925). Bispham was well known for his equity treatise as a senior professor in the Department of Law at the University of Pennsylvania. William Draper Lewis, *George Tucker Bispham*, 54 AM. L. REG. 718, 718 (1906).

148 Chafee I, *supra* note 39, at 884.

149 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA §§ 98-102 (W.H. Lyon ed., 14th ed. 1918) [hereinafter FOURTEENTH EDITION].

150 *See* Rosalind Poll, Note, *"He Who Comes into Equity Must Come with Clean Hands,"* 32 B.U. L. REV. 66, 67 (1952); *see also* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA 432-43 (1st ed. 1881). A book review of the third edition had this to say:

> [T]he second edition in 1892, after the death of the author . . . . It is difficult to overestimate the importance of this work, or the effect that it has had upon the development of equity jurisdiction in this country. At the time of appearance in 1881, few of the states had any large or consistent body of equity precedents in their reported cases.

H.T.L., Book Review, 19 HARV. L. REV. 481, 481 (1906); *see also id.* at 483 (claiming it

sections to the subject covering twenty-four pages.[151] Pomeroy describes unclean hands as "a universal rule guiding and regulating the action of equity courts in their interposition on behalf of suitors for any and every purpose, and in their administration of any and every species of relief."[152]

Zechariah Chafee, Jr., a practitioner and Harvard law professor, was the first scholar to undertake a comprehensive analysis of the defense in the United States.[153] The Thomas M. Cooley Lectures that he delivered at the University of Michigan Law School in 1949 and his subsequent publications in the *Michigan Law Review* (and as a book) continue to be the primary source of the American experience with the equitable defense.[154] Without any sustained analysis of the defense in other countries, Chafee is still relied on as authoritative on the subject.[155]

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is "one of the few masterpieces of our legal literature").

151 POMEROY, EQUITY JURISPRUDENCE, *supra* note 1, §§ 397-404.

152 *Id.* § 397. Although not focusing on the clean hands doctrine, other American literature to examine equity holistically and philosophically was also published in the middle of the twentieth century. *See, e.g.*, WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY (2d ed. 1956); MCCLINTOCK, *supra* note 76; WILLIAM F. WALSH, A TREATISE ON EQUITY (1930); *see also* John L. Garvey, *Handbook of Modern Equity*, 8 CATH. U. L. REV. 51, 53 (1959) (book review) ("One is tempted to say that this and McClintock's hornbook are the only current American texts in the field, although the recent edition of Clark's work might cause some to quarrel with the statement."); *id.* ("Though the reviewers had only light praise for the original edition of this work, public response justified three printings in the six years that passed before the appearance of this second edition.").

153 Zechariah Chafee, Jr., a practitioner and professor at the Harvard Law School, was a noted scholar of equity jurisprudence. DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW (1986) (biography of Chafee). To my knowledge, he is also the last scholar to study unclean hands other than my recent work. *See* CHAFEE, SOME PROBLEMS, *supra* note 101, at iii-iv; *see also* Edgar N. Durfee, *Foreword* to *id.* at ix-xi.

154 *See* CHAFEE, SOME PROBLEMS, *supra* note 101, at 5; Chafee I, *supra* note 39, at 877; Chafee II, *supra* note 39, at 1065; *see also* Chafee, SELECTED ESSAYS ON EQUITY, *supra* note 14, at iii-iv; *accord* Edgar N. Durfee, *Foreword* to CHAFEE, SOME PROBLEMS, *supra* note 101, at ix-xi. He is most known for the Thomas M. Cooley Lectures Chafee delivered at the University of Michigan Law School in 1949 and his subsequent publications in the *Michigan Law Review*. *See generally* Chafee I, *supra* note 39; Chafee II, *supra* note 39.

155 Zechariah Chafee's work is the leading source of research on unclean hands in this country and abroad. *See, e.g.*, Scattaretico v. Puglisi, 799 N.E.2d 1258, 1261-62 n.14 (Mass. App. Ct. 2003) ("The indispensable writing on the subject by Professor Chafee . . . ."); LAYCOCK, REMEDIES, *supra* note 125, at 938 (describing Chafee's as probably the "best treatment" of unclean hands). For international recognition of Chafee's analysis of unclean hands, see R.P. MEAGHER, W.M.C. GUMMOW & J.R.F. LEHANE, EQUITY: DOCTRINES AND REMEDIES, at 82 n.15 (3d ed. 1992) (noting Chafee's

Writing in the next decade, Professor Ralph Newman analyzed unclean hands in portions of his comparative study of law and equity.[156] Newman also analyzed equity in the traditional trans-substantive manner, although he would be one of the last American scholars to do so.[157] After law school curricular changes began in earnest, any seminal work on equity would be examined under the label "remedies."[158] Dan Dobbs's book fits this description.[159] This text

"important article" but disagreeing with its emphasis on illegality and unclean hands' operation at law).

There were a few student notes on the subject of unclean hands defense as well. *See generally* Poll, *supra* note 150; D.C.H., Case Comment, *Equity-Clean Hands-Iniquity of One Plaintiff Bars All*, 48 W. VA. L.Q. 172, 173 (1941) (discussing unclean hands as a factor to be considered in the exercise of judicial discretion). In fact, twenty-five years before my research regarding the fusion of unclean hands at law, there was student interest in the topic. *See* William J. Lawrence, III, Note, *The Application of the Clean Hands Doctrine in Damage Actions*, 57 NOTRE DAME L. REV. 673, 673 (1982); *see also* Roger G. Rose, Note and Comment, *Equitable Defenses to Actions at Law*, 34 OR. L. REV. 55, 55 (1954) (discussing fusion of unclean hands in Oregon). Other scholarship, also primarily student notes, has been relegated to specific subject areas. *See, e.g.*, Kevin Mack, Note, *Reforming Inequitable Conduct to Improve Patent Quality: Cleansing Unclean Hands*, 21 BERKELEY TECH. L.J. 147, 149 (2006); Dan Markel, Note, *Can Intellectual Property Law Regulate Behavior? A "Modest Proposal" for Weakening Unclean Hands*, 113 HARV. L. REV. 1503, 1503-04 (2000).

156 The book addressing the troublesome problem of fusion was the product of a grant by the *Evening Post*. Sheldon Tefft, *Equity and Law: A Comparative Study by Ralph A. Newman*, 15 J.L. EDUC. 231, 231 (1962) (reviewing Newman's book). It was supervised by an advisory board of distinguished scholars from the United States, Australia, Scotland, France, and Spain. Ralph Newman was a professor at Washington College of Law of American University and known for his hornbook on the *Law of Trusts*. Lee Silverstein, *Equity and Law: A Comparative Study by Ralph A. Newman*, 62 COLUM. L. REV. 193, 198 (1962) (reviewing Newman's book).

157 *See* Anenson & Mark, *supra* note 7, at 1507-08 (explaining that equitable defenses have not been systematically studied in the last fifty years); *see also* Anenson, *Triumph of Equity*, *supra* note 43, at 438-39 (discussing the lack of contemporary American treatises on equity).

158 *See* Laycock, *How Remedies Became a Field*, *supra* note 31, at 249-60 (discussing the law school movement away from an equity course and the new AALS section on Remedies that began in the 1970s, which "undertook to help cement the modern remedies course in the curriculum").

159 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION (2d ed. 1993) [hereinafter LAW OF REMEDIES]. The original edition by Dobbs was the first treatise on the subject of remedies. Laycock, *How Remedies Became a Field*, *supra* note 31, at 261. Doug Laycock describes the treatise as "an invaluable resource that everyone in the field relies on . . . . As the treatise ages, it is not so good for finding authoritative cases any more, but its analysis is still authoritative and it continues to answer questions for novices and old hands alike." *Id.* at 262. Recently, the treatise was updated and re-published by Caprice Roberts. DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION (3d ed. 2018).

also addresses the defense of unclean hands and provides insights on the application of its elements.[160] The American Law Institute, analyzing case law for various *Restatements of the Law*, have discussed the defense within the separate contexts of Contracts, Torts, Property, and, most recently, Restitution.[161]

Practitioners may resort to encyclopedias such as *Corpus Juris Secundum* for simple (if not overly simplistic) summaries of the doctrine.[162] Certain state treatises contain a more rigorous analysis, but even they fail to synthesize the defense in a comprehensive manner.[163] Consequently, the defense of unclean hands must be cobbled together from various subjects and often out-of-date resources.

The lack of attention to unclean hands is a symptom of greater events. The law-equity merger in state and federal courts and subsequent law school curricular changes obscured the evolution of equity.[164] In the late twentieth century, following the unification of courts and procedures, law schools transitioned from teaching a course in equity to a course in remedies (comprising both law and equity).[165] As a result, a considerable amount of equitable principles

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[160] DOBBS, LAW OF REMEDIES, *supra* note 159, at 92.

[161] As an example, for the application of the unclean hands defense in tort law, see RESTATEMENT (SECOND) OF TORTS §§ 7, 76, 196 (AM. LAW. INST. 1965); RESTATEMENT (SECOND) OF TORTS § 693 (AM. LAW. INST. 1977); RESTATEMENT (SECOND) OF TORTS §§ 766, 766B, 768, 889, 894, 933 cmt. A, 940 (AM. LAW. INST. 1979). There is no reference to the defense in the third edition comprising specific subject matter. The defense can also be found in the Restatements of Agency, Employment, Trusts, Conflicts of Law, and Unfair Competition.

[162] *See, e.g.*, 30 CORPUS JURIS SECUNDUM § 109 (2018); 27A AM. JUR. 2D §§ 100-106 (2016). As discussed previously, Story and Pomeroy treatises provided a comprehensive treatment of equity in the early twentieth century; but even these books were geared to practitioners and concentrated on the technical aspects of equitable doctrines. *See* POMEROY, EQUITY JURISPRUDENCE, *supra* note 1; STORY, FOURTEENTH EDITION, *supra* note 149.

[163] *See, e.g.*, 2 CALIFORNIA AFFIRMATIVE DEFENSES § 45:1 (2d ed. 2017); 1-11 CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11.07 (2017).

[164] Anenson, *A View from Equity*, *supra* note 14, at 272.

[165] *See* Anenson, *Pluralistic Model*, *supra* note 14, at 647 ("Many practicing lawyers have graduated without the benefit of a comprehensive course in equity."); Laycock, *How Remedies Became a Field*, *supra* note 31, at 253-55; *see also* Chafee, SELECTED ESSAYS ON EQUITY, *supra* note 14, at xiv ("[T]he elimination of a separate course in equity in many of the law schools in the United States has caused much that is truly valuable in the study of equity to be either completely lost or scattered to the point of useless dilution in various courses."); Douglas Laycock, *Remedies: Justice and the Bottom Line Introduction*, 27 REV. LITIG. 1, 7 (2007) (explaining that the prior

were lost in the transition.[166] No doubt due to their universal application to all subject matter, equitable defenses such as unclean hands went missing.[167] American scholars also stopped specializing in the subject of equity.[168]

Notwithstanding these developments, cases continued to recognize and even extend equitable principles, including defenses, long after judges and the bar ceased understanding them.[169] Not surprisingly, without any guidance, courts have been inconsistent in how they define and determine the scope of equitable defenses.[170] Therefore, the next section aims to eliminate the doctrinal confusion by inventorying, reconciling, and coordinating cases on the equitable defense of unclean hands.

V. DEFINITION OF THE DEFENSE

Anything less than a "pure conscience" and "pure hands" may disqualify the litigant seeking the aid of equity under the clean hands doctrine.[171] To invoke the defense, courts generally require some form

courses in equity, damages, and restitution were combined into a single course in remedies (summarizing Laycock, *How Remedies Became a Field*, *supra* note 31)).

166 Chafee, SELECTED ESSAYS ON EQUITY, *supra* note 14, at xiv.

167 Legal textbooks on remedies and associated subjects have continued to at least mention equitable defenses such as unclean hands. Although it is not clear how much time in class, if any, is devoted to the subject. LAYCOCK, REMEDIES, *supra* note 125, at 938-41.

168 Anenson, *A View from Equity*, *supra* note 14, at 273 n.138 ("There is no comprehensive treatment of modern equity in American law."); discussion *supra* INTRODUCTION.

169 There is confusion at the level of doctrine and at the level of principle. Not surprisingly, an attempt to identify a single approach to equity from early United States Supreme Court decisions was not successful. *See generally* John R. Kroger, *Supreme Court Equity, 1789–1835, and the History of American Judging*, 34 HOUS. L. REV. 1425, 1427 (1998); *infra* note 170.

170 *See* Anenson & Mark, *supra* note 7, at 1444 (criticizing the Federal Circuit's definition of inequitable conduct derived from unclean hands). Many of the cases reaching the Supreme Court for decision involved circuit splits on the availability and application of equitable defenses. *E.g.*, Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1972 (2014) (involving application of laches in copyright law). The Supreme Court recently decided *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods. LLC*, 137 S. Ct. 954 (2017), where the Federal Circuit, sitting en banc, divided on the question of laches and its availability to bar legal relief under the Patent Act. SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 967 (2017); *see* SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 807 F.3d 1311, 1333 (Fed. Cir. 2015) (involving a divided court on the issue of laches and its application to royalty).

171 Manhattan Med. Co. v. Wood, 108 U.S. 218, 227 (1883) (describing the

of illegal or unethical conduct to warrant dismissal.[172] Many courts also mandate that the unclean conduct have a connection to the case.[173] The "unclean conduct" and "connection to the litigation" components of the defense are explored below along with the association between them.

A. Unclean Conduct Component

Any and all misfeasance that smacks of injustice may constitute unclean hands.[174] The English court in *Dering v. Earl of Winchelsea*[175] explained that it must be a depravity in the legal as well as the moral sense.[176] Nevertheless, actions (including misrepresentations and omissions) that lack a proper equitable nature need not be illegal;[177] "inequitable," "unconscionable," or deriving from a "bad motive" will do.[178] Conduct that does not conform to "minimum ethical standards" may also satisfy the doctrine.[179]

unclean hands defense in a trademark intellectual property case as "pure hands and pure conscience" (citation omitted)); *see also* Buchannon v. Upshaw, 42 U.S. 56, 81 (1843) (argument of counsel) ("clean hands and pure heart"); United States v. Schooner Betsey, 8 U.S. 443, 444 (1807) (argument of counsel) ("pure heart" and "clean hands").

172 DOBBS, LAW OF REMEDIES, *supra* note 159, at 92-96 (illegal or unethical).

173 POMEROY, EQUITY JURISPRUDENCE, *supra* note 1, § 399, at 94-95 (discussing the limitations upon the principle); *id.* at 97 ("The dirt upon his [or her] hands must be his [or her] bad conduct in the transaction complained of."). *But see* SNELL'S TWENTY-SEVENTH EDITION, *supra* note 63, at 33 (noting that the "limitation was not recognised [in England] in the reign of Elizabeth I and her immediate successors, and . . . has been lost sight of in some American jurisdictions").

174 *See, e.g.*, Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244-45 (1933) (stating the governing principle that courts are shut to parties whose prior conduct "has violated conscience, or good faith, or other equitable principle" (citation omitted)); Deweese v. Reinhard, 165 U.S. 386, 390 (1897).

175 Dering v. Earl of Winchelsea, (1787) 29 Eng. Rep. 1184, 1185 (first articulating the doctrine of unclean hands).

176 *Id.*

177 Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945) ("[O]ne's misconduct need not necessarily have been of such a nature to be punishable as a crime or to justify legal proceedings of any character.").

178 *See In re* Shewchuk Estate, 282 A.2d 307, 314 (Pa. 1971) (finding conduct not sufficiently unclean when inconsistent statements were not made with a selfish motive or for personal gain); Poll, *supra* note 150, at 67-68 (referencing early twentieth century cases applying the clean hands doctrine in situations involving bad motive or immoral intent).

179 *Precision Instrument*, 324 U.S. at 816 (justifying the application of unclean hands on the grounds that the petitioner's conduct did not conform to "minimum ethical standards"); *see also* Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 492

So are there any limits on the kind of disqualifying behavior? One issue yielding different answers is whether the defense requires a particular mental state. Following the United States Supreme Court's reference to "any willful act" in one of its epic cases invoking the clean hands doctrine,[180] certain state and federal courts have parroted that particular state of mind regardless of the subject matter of the lawsuit.[181] Like many cases, the Supreme Court's decisions demonstrate that one of the circumstances that may satisfy unclean hands is a specific intent to deceive.[182] But the Supreme Court never required it. The Court's opinions took account of actions as well.[183]

In line with state law, what is inequitable,[184] unconscionable,[185] or lacking in good faith[186] has been a constant consideration of the

(1942) (equity may rightly withhold its assistance from improper business practices); 4 CALLMANN ON UNFAIR COMPETITION, TRADEMARK & MONOPOLY § 23:14 (4th ed. 2001 Supp.) (noting the doctrine of unclean hands "is of special importance in unfair competition cases, for fairness in business . . . is a common duty owed by all to all"); *cf.* Int'l News Serv. v. Associated Press, 248 U.S. 215, 245 (1918) (finding no unclean hands because conduct comports with industry standard). For an evaluation of equitable defenses, including unclean hands, as a remedy for unethical behavior, see Anenson & Mayer, *supra* note 16 and Anenson, *Role of Equity*, *supra* note 14.

180 *Precision Instrument*, 324 U.S. at 815 ("Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim . . . .").

181 Weiss v. Smulders, 96 A.3d 1175, 1198 n.19 (Conn. 2014).

182 *Precision Instrument*, 324 U.S. at 814-15 (1945) (ruling that equity requires suitors to act fairly and without fraud or deceit); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 251 (1944) (vacating a patent because it was obtained by fraud); Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 247 (1933) (holding that equitable relief is unavailable for those that act fraudulently or not in good faith).

183 For example, the Supreme Court's unclean hands decision in *Keystone Driller* described the conduct as "unconscionable acts." *Keystone Driller*, 290 U.S. at 244-45.

184 Courts often describe unclean conduct as "inequitable conduct" in their decisions. *See, e.g.*, Neeme Sys. Sol. Inc. v. Spectrum Aeronautical LLC, 250 P.3d 1206, 1213 (Ariz. Ct. App. 2011) (quoting Smith v. Neely, 380 P.2d 148, 149 (Ariz. 1963)); Fladeboe v. Am. Isuzu Motors, Inc., 58 Cal. Rptr. 3d 225, 235-36 (Cal. Ct. App. 2007); Heidbreder v. Carton, 645 N.W.2d 355, 371 (Minn. 2002); *In re* Francis, 186 S.W.3d 534, 551 (Tex. 2006); Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship, 242 P.3d 1, 13 (Wash. Ct. App. 2010).

185 Nat'l Fire Ins. Co. v. Thompson, 281 U.S. 331, 338 (1930) (declining to interfere based on an "unconscientious" attitude); Clarke v. White, 37 U.S. 178, 193 (1838) (stating that the doctrine applies only where the plaintiff comes with an "unaffected conscience").

186 ABF Freight Sys. v. NLRB, 510 U.S. 317, 330 (1994) (Scalia and O'Connor, JJ., concurring) (finding "inequitableness or bad faith relative to the matter in which he seeks relief" (quoting MCCLINTOCK, *supra* note 76, § 26, at 63 n.75)); Sample v. Barnes, 55 U.S. 70, 74 (1852) ("[N]ever interfere in opposition to conscience or good faith."). The Supreme Court held that the defense "closes the door of a court of equity

Supreme Court in applying unclean hands.[187] While not necessarily inconsistent with the imposition of a particular mental state, the Court has also found conduct that is simply unfair to be unclean.[188]

The Supreme Court mentioned that a "willful act" is sufficient to invoke unclean hands, but it did not limit the defense to this single condition or cite any authority for the reference.[189] Presumably, the reference came from Story's formulation given by some early American courts calling for willful conduct regarding the matter in litigation.[190]

to one tainted with inequitableness or bad faith . . . ." *Precision Instrument*, 324 U.S. at 814 (quoting Bein v. Heath, 47 U.S. 228, 247 (1848)). Correspondingly, honesty and good faith typically negate unclean hands. Newton v. Consol. Gas Co., 258 U.S. 165, 175-76 (1922) (implying good faith excludes unclean hands).

187 *See, e.g.*, Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 392 (1944) ("We do not find here any 'unconscientious or inequitable attitude' on the part of the carrier." (quoting Int'l News Serv. v. Associated Press, 248 U.S. 215, 245 (1918))).

188 *Bein*, 47 U.S. at 247 (declaring that the courts will never serve "one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage") (cited by Kitchen v. Rayburn, 86 U.S. 254, 263 (1874) and Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933)); *accord* Kendall-Jackson Winery, Ltd. v. Superior Court, 90 Cal. Rptr. 2d 743, 754 (Cal. Ct. App. 1999) ("[I]t is an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of the merits of his claim."); STORY, FOURTEENTH EDITION, *supra* note 149, § 99 (commenting that an unfair transaction can constitute unclean hands even if within the law).

189 *Precision Instrument*, 324 U.S. at 815 ("Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim . . . ."). Before *Precision Instrument*, at least one Supreme Court decision addressing unclean hands used the term "willful" to indicate an absence of good faith. *See* Curtin v. Benson, 222 U.S. 78, 85-86 (1911) (indicating that unclean hands did not apply when the conduct was not willful, but rather an "honest assertion of rights"); *see also* Weiner v. Romley, 381 P.2d 581, 582-83 (Ariz. 1963) (declaring that the invocation of unclean hands requires willful misconduct as opposed to an honest mistake); Hartman v. Cohn, 38 A.2d 22, 25 (Pa. 1944) (holding that honest conduct, as opposed to willful conduct, will allow a party to seek equitable relief). Only a few other unclean hands decisions (out of an estimated one hundred decisions or so) by the Supreme Court even mention the term. *See* Clinton E. Worden & Co. v. Cal. Fig Syrup Co., 187 U.S. 516, 530 (1903). Congruently, the leading case on the defense of equitable estoppel required willfulness, but later American courts relaxed the requirement. *See* Anenson, *Pluralistic Model*, *supra* note 14, at 650. Even by the 1980s, Prosser and Keaton advised that there was still no clear consensus on the meaning of any of the requisite mental states. PROSSER AND KEETON ON THE LAW OF TORTS § 8 (W. Page Keeton ed., 5th ed. 1984) (explaining that state of mind definitions diverged in authoritative treatises and in court opinions); *see also id.* (defining willfulness as between negligence and intentional conduct).

190 STORY, FOURTEENTH EDITION, *supra* note 149, § 99 ("Any willful act in regard to a matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men will be sufficient to make hands of the application

Various modern decisions have retained the willfulness criterion.[191] Certain contemporary courts have elevated the state of mind even further to an intent to deceive.[192] It seems there is no current consensus and Supreme Court cases appear expressly to the contrary.

unclean."); *cf.* JOSIAH WILLIAM SMITH, A MANUAL OF EQUITY JURISPRUDENCE § 36, at 29 (J. Trustram ed., 14th ed. 1889) (describing unclean hands in fraudulent transactions as "willful" misconduct). Story also described unconscionable conduct constituting unclean hands as "morally reprehensible as to known facts." STORY, FOURTEENTH EDITION, *supra* note 149, § 98; s*ee also* Danciger v. Stone, 187 F. 853, 858 (E.D. Okla. 1909) (explaining that "free and deliberate action with knowledge of the facts" is sufficient for unclean hands). Pomeroy does not mention a state of mind requirement in the text of the fourth edition of his treatise, but a case annotation uses "willful" in referring to the connection component of unclean hands. *See* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 399, at 741 n.1 (Bancroft-Whitney 4th ed. 1918) (annotation quoting Lewis & Nelson's Appeal, 67 Pa. 153, 166 (1870)) (citing EDMUND H.T. SNELL, PRINCIPLES OF EQUITY 25 (London, Stevens & Haynes 1st ed. 1868)). The willful reference in many American courts can be tracked to the original edition of Edmund Snell's leading English treatise. *See, e.g.*, Yale Gas-Stove Co. v. Wilcox, 29 A. 303, 311 (Conn. 1894). The reference to willful misconduct in "Snell's Principles of Equity" was removed in later editions by the twentieth century. For other courts espousing a willfulness criterion relying on *Precision Instrument*, see Stachnik v. Winkel, 230 N.W.2d 529, 534 (Mich. 1975), or for a passage from the *Corpus Juris Secundum* from the mid-twentieth century, see Seal v. Seal, 510 P.2d 167, 173 (Kan. 1973) (quoting 30 CORPUS JURIS SECUNDUM, *supra* note 162, § 95(a)) ("[W]illful conduct which is fraudulent, illegal, or unconscionable.").

191 *Compare* Queiroz v. Harvey, 205 P.2d 1120, 1122 (Ariz. 2009) (en banc) ("In *Weiner*, this Court held that when inequitable conduct was not 'willful,' unclean hands would not apply."), *and* Broome v. Broome, 75 So. 3d 1132, 1140 n.15 (Miss. Ct. App. 2011) ("The clean hands doctrine prevents a complaining party from obtaining equitable relief in court when he is guilty of willful misconduct in the transaction at issue."), *and* Shapiro v. Shapiro, 204 A.2d 266, 268 (Pa. 1964) ("Application of the unclean hands doctrine is confined to willful misconduct which concerns the particular matter in litigation."), *with* Saudi Basic Indus. Corp. v. ExxonMobil Corp., 401 F. Supp. 2d 383, 393-94 (D.N.J. 2005) (rejecting willfulness as criterion and noting number of decisions that allow "gross negligence" or "recklessness" to satisfy unclean hands).

192 *See* Japan Telecom, Inc. v. Japan Telecom Am., Inc., 287 F.3d 866, 870 (9th Cir. 2002) ("Bad intent is the essence of the defense of unclean hands." (quoting Wells Fargo & Co. v. Stagecoach Props., Inc., 685 F.2d 302, 308 (9th Cir. 1982))); Shriner v. Sheehan, 773 N.E.2d 833, 848 (Ind. Ct. App. 2002) (listing intentional misconduct as an element of unclean hands); Locken v. Locken, 650 P.2d 803, 805 (Nev. 1982) ("[S]uch conduct, standing alone, absent an intent to deceive, does not amount to unclean hands."). There is no liability standard requiring intentional misconduct in federal decisions concerning the spoliation of evidence and other litigation misconduct often grounded in unclean hands. RENDLEMAN, COMPLEX LITIGATION, *supra* note 73, at 269; Anenson, *A Process-Based Theory*, *supra* note 2, at 545 (discussing fabrication, destruction, and suppression of evidence).

In particular, the Supreme Court has declared that it is not essential that the unclean conduct be illegal or justify legal proceedings to invoke the defense and disqualify the remedy.[193] The Supreme Court's often cited opinion in *Cathcart v. Robinson* by Chief Justice Marshall is clear that conduct constituting unclean hands need not meet the criteria for fraud or misrepresentation.[194] Lower state and federal courts are in accord.[195] Moreover, *Bein v. Heath*, relied on by the Court in subsequent decisions, seems to negate any requirement of a fraudulent intent.[196] Furthermore, the Supreme Court in *United States v. Marshall Silver Mining* affirmed the dismissal of a land patent dispute for delay constituting unclean hands because the party was not free of fault or neglect, knowledge, and negligence.[197] However, courts

[193] The Court explained in *Precision Instrument* that "one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or to justify legal proceedings of any character." *Precision Instrument*, 324 U.S. at 815.

[194] Cathcart v. Robinson, 30 U.S. 264, 276-77 (1831) (noting unclean hands is broader than contract defenses sufficient to justify rescission); *accord* POMEROY, EQUITY JURISPRUDENCE, *supra* note 1, § 400 (advising that unclean hands includes concealment of important facts even if not actually fraudulent). The decision denied a request for the specific performance of a contract where the seller aided the buyer's mistake. *See generally Cathcart*, 30 U.S. at 281-82.

[195] *See, e.g.*, San Ann Tobacco Co. v. Hamm, 217 So. 2d 803, 810 (Ala. 1968) (finding that fraud or deceit that would amount to unclean hands did not need to be the same conduct as would constitute fraud or deceit under the common law); DeRosa v. Transamerica Title Ins. Co., 262 Cal. Rptr. 370, 373 (Cal. Ct. App. 1989) ("The doctrine does not require the party seeking relief to be guilty of fraud; it is sufficient if he merely acted unconscientiously."); DuPont v. DuPont, 85 A.2d 724, 725-26 (Del. Ch. 1951); *Stachnik*, 230 N.W.2d at 534 (stating that all elements of fraud need not be present to invoke the clean hands maxim to bar specific performance). *See generally* 30 CORPUS JURIS SECUNDUM, *supra* note 162, § 112 (citing cases).

[196] Bein v. Heath, 47 U.S. 228, 247 (1848) (noting "fraud[] . . . *or* any unfair means" (emphasis added)) (cited by Kitchen v. Rayburn, 86 U.S. 254, 263 (1874) and Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240 (1933)). Justice Brandeis' famous dissent in *Olmstead v. United States* declared that the principle of unclean hands has "long been settled" and referenced contract illegality cases that do not require scienter. Olmstead v. United States, 277 U.S. 438, 483 (1928) (Brandeis, J., dissenting) (citing McMullen v. Hoffman, 174 U.S. 639 (1899) (discussing history of contract illegality and explaining that there is no need for fraud, oppression, or corruption) and Hazelton v. Sheckells, 202 U.S. 71 (1906) (denying contract enforcement on grounds of illegality irrespective of intent)).

[197] *See* United States v. Marshall Silver Mining Co., 129 U.S. 579, 589 (1889). Similarly, in *Simmons v. Burlington*, 159 U.S. 278 (1895), the Supreme Court reversed the lower court and dismissed the cross bill in equity under the maxim of unclean hands because the lienholder had delayed in asserting his rights after reorganization. *Id.* at 291-92. Citing *Pomeroy*, the court held that acquiescence (which implies knowledge) is an important factor in obedience to the clean hands maxim. *See id.* at 291; *see also* Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 403 (1944)

have hesitated to bar claims for unclean hands based solely on unreasonable conduct. Some decisions have avoided a legal determination as to whether mere negligence could constitute unclean hands by indicating that the defendant failed to cite any authority for the proposition.[198] Others are clear that negligent conduct does not amount to the defense.[199]

The fact that inequitable conduct constituting unclean hands often concerns fraud does not change its definition and validate a specific intent to deceive.[200] Supreme Court opinions describe unclean hands in the disjunctive as "fraud *or* any other type of inequitable conduct."[201] State courts similarly list bad motive as amounting to unclean hands as well as other circumstances.[202] Furthermore, unclean hands is a species of equitable (constructive) fraud which is broader than common law fraud.[203] Fraud in equity did not require intent —

(Frankfurter and Roberts, JJ., dissenting) (pronouncing that the unclean hands doctrine was established to prevent a violation of the law even if the plaintiff had no moral turpitude). For a lower court case finding that negligence can constitute unclean hands, see POM Wonderful LLC v. Coca Cola Co., 166 F. Supp. 3d 1085, 1092 (C.D. Cal. 2016) (defining conduct component under the Lanham Act as wrongfulness or willfulness or gross negligence or bad faith).

198 *See* Dollar Sys., Inc. v. Avcar Leasing Sys., Inc., 890 F.2d 165, 173 (9th Cir. 1989) (declaring that it was presented with no authority that negligent breach of contract in a franchise dispute constitutes unclean hands); Wolf & Klar Cos. v. Garner, 679 P.2d 258, 260 (N.M. 1984) (affirming the trial court's refusal of the unclean hands defense based on the plaintiff jeweler's negligent hiring and supervision of employee even though it could have avoided the loss).

199 *See* Crick v. Starr, No. 08 MA 173, 2009 WL 4895270, at *17 (Ohio Ct. App. Dec. 9, 2009) (declaring that unclean hands is not mere negligence, ignorance, or inappropriateness).

200 Poll, *supra* note 150, at 66 (explaining that the clean hands maxim embodies several other principles, such as: "[n]o action arises out of fraud and deceit").

201 United States v. Dubilier Condenser Corp., 289 U.S. 178, 221 (1933) (Stone, J., dissenting) (patent case specifying "fraud *or* any other type of inequitable conduct" (emphasis added)).

202 *See, e.g.*, Johnson v. Freberg, 228 N.W. 159, 160 (Minn. 1929) (explaining that bad motive or conduct benefiting oneself or injuring others may constitute unclean hands).

203 Eaton describes two kinds of fraud in equity: actual and constructive. "Actual fraud arises from facts and circumstances of imposition, and may be described as something said, done, or omitted by a person with the design of perpetrating what he must have known to be a positive fraud." EATON ON EQUITY, *supra* note 54, § 122, at 287. "Constructive fraud may be described as an act done or omitted, not with actual design to perpetrate positive fraud or injury upon other persons, but which, nevertheless, amounts to positive fraud, or is construed as a fraud by the court because of its detrimental effect upon public interests and public or private confidence." *Id.* § 123.

only "acts inconsistent with fair dealing and good conscience."[204] Equitable fraud has no exact definition for the purpose of promoting deterrence.[205] Equity extended the ancient maxim that one should not profit from their own wrong to include situations where it is hard to tell if one was profiting from their own wrong.[206] Activities regarded as fraudulent in equity were done without any intention to deceive or cheat.[207] The state of mind was simply irrelevant.[208] In certain situations, equity acted on simple negligence.[209]

From the more general idea of fraud came more specific doctrines, such as contribution, which was at issue in the English case that first recognized the principle of unclean hands. *See* MEAGHER, GUMMOW AND LEHANE'S EQUITY, *supra* note 47, at 450 (explaining that fraud is "[o]ne of the three pillars which support entire structure of equity jurisdiction, exclusive, auxiliary, concurrent"); *see also* Smith, *Fusion and Tradition*, *supra* note 23, at 25 n.34 (noting that the phrase equitable fraud in some periods covered all grounds of equitable intervention).

[204] *See* 27 AM. JUR. 2D *Equity* § 5 (2008) ("[F]raud in equity has a much broader connotation than at law and includes acts inconsistent with fair dealing and good conscience . . . ."); POMEROY, EQUITY JURISPRUDENCE, *supra* note 1, § 399, at 99 n.17 ("Fraud, in equity, often consists in the unconscientious use of a legal advantage originally gained with innocent intent . . . ."); L.A. SHERIDAN, FRAUD IN EQUITY 210 (1957) (explaining fraud remains "the residuary legatee of what offends the conscience").

[205] *See* STORY, FOURTEENTH EDITION, *supra* note 149, at 261 (advising that "[b]y disarming the parties of all legal sanction and protection, they suppress the temptations and encouragements, which might otherwise be found too strong for their virtue"). It was the deterrence goal that the Supreme Court found dispositive when it refused to require a particular state of mind in *Pinter v. Dahl*, 486 U.S. 622, 633-34 (1988). In that case, the Court established the criteria for the clean hands doctrine's kindred legal defense of *in pari delicto* in dismissing statutory actions under the securities laws. *Id.* The securities claim at issue was a strict liability offense and the plaintiff argued the defense was inappropriate. The Court disagreed. It held that the plaintiff's fault need not be either intentional or willful in order to establish a judge-made defense to a private action under the securities statutes. *Id.* It explained that "regardless of the degree of scienter, there may be circumstances in which the statutory goal of deterring illegal conduct is served more effectively by preclusion of suit than by recovery." *Id.* at 634; *see, e.g.*, Anenson, *Limiting Legal Remedies*, *supra* note 2, at 78, 81-83 (discussing cases fusing unclean hands at law by analogy to legal defense of *in pari delicto*); Anenson, *Statutory Interpretation*, *supra* note 3, at 15 (analyzing the *Pinter* case among other cases involving equitable defenses).

[206] *See* Smith, *Fiduciary Law*, *supra* note 23, at 273; *see also* Anenson, *A View from Equity*, *supra* note 114, at 265.

[207] *See* MEAGHER, GUMMOW AND LEHANE'S EQUITY, *supra* note 47, at 445 (explaining that equitable fraud is not just actual, intentional, premeditated fraud).

[208] *See* Anenson, *A View from Equity*, *supra* note 14, at 263 n.62 ("Moral culpability . . . need not be proven to justify equitable fraud — it has a different role." (quoting JOHN GLOVER, EQUITY, RESTITUTION & FRAUD § 1.6, at 8 (2004))); *see also* Anenson, *Pluralistic Model*, *supra* note 14, at 650 (examining the removal of

Sir Thomas More, the first Lord Chancellor drawn from the ranks of the common lawyer,[210] is said to have grounded the authority of the Chancery in not only fraud, but also accident and things of confidence.[211] These are the three general circumstances that moved the conscience of the Chancellor.[212] Because historic equity acted on "conscience,"[213] it could conceivably include all of the grounds for equity jurisdiction including innocent misrepresentation.[214]

In light of the foregoing, any fraud in the facts of certain Supreme Court cases does not find support in their legal precedents or the equitable tradition of unclean hands. Given the totality of the Supreme Court decisions, along with the bulk of authority across the states, it seems the requisite level of cognition and culpability to disqualify a litigant is left to the discretion of the trial court. As a practical matter,

reliance and relaxation of intent for equitable estoppel in light of certain core concerns of equity); Anenson, *Triumph of Equity*, *supra* note 43, at 390-91, 398-400 (same).

209 *See* Anenson & Mark, *supra* note 7, at 1467 n.161.

210 *See* Anenson, *Triumph of Equity*, *supra* note 43, at 379 n.4 (explaining that Sir Thomas More was the first lawyer to be Lord Chancellor in 1529). Every chancellor from 1380 to 1488 was a church official. *See* Thomas Edward Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant*, *in* SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 208, 214-15 (Ass'n of Am. Law Schs. ed., 1907); *see also* Henry Arthur Hollond, *Some Early Chancellors*, 9 CAMBRIDGE L.J. 17, 23 (1945) (indicating that the position was held by laymen for only about twelve years during the fourteenth century).

211 *See* MEAGHER, GUMMOW AND LEHANE'S EQUITY, *supra* note 47, at 450.

212 *See* Anenson, *A View from Equity*, *supra* note 14, at 261-62; *see also* STORY, FOURTEENTH EDITION, *supra* note 149, at 47 (explaining that the chancellor was the dispenser of the king's conscience).

213 Helmut Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, 71 L.Q. REV. 223, 223 (1955) ("[T]he Court of Chancery is addressed as a 'Court of Conscience,' and the decisive question in most cases is whether defendant could have acted in good conscience as he [or she] did."); *accord* Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933) ("A court of equity acts only when and as conscience commands . . . ." (quoting Deweese v. Reinhard, 165 U.S. 386, 390 (1897))).

214 *See* WORTHINGTON, *supra* note 142, at 39-40; T.M. YEO, CHOICE OF LAW FOR EQUITABLE DOCTRINES 96 (2004); *see also* SHERIDAN, *supra* note 204, at 210 (explaining that innocent misrepresentation as a ground of equitable intervention was introduced late in the nineteenth century); SNELL'S PRINCIPLES OF EQUITY 431-32 (H. Gibson Rivington & A. Clifford Fountaine eds., 19th ed. 1925) [hereinafter SNELL'S NINETEENTH EDITION]. Given equity's recognition that bright lines cannot always be drawn among shadings of an almost infinitely varied human experience, it is not remarkable that courts failed to distinguish intentional from unintentional conduct in discerning unclean hands. *See* PROSSER AND KEETON ON TORTS, *supra* note 189, § 8, at 33 (observing that intent is "one of the most basic, organizing concepts of legal thinking" as well as the "most often misunderstood").

however, cases that have been found to be sufficiently serious to amount to unclean hands tend to involve some level of cognition of a wrong, especially behavior that is intentional or done in bad faith.

B. Connection Component

Courts apply unclean hands only where the inequitable act has a connection to the matter in controversy.[215] In the words of Pomeroy: "The dirt on his [or her] hands must be his [or her] bad conduct in the transaction complained of."[216] Certain cases have also recognized similar wrongdoing.[217] As analyzed in Part I, judges employ the doctrine for purposes of preventing a private advantage and protecting the court.[218]

The connection condition of unclean hands formed the basis of the original English case of *Dering v. Earl of Winchelsea*.[219] In *Dering*, the court emphasized that the maxim is not invoked merely by establishing a "general depravity."[220] It ruled that there must be an "immediate and necessary" connection between the conduct said to make the plaintiff's hands unclean and the right claimed.[221]

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[215] *See Keystone Driller*, 290 U.S. at 245 (explaining that the violations of conscience must affect the equitable relations between the parties concerning "something brought before the court for adjudication"). The doctrine of clean hands is generally defined as follows: "a court of equity may deny relief to a party whose conduct has been inequitable, unfair, and deceitful, *but [the] doctrine applies only when the reprehensible conduct complained of pertains to the controversy at issue*." *Unclean Hands Doctrine*, BLACK'S LAW DICTIONARY (6th ed. 1990) (emphasis added) (citations omitted).

[216] POMEROY, EQUITY JURISPRUDENCE, *supra* note 1, § 399. *But see* SNELL'S TWENTY-SEVENTH EDITION, *supra* note 63, at 33 (noting that the limitation was not recognized in England during the reign of Elizabeth I and her immediate successors and had been lost sight of in some American jurisdictions).

[217] *See, e.g.*, Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp., 238 F.R.D. 679, 693-94 (S.D. Fla. 2006) (ruling that unclean hands may be available as a defense to legal relief under federal civil RICO claim for illegal pricing based on the plaintiff's illegal pricing in violation of the statute).

[218] *See* discussion *supra* Part I (discussing two purposes of unclean hands); *infra* Part VI; *accord* YOUNG ET AL., *supra* note 109, at 180-84 (discussing Australian and English law of unclean hands).

[219] (1787) 29 Eng. Rep. 1184 (recognizing the doctrine of unclean hands but denying its application on the ground that the alleged unclean acts lacked the requisite relation to the case).

[220] *Id.* at 1184-85.

[221] *Id.*

Early American cases reiterated *Dering*'s "immediate and necessary" language.[222] United States Supreme Court decisions of unclean hands continue to require a relationship between the wrong and the remedy or right.[223] In fact, in a twenty-first century case addressing the defense, the Court reiterated Pomeroy's classic formulation that the wrongdoing must be "in the course of the transaction at issue."[224] But the unclean conduct need not be in the same transaction so long as the events are related.[225] Akin to fraud jurisprudence, it is sufficient if the dirty deed infects the issue before the court.[226]

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[222] *See, e.g.*, Bateman v. Fargason, 4 F. 32, 32-33 (C.C.W.D. Tenn. 1880); Shaver v. Heller & Merz Co., 108 F. 821, 834 (8th Cir. 1901); FREDERICK S. WAIT, TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS' BILLS § 439, at 584 (1884) (citing cases from Pennsylvania and Tennessee); *see also* Camors-McConnel Co. v. McConnell, 140 F. 412, 417 (S.D. Ala. 1905). For modern cases endorsing the "immediate and necessary" language, see, for example, Ne. Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1354 (3d Cir. 1989).

[223] *See, e.g.*, ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 329-30 (1994) (Scalia and O'Connor, JJ., concurring). In *Keystone,* the Supreme Court echoed *Dering*'s "immediate and necessary" language and ruled that the wrongful acts "affect the equitable relations between the parties *in respect of something brought before the court for adjudication*." Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933) (emphasis added). Again, the Court explained in *Precision Instrument* that the defense "closes the doors of a court of equity to one tainted with inequitableness or bad faith *relative to the matter in which he seeks relief*." Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945) (emphasis added).

[224] McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360 (1995) (citing POMEROY, EQUITY JURISPRUDENCE, *supra* note 1, § 399).

[225] For example, the malicious prosecution cause of action in *Pond v. Insurance Co. of North America* was predicated on an unsuccessful indemnity suit filed by an insurer against an insurance agent arising out of a wrongful death action. Pond v. Ins. Co. of N. Am., 198 Cal. Rptr. 517, 521-23 (Cal. Ct. App. 1984). The agent knowingly withheld critical evidence and made other misrepresentations relevant to the insurer's defense in the underlying litigation that caused it to settle. *Id.* at 519-20, 521-23. The agent's nondisclosures would have also changed the outcome of the indemnity suit upon which he predicated his malicious prosecution claim. *Id.* at 522. The court of appeals agreed with the trial court and barred the agent's action for damages under the clean hands doctrine. *Id.* at 522-23 (calling the agent's conduct in bringing the malicious prosecution action the "classic 'chutzpah'").

[226] *See* Conard v. Nicoll, 29 U.S. 291, 297 (1830) (explaining that "if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected by those other frauds, unless in some way or other it be connected with or form a part of them"); Samasko v. Davis, 64 A.2d 682, 685 (Conn. 1949) ("Where a plaintiff's [equitable] claim 'grows out of, or depends on, or is inseparably connected with, his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have.'" (quoting Gest v. Gest, 167 A. 909, 912 (Conn. 1933))); Anenson & Mark, *supra* note 7, at 1497-98 (reviewing *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 244-46 (1933), and noting that although the inequitable conduct occurred as to only one patent, the

Discussing the connection condition in the nineteenth century, Justice Brandeis emphasized that "[e]quity does not demand that its suitors shall have led blameless lives."[227] Discerning a "want of equity in the allegations and corresponding proof" as opposed to "the bad conduct in life and character of the complainant" is not exclusively factual, but normative.[228]

Take the initial *Dering* case.[229] The case involved one surety seeking contribution from two other sureties. The former had been sued by the Crown to pay the debt of his brother, a customs collector. The plaintiff was one of three persons that had given a security for the performance of the collector's duties. The allegation of unclean hands by the defendants asserted that the plaintiff encouraged the collector (his brother) in gaming when he knew his brother lacked his own funds and was breaking the rules of the Treasury in his use of public funds.[230]

The court assumed the "evil example" of the plaintiff led the collector on and contributed to the missing public funds.[231] Yet still, it concluded that the facts did not constitute a defense.[232] By analogy to modern day tort law and the principle of proximate cause, a judge might have said there was a factual connection, but not a legal one. Presumably, the court declined the defense because it decided that the collector is responsible to fulfill his own duties regardless of outside pressure or encouragement.

Cases from the Supreme Court and lower state and federal courts regularly use risk language of "direct" versus "collateral, remote, indirect" in assessing the connection component.[233] In his iconic

Supreme Court affirmed the dismissal of all five patents for practical and procedural reasons).

227 *See* Loughran v. Loughran, 292 U.S. 216, 229 (1934).

228 *See* Clarke v. White, 37 U.S. 178, 193 (1838); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 63(e) (AM. LAW INST. 2011) ("Whether particular misconduct is directly relevant or merely 'collateral' to the relief sought by the claimant will depend on the court's sense of fitting punishment in the case at hand.").

229 Dering v. Earl of Winchelsea, (1787) 29 Eng. Rep. 1184, 1184.

230 *Id.*

231 *Id.* (relating that "this may all be true" and that the plaintiff might possibly have involved his brother in some way).

232 *Id.* at 1185.

233 *See, e.g.*, Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 390-93 (1944) (distinguishing collateral versus direct violations of federal criminal law); Loughran v. Loughran, 292 U.S. 126, 129 (1934) (employing the language "collateral" and "indirect and remote" in reference to violation of law); Kendall-Jackson Winery, Ltd. v. Superior Court, 90 Cal. Rptr. 2d 743, 749 (Cal. Ct. App. 1999) (using direct versus

analysis of unclean hands, Chafee likewise posed the question as to the closeness of the connection as whether an illegal transaction is "central" or "collateral" to the litigated claim?[234] He concluded that the answer cannot be determined solely by the facts, but by an analysis of underlying values.[235] It requires judgment. Similarly, Dobbs described the connection component of unclean hands as akin to a duty analysis.[236] From this vantage, a trial judge could determine foreseeability and decide whether the unclean conduct is so closely related to the claim or case that it is within the scope of the risk.[237]

Cases (even within the same jurisdiction) are not uniform on whether the unclean conduct must result in harm or prejudice.[238]

indirect dichotomy); *see also* DOBBS, LAW OF REMEDIES, *supra* note 159, § 2.4(2), at 93 n.2 (citing Ne. Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1354 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989)).

[234] Chafee I, *supra* note 39, at 896-98 (examining suits to enforce illegal contracts in law and equity). After asking whether the main transaction is illegal, Chafee poses the following questions: Is the illegal transaction "central to the litigated claim"? Or is it collateral? *Id.* at 897-98.

[235] *Id.* at 898. Chafee commented on the difficulty courts have in determining the effect of unlawful acts that are completed. *Id.* at 896-98 (comparing relationship requirement issue in the equity case of *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899) (seller resisted specific performance of a land contract because the buyer got the price as a bribe for political favors to a third person) with the law case of *Loughran v. Loughran*, 292 U.S. 216, 228 (1934)).

[236] Dobbs considered the connection component of unclean hands congruent if the wrongdoing was: (1) same kind of harm that the plaintiff intended or unreasonably risked and it resulted in (2) actual or threatened harm to the defendant (or group of persons which the defendant is identified with). DOBBS, LAW OF REMEDIES, *supra* note 159, § 2.4(2), at 93.

[237] Professor Rendleman describes Dobbs's analysis as asking whether the plaintiff's misconduct is so closely related that it is within the scope of the risk? RENDLEMAN, COMPLEX LITIGATION, *supra* note 73, at 270. Dobbs also saw the case law as employing two different standards depending on the circumstances. DOBBS, LAW OF REMEDIES, *supra* note 159, § 2.4(2), at 95. In some cases, he found that courts used a narrow formula. *See id.* They emphasize that "[w]hat is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts . . . ." *Id.* In other cases, he concluded that courts used a broad formula. *See id.* They simply ask whether the improper conduct "sufficiently affected the equitable relations between the parties." *Id.*; *see also* Anenson, *A Process-Based Theory*, *supra* note 2, at 543-44 (further defending the idea of analyzing the relationship between the wrong and remedy under principles of proximity).

[238] *Compare* Belling v. Croter, 134 P.2d 532, 537 (Cal. Ct. App. 1943) ("'[U]nclean hands' principle is equally applicable to cases of intent to defraud as to those in which the intent ripened into accomplishment." (citing Tognazzi v. Wilhelm, 56 P.2d 1227 (Cal. 1936)), *with* Miller & Lux v. Enter. Canal & Land Co., 75 P. 770, 772 (Cal. 1904) ("[F]raud without injury is never available as a defense in equity."), *and* Jeong Soon v. Beckman, 44 Cal. Rptr. 190, 192 (Cal. Ct. App. 1965) (declaring that

However, the weight of authority appears to favor application of the defense without it.[239] There are certainly cases of unclean hands where the plaintiff has been unjustly enriched at the defendant's expense. As such, the extent of any unfair benefit can be considered in relation to the defendant's harm.[240] Nevertheless, courts typically do not require it. In *Morton Salt Co. v. G.S. Suppiger Co.*, for instance, the United States Supreme Court declared that the clean hands doctrine applies "regardless of whether the particular defendant has suffered from the misuse of the patent."[241]

While the original English and American cases *did* require proof of harm to the defendant,[242] later decisions did not. The prevailing view is that unclean hands applies even though the plaintiff has not injured anyone (including the defendant).[243] Just one example is the Delaware

prejudice is required for unclean hands). *See also* Lawler v. Gilliam, 569 F.2d 1283, 1293 n.7 (4th Cir. 1978) ("The party to a suit, complaining that his opponent is in court with unclean hands because of the latter's conduct in the transaction out of which the litigations arose, or with which it is connected, must show that he himself has been injured by such conduct, to justify the application of the principle to the case." (internal quotation marks and citation omitted)).

239 *See, e.g.*, FLIR Sys., Inc. v. Sierra Media, Inc., 965 F. Supp. 2d 1184, 1194 (D. Or. 2013) ("[W]hile the Ninth Circuit has recognized that the extent of the harm caused by the plaintiff's misconduct is a highly relevant consideration, it has not held that a defendant asserting an unclean hands defense is required to demonstrate prejudice." (internal quotation marks and citation omitted) (emphasis added)).

240 *See, e.g.*, Earle R. Hanson & Assocs. v. Farmers Coop. Creamery Co., 403 F.2d 65, 70 (8th Cir. 1968) ("The plaintiff may be denied relief . . . where the result induced by his conduct will be unconscionable either in the benefit to himself or the injury to others."); *accord* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, *supra* note 228, § 63(a) (discussing unclean hand as a defense to unjust enrichment).

241 Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 494 (1942) (affirming trial court dismissal of patent infringement complaint for want of equity under the clean hands doctrine).

242 *See* Chafee I, *supra* note 39, at 881 (explaining that the early cases referenced by Francis were situations where the applicant harmed the respondent); *id.* (noting that one of Francis' footnotes specifies that "[t]he iniquity must have been done to the defendant himself" (citing FRANCIS, MAXIMS OF EQUITY 6 n.(b) (4th ed.))). Some cases still require injury to the defendant in order to satisfy the clean hands doctrine. *See* Kostelnik v. Roberts, 680 S.W.2d 532, 535-36 (Tex. Ct. App. 1984) (no connection between claimant's unclean hands and claim because the wrongful conduct complained of "must have been done to the defendant himself and not to some third party"). *But see* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, *supra* note 228, § 63(f) (asserting the case fundamentally misstates the law).

243 *See* Green v. Higgins, 535 P.2d 446, 450 (Kan. 1975) (citing MCCLINTOCK, *supra* note 76, § 26 and cases from Arkansas and Washington); *see also* Yeiser v. Rogers, 108 A.2d 877, 878-79 (N.J. Super. Ct. App. Div. 1954), *aff'd*, 116 A.2d 3 (N.J. 1955) (declaring that it is not the wrong accomplished, but the wrong planned that matters

Court of Chancery decision in *Nakahara v. NS 1991 American Trust*.[244] Citing the Supreme Court decision in *Deweese v. Reinhard*, the chancellor rejected the idea of "no harm, no foul" and explained that "[e]quity does not reward those who act inequitably, even if it can be said that no tangible injury resulted."[245] As a result, courts have held that misrepresentation and concealment of important facts, even though non-material, constitutes unclean hands.[246]

A finding of unclean hands in the absence of detrimental reliance is especially noticeable if there has been an attempt to gain an advantage. Federal and state courts routinely hold that such circumstances satisfy the doctrine.[247] This includes when misconduct has the potential to interfere with the process of decision-making.[248] As the Supreme Court pronounced in *Hazel-Atlas*: "No fraud is more odious than an *attempt* to subvert the administration of justice."[249]

Another ordinary use of the defense is when the injury, whether actual or symbolic, is to the public interest. Consider again the United States Supreme Court. It has been particularly vigilant in safeguarding judicial and administrative processes as well as government contracting.[250] In *S&E Contractors, Inc. v. United States*, the Supreme

when invoking unclean hands).

[244] 739 A.2d 770 (Del. Ch. 1998).

[245] *Id.* at 794-95 (denying litigation expenses for unclean hands even though satisfied contractual prerequisites (citing Deweese v. Reinhard, 165 U.S. 386, 390 (1897))).

[246] *See* Turchi v. Salaman Media Partners, Ltd., No. 11268, 1990 Del. Ch. LEXIS 34, at *23 (Mar. 14, 1990), *aff'd sub nom.* Media v. Turchi, 597 A.2d 354 (Del. 1991); *see also* Portnoy v. Cryo-Cell Int'l, Inc., 940 A.2d 43, 81 n.206 (Del. Ch. 2008) ("Harm . . . is not strictly required for the doctrine of unclean hands to bar relief.").

[247] *See* Anenson & Mark, *supra* note 7, at 1472-84 (detailing how the Supreme Court's decisions applying unclean hands in intellectual property law do not require harm).

[248] *See id.* (detailing cases including Supreme Court inequitable conduct decisions).

[249] Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944) (Roberts, J., dissenting) (emphasis added). *Precision Instrument* described the patentee's obligations as an "uncompromising duty [to the Patent Office] to report to it all facts concerning *possible* fraud or inequitableness underlying the applications in issue." *See* Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 818 (1945) (emphasis added). The patentee in *Keystone* adjudicated the validity of the patent in prior litigation without disclosure of the contract keeping secret the potential prior use. Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 242 (1933).

[250] *See* Anenson & Mark, *supra* note 7, at 1474-75. The Supreme Court has also found the public interest key in other areas of federal law. *See, e.g.*, Bevans v. United States, 80 U.S. 56, 62 (1872) (affirmed finding of unclean hands because public policy requiring strict accountability of receivers of public money).

Court endorsed the application of unclean hands.[251] It declared that "[c]ontracts with the United States — like patents — are matters concerning far more than the interest of the adverse parties; they entail the public interest."[252] The Court declared:

> Where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public.[253]

Lower courts have embraced the public interest under the doctrine of unclean hands as well.[254] In deterring violations of the law, they have refused to require private harm in dismissing statutory actions.[255] Private law cases where the unclean conduct involved potential statutory violations additionally establish that possible public injury is sufficient grounds for unclean hands.[256] Courts are using the defense of unclean hands as an indirect method of deterring serious violations which were otherwise hard to obtain.[257] For this reason, private or even public harm is not a condition of dismissal if the conduct has the potential to encourage future violations.[258]

Chafee advised that the progression of unclean hands to include third party protection occurred in the late nineteenth century.[259] Dobbs's commentary on unclean hands instructed its further extension to protect the public interest that had taken hold by the early

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[251] S&E Contractors, Inc. v. United States, 406 U.S. 1, 15 (1972).

[252] *Id.*

[253] *Id.* (quoting *Precision Instrument*, 324 U.S. at 815).

[254] *See* CORPUS JURIS SECUNDUM, *supra* note 162, § 116 (citing cases involving protection of the public interest).

[255] *See, e.g.*, Mallis v. Bankers Tr. Co., 615 F.2d 68, 75-76 (2d Cir. 1980) (applying New York state law and holding that no injury is needed if there is harm to public policy); Thompson v. Orcutt, 777 A.2d 670, 674-81 (Conn. 2001) (noting an exception to private harm if the application of unclean hands furthers the public interest).

[256] *See* Anenson & Mark, *supra* note 7, at 1476-77 (citing cases).

[257] *See* Chafee I, *supra* note 39, at 902 (analyzing unclean hands category of illegality decisions).

[258] In *Carrington*, for instance, applying the unclean hands defense promoted the deterrence function. Carrington v. Pratt, 59 U.S. 63, 66-68 (1855) (noting that the party acting in bad faith "would risk nothing" if the security was held valid to the extent of the loan).

[259] Chafee I, *supra* note 39, at 892 (discussing unclean hands expansion in the late 1800s to include third parties (citing cases)).

twentieth century.[260] Therefore, as evidenced by a plethora of decisions, courts had carved out an exception to the injury requirement in the public interest.[261]

Notwithstanding, the Court of Appeals for the Federal Circuit recently reinvented inequitable conduct, a defense derived from unclean hands in patent law, by requiring detrimental reliance on the basis of the same criterion found in common law fraud.[262] Again, though, unclean hands decisions from the Supreme Court and lower state and federal courts are clear that the defense is broader than fraud; it is beyond fraud.[263] Moreover, "equitable" rather than "common law" fraud is the appropriate comparison. It bears repeating that the doctrine of unclean hands is considered part of the larger notion of constructive fraud that provided a basis for equitable intervention.[264] Traditionally, fraud in equity included agreements affecting public relations by interfering with legislative, executive, or judicial proceedings.[265] Equitable fraud did not require detrimental reliance just as it did not require a specific intent to deceive.[266]

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[260] DOBBS, LAW OF REMEDIES, *supra* note 159, § 2.4(2), at 94-95 (criticizing cases of unclean hands for improper conduct not causing injury to the defendant).

[261] For cases in Australia not requiring harm to the defendant due to the paramount public interest, see YOUNG ET AL., *supra* note 109, at 183-84 (citing Kettles & Gas Appliance Ltd. v. Anthony Hordern & Sons Ltd., 35 SR (NSW) 108 (1934); Angelides v. James Steadman Hendersons Sweets Ltd., 40 CLR 43 (1927)).

[262] Anenson & Mark, *supra* note 7, at 1484 (critiquing Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276 (Fed. Cir. 2011)).

[263] *See id.*; discussion *supra* Section V.A; *accord* SAMANTHA HEPBURN, PRINCIPLES OF EQUITY AND TRUSTS § 15.4 *Equitable Defences*, at 69-70 (2d ed. 2001) (outlining unclean hands cases in Australia involving fraud in the broad sense).

[264] *See* discussion *supra* notes 199–205. Story advised that:

> It is not easy to give a definition of Fraud in the extensive signification, in which that term is used in Courts of Equity; and it has been said, that these Courts have, very wisely, never laid down, as a general proposition, what shall constitute fraud, or any general rule, beyond which they will not go upon the ground of fraud, lest other means of avoiding the Equity of the Courts should be found out.

STORY, FOURTEENTH EDITION, *supra* note 149, § 186 (14th ed.).

[265] *See* POMEROY, EQUITY JURISPRUDENCE, *supra* note 1, § 399; SNELL'S NINETEENTH EDITION, *supra* note 214, at 441.

[266] In contrast to positive fraud that required an intent to deceive and reliance, Story explained that constructive fraud in equity included situations involving confidential relations, imbalances of power, and agreements against public policy (including abuses of judicial processes), and/or a mixture of them. *See* STORY, FIRST EDITION, *supra* note 146, §§ 258-59. Equity originated in the Middle Ages when the "might makes right" mentality predominated among kings and commoners. *See* Anenson, *Triumph of Equity*, *supra* note 43, at 384-85.

The fact that fraud in the broad sense can constitute unclean hands does not necessarily preclude a narrow approach in a given situation. A more conservative outlook could prevent relief if the dirty deed was absolutely essential by having the plaintiff plead it or rely on it to prove the claim. Using the language of tort law, "but for" the unclean conduct, could the applicant make out their case? If not, they have unclean hands. If so, they do not. (Under a wider perspective, they may still have unclean hands if there is a requisite connection.) The fraudulent conveyance scenario fits the bill.[267] To recover the property the applicant must set forth the real reason for its conveyance in the first place.

Another cautious stance is when the unclean conduct negates an element of the claim. Thus, rather than arguing that circumstances exist which should qualify or preclude a claim, the defendant demonstrates that not all the elements of a plaintiff's claim have been made out. While there are cases whose fact patterns fit within these positions,[268] no court has mandated either restrictive view.[269] The surrounding circumstances notwithstanding, these are the easier cases concerning the clean hands doctrine.

Courts are certainly more comfortable with Chafee's vision that entailed situations where the plaintiffs' fault contributed to their own harm.[270] This corresponds to *Dering*'s dicta that the unclean hands defense may be satisfied if the applicant for relief had bored a hole in the side of a ship that caused his goods to be thrown overboard to save the ship.[271] For a modern take, consider *Blain v. Doctor's Co.*[272] In this case, a doctor brought a legal malpractice action based on his attorney's bad advice to lie at a deposition. The court found lying constituted unclean hands which was attributable to the doctor's own

[267] *See* Health Maint. Network of S. Cal. v. Blue Cross of S. Cal., 249 Cal. Rptr. 220, 232 (Cal. Ct. App. 1988) (commenting that the "clean hands" doctrine "is usually associated with the rule of law which precludes a grantor from recovering his property from a grantee when the conveyance is deemed a fraudulent one").

[268] *See* Blain v. Doctor's Co., 272 Cal. Rptr. 250, 258-59 (Cal. Ct. App. 1990).

[269] *See id.*

[270] *See* Chafee II, *supra* note 39, at 1091-92; discussion *supra* Part I and note 86; *see also* Mullins v. Picklesimer, 317 S.W.3d 569, 577 (Ky. 2010) ("In a long and unbroken line of cases [the Kentucky Supreme Court] has refused relief to one, who has created by his fraudulent acts the situation from which he asks to be extricated.").

[271] Dering v. Earl of Winchelsea, (1787) 29 Eng. Rep. 1184, 1185 (announcing that such a person could not claim contribution from his fellow cargo-owners because he would be the author of the loss).

[272] 272 Cal. Rptr. 250 (Cal. Ct. App. 1990).

injuries for emotional distress and loss of work as a physician.[273] As such, the doctor lacked proof that the attorney's professional negligence had a causal connection to these injuries.[274]

More extreme decisions apply unclean hands to the same or similar conduct that does not cause or attempt to cause harm to the defendant. The litigants are not acting in concert which might merit the application of the narrower doctrine of *in pari delicto*.[275] Nor does the traditional idea of equitable estoppel fit the fact patterns because there is no reliance on the inequitable conduct.[276] The most notable cases here involve unfair competition. Some of these cases though can be understood under the public interest exception to the connection component. When the plaintiff violates the same statute as the defendant, these could be conceptualized under the public harm criterion satisfying the connection component. In a civil RICO case,[277] for instance, the court recognized the possibility of unclean hands to preclude legal relief where both parties allegedly engaged in illegal pricing.[278]

There are many decisions of deceptive trade practices in trademark law. In *Häagen-Dazs, Inc. v. Frusen Glädjé, Ltd.*,[279] the plaintiff was barred from obtaining an injunction against the defendant's false designation of its ice cream as Swedish where the plaintiff's own labeling falsely suggest that its ice cream was from Scandinavia.[280]

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[273] *Id.* at 258-59.

[274] *Id.*

[275] *See* discussion *supra* note 36.

[276] *See id.*

[277] Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp., 238 F.R.D. 679 (S.D. Fla. 2006).

[278] *Id.* at 693-94 (denying plaintiff's renewed motion for class certification due in part to the potential availability of unclean hands as a defense to legal relief under federal civil RICO based on the plaintiff's illegal pricing in violation of the statute); *see also* Smith, *Form and Substance*, *supra* note 69, at 335-36 (explaining that the kind of disqualifying behavior amounting to unclean hands in England need not be based on unconscionability (citing Hubbard v. Vosper (1972) 2 QB 84 (Eng.)) (finding Scientologists denied an injunction against defamatory publications due to their own deplorable activities)).

[279] 493 F. Supp. 73 (S.D.N.Y. 1980).

[280] *Id.* at 74-76 (finding the plaintiff guilty of the same deceptive trade practices of which it accuses defendants); *see also* Chafee II, *supra* note 39, at 1076-77 (reviewing Clinton E. Worden & Co. v. Cal. Fig Syrup Co., 187 U.S. 516, 528 (1903) (refusing to aid "California Fig Syrup" that had no figs)). Other disputes involving trademarks have mandated that plaintiff's conduct must have injured the defendant. *See, e.g.*, Lawler v. Giliam, 569 F.2d 1283, 1293 n.7 (4th Cir. 1978). Mid-twentieth century decisions involving statutory violations as constituting unclean hands have been justly criticized for strictly applying the defense of unclean hands to preclude a remedy

Some cases, however, are more tenuous in terms of the public interest. These cases do not involve breach of a statute. In *Unilogic, Inc. v. Burroughs Corp.*,[281] the plaintiff was held ineligible for damages for the conversion of software from a failed joint development project where the plaintiff was also guilty of conversion.[282]

Consider *UZ Engineered Products Co. v. Midwest Motor Supply Co., Inc.* (*Kimball-Midwest*) as well.[283] The case involved one competitor suing another for interference with its employment contracts resulting in the loss of its sales force. Because the defendant company used a contract with identical terms, counsel for the plaintiff argued that equitable defenses, including unclean hands, precluded the defendant from challenging the validity of its employment agreements.[284] The appellate court agreed, although it announced the principle as estoppel.[285] Because estoppel traditionally requires reliance on an inconsistency which was absent in this case, however, the better fit was unclean hands.[286]

These situations still can be loosely rationalized under the concept of preventing litigants from benefitting from their own wrong. The litigants lack standing under the clean hands doctrine by their hypocrisy in taking an identical stance to the one they are attempting to condemn. In other words, the claim may have merit, but the hypocrite does not deserve to raise it. As outlined in Part I, it has been argued that the moral norm of *tu quoque*, among others, is embodied

without weighing or otherwise considering the policies of the claim. *See* Chafee I, *supra* note 39, at 878; Chafee II, *supra* note 39, at 1092; discussion *infra* Part VI.

281 12 Cal. Rptr. 2d 741 (Cal. Ct. App. 1992).

282 *Id.* at 743-45 (finding unclean hands available for the same conduct on which the plaintiff based their claim for relief).

283 *See* UZ Engineered Prods. Co. v. Midwest Motor Supply Co., Inc. (Kimball-Midwest), 770 N.E.2d 1068, 1079-80 (Ohio Ct. App. 2001).

284 *Id.* The author was trial and appellate counsel for UZ Engineered Products in this case. *Id.* Kimball-Midwest not only executed the same covenants as UZ, but acknowledged and enforced them as well. *See* Anenson, *Role of Equity*, *supra* note 14, at 21 (reviewing the case).

285 Without discussing its elements or policies, the appellate court simply labeled the defense "estoppel." *UZ Engineered Prods. Co.*, 770 N.E.2d at 1079-80; *see* Anenson, *Role of Equity*, *supra* note 14, at 54 n.253.

286 Some courts have removed the reasonable reliance requirement of equitable estoppel in furtherance of other policies. *See* Anenson, *Pluralistic Model*, *supra* note 14, at 663-64; Anenson, *Triumph of Equity*, *supra* note 43, at 390-91. For a comparison of estoppel and unclean hands, see Anenson, *Role of Equity*, *supra* note 14, at 47-53. For other unfair competition cases involving unclean hands based on the same conduct, such as when both parties improperly steal trade secrets or customers, see Chafee II, *supra* note 39, at 1082.

in the defense's normative structure.[287] This Latin tag means "you too" or can be understood by equivalent phrases like "look who's talking" or "the pot calling the kettle black."[288]

Generally, tort actions will be more remote than contract cases and lack the requisite link. This is due to the absence of a prior relationship between the parties. It is not surprising that the early descriptions of unclean hands associated it with transactions. However, litigation involving fraud or other tortious conduct arising from a contractual or other prior relationship tends to be less tenuous and, as a result, more favorable for the application of the defense.[289]

Another question is whether the connection is assessed on the entire controversy or on a claim by claim basis.[290] Most courts separate the analysis without elaboration.[291] This seems correct. After all, the concept of clean hands arose, and had been applied repeatedly, before the proliferation of code pleading concluded at the federal level and in most states by the middle of the twentieth century.[292] The modern codes permitted an expanded scope to a single action. Technological advances during the same period meant that issues appeared in new and more complex combinations. Under the technical pleading requirements abolished by the Field Code and other Field-type statutes recognizing a liberal joinder of claims and defenses, there was simply no need to make such a determination.

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[287] *See* Herstein, *supra* note 94, at 205.

[288] *Id.* at 192-93; *see* G.A. Cohen, *Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?*, *in* FINDING ONESELF IN THE OTHER 115, 119 (Michael Otsuka ed., 2013); *see also id.* at 119 n.8 (explaining that the interpersonal dimension of moral utterances has been neglected in moral philosophy).

[289] *See, e.g.*, Unilogic, Inc. v. Burroughs Corp., 12 Cal. Rptr. 2d 741, 742-43 (Cal. Ct. App. 1992) (asserting claims in tort arising out of business dealings).

[290] The right to a jury trial has the same confusion. *See* Anenson, *Triumph of Equity*, *supra* note 43, at 412-21 (analyzing differences in state and federal law to jury trial of equitable defenses, including confusion over whether to classify by controversy or claim); Note, *The Right to Jury Trial Under Merged Procedures*, 65 HARV. L. REV. 453, 455-57 (1952) (analyzing how courts judge the issue of jury trial either by action or issue).

[291] *See infra* note 296.

[292] The Field Code in New York abolished common law forms and united law and equity in a simplified procedure in 1848. Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 317 (1988). It precipitated the merger in other states and eventually the federal system. The formal separation of law and equity procedure in the federal system was not eliminated until 1938 when the Federal Rules of Civil Procedure went into effect. *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 973 (1987) [hereinafter *How Equity Conquered Common Law*].

If the connection component is to have any teeth, it makes sense that the defense of unclean hands should be analyzed according to the claim for relief rather than the entire cause of action. It should only prevent the claim to which the unclean conduct is related. The whole controversy should not stand or fall as a unity. Claims unaffected by the unclean conduct should remain.[293] Indeed, Pomeroy discussed the doctrine as refusing "all" relief, but qualified the explanation "with reference to the subject-matter or transaction in question."[294] This comports with the unclean hands' justificatory norm of retribution that punishment should be proportional to the wrong committed.[295]

In California where courts have broadened the ambit of unclean hands, decisions are clear that the defense is applied in a granular fashion. Courts carefully assess the viability of the defense by issue and do not lump all causes of action together in analyzing the appropriateness of its application.[296] Courts sometimes even narrow the inquiry further to decide between remedies to a single claim or use the doctrine to reduce (but not totally ban) the remedy.[297]

One United States Supreme Court decision, however, may appear to the contrary. It declared in *Manufacturers' Finance Co. v. McKey* that

[293] Anenson & Mark, *supra* note 7, at 1496-1502 (making argument for litigation claims and patent claims).

[294] POMEROY, EQUITY JURISPRUDENCE, *supra* note 1, § 397, at 91.

[295] Herstein, *supra* note 94, at 201-03; *supra* Part I.

[296] Courts may apply the clean hands doctrine to preclude an entire lawsuit or to some claims and not others. *See* Murillo v. Rite Stuff Foods, Inc., 77 Cal. Rptr. 2d 12, 18 (Cal. Ct. App. 1998) (ruling that unclean hands bars wrongful discharge and contract claims but not sexual harassment); *see also* Ample Bright Dev., Ltd. v. Comis Int'l, 913 F. Supp. 2d 925, 940-41 (C.D. Cal. 2012) (refusing to apply the clean hands doctrine to promissory estoppel claim in part because the parties only raised the defense to declaratory judgment action); Blain v. The Doctor's Co., 272 Cal. Rptr. 250, 258-59 (Cal. Ct. App. 1990) (making separate inquiries into the kinds of harm allegedly resulting from the professional negligence, emotional distress, and the inability to continue professional practice).

[297] *See* Anenson, *Statutory Interpretation*, *supra* note 3, at 38 (identifying the Supreme Court's new emphasis on equitable defenses as adjustment, rather than eradication, mechanisms (citing Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1978-79 (2014))); *accord* Salas v. Sierra Chem. Co., 327 P.3d 797, 812-13 (Cal. 2014), *cert. denied*, 135 S. Ct. 755 (2014) (holding that unclean hands could not be a complete defense to a statutory claim based on public policy but could guide the relief the court could fashion); Cortez v. Purolator Air Filtration Prods. Co., 999 P.2d 706, 716 (Cal. 2000) (ruling that "equitable defenses may not be asserted to wholly defeat a UCL claim (that is equitable)"); *infra* Part VI. Unclean hands cases involving trademarks also recognize that the defense may bar legal and/or equitable relief in whole or in part. RESTATEMENT (THIRD) OF UNFAIR COMPETITION: PLAINTIFF'S MISCONDUCT § 32 (AM. LAW. INST. 1995) (Mar. 2016 update).

unclean hands denies relief *in toto*.[298] But the decision preceded the promulgation of the Federal Rules of Procedure providing for the liberal joinder of claims.[299] Since that time, lower federal courts have limited "the reach of the doctrine to only some of the claims."[300] Furthermore, under the related doctrine of fraud on the court stemming from the Supreme Court's unclean hands decision in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,[301] courts regularly parcel the pleadings.[302]

An additional aspect of the connection component — timing — deserves attention. There is universal recognition of when to evaluate the requisite relationship between the conduct and the case (claim). As indicated earlier, courts are not in the business of assassinating a litigant's character in terms of his or her general behavior in life. Correspondingly, litigants are allowed to wash their once dirty hands clean and maintain the lawsuit.[303]

Accordingly, the unclean hands defense does not apply unless there is a connection between the conduct and the case. While there is a risk that the scope of the disablement may be defined too indiscriminately

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[298] Mfrs.' Fin. Co. v. McKey, 294 U.S. 442, 451 (1935) (declaring that "the maxim, if applicable, required the district court to halt petitioner at the threshold and refuse it any relief whatsoever"). The Supreme Court alternatively held that no inequitable conduct was involved in the case. *Id.*

[299] The Federal Rules of Civil Procedure of 1938 joined law and equity processes in the federal system. *See* Subrin, *How Equity Conquered Common Law*, *supra* note 292, at 973.

[300] New Valley Corp. v. Corp. Prop. Assocs. 2 & 3, 181 F.3d 517, 525 (3d Cir. 1999) ("As an equitable doctrine, application of unclean hands rests within the sound discretion of the trial court. . . . [T]he court has discretion to limit the reach of the doctrine to only some of the claims."); *see also* J.L. Cooper & Co. v. Anchor Sec. Co., 113 P.2d 845, 853-54 (Wash. 1941) ("Even proof of misconduct as to one part of a transaction will not necessarily deprive a party of equitable relief as to another part thereof.").

[301] 322 U.S. 238, 250-51 (1944).

[302] *See* Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions*, 4 CONN. INS. L.J. 589, 707 (1998); Jonathan M. Stern, *Untangling a Tangled Web Without Trial: Using the Court's Inherent Powers and Rules to Deny a Perjuring Litigant His Day in Court*, 66 J. AIR L. & COM. 1251, 1254 (2001).

[303] *See, e.g.*, Gen. Elec. Co. v. Klein, 129 A.2d 250, 251 (Del. Ch. 1956) (ruling that a repentant sinner, especially where duly punished, is not unwelcome in equity); Howard v. Howard, 913 So. 2d 1030, 1041-42 (Miss. Ct. App. 2005) (expressing the idea that unclean hands can be cleansed to allow the plaintiff to receive relief); Poll, *supra* note 150, at 72-75 (discussing cases denying the clean hands doctrine once the improper practice had ceased and its consequences dissipated).

(along with many other legal and equitable doctrines),[304] this rule of relatedness provides a reasonable prescription for its application.[305] In fact, the connection component of unclean hands has been the method by which courts typically constrain the defense.[306] As emphasized by Judge Posner: "The linguistically fastidious may shudder at 'nexus,' that hideously overworked legal cliché, but there can be no quarrel with the principle."[307]

C. Sliding Scale

A trial court typically analyzes the seriousness of the conduct and its relation to the case in tandem rather than determines each element in isolation. Specifically, in considering the clean hands doctrine, judges employ stricter rules of relatedness for inadvertence and allow a more liberal connection for increasing levels of cognition.[308] Put differently, comparable to liability in tort,[309] courts tend to impose greater responsibility upon those whose conduct was intended to do harm rather than when they possess lesser states of mind.[310] In articulating

[304] *See, e.g.*, Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 73 (1993) ("Discretion and flexibility pervade the system and are not limited to the historic confines of equity.").

[305] Anenson, *Treating Equity Like Law*, *supra* note 10, at 506; *see also* Anenson, *Role of Equity*, *supra* note 14, at 49-50 (noting that "it is difficult to reconcile those cases determining if misconduct is related to the lawsuit or merely collateral"). *See generally* Anenson, *A Process-Based Theory*, *supra* note 2, at 511-12 (providing four-phase procedural model of incorporation of unclean hands at law to further clarify the doctrine).

[306] *See, e.g.*, Anenson, *A Process-Based Theory*, *supra* note 2, at 516 ("While not universal, many courts also mandate that the unclean conduct have a connection to the case.").

[307] Shondel v. McDermott, 775 F.2d 859, 869 (7th Cir. 1985).

[308] Anenson & Mark, *supra* note 7, at 1487.

[309] *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 189, § 8, at 34-37 (noting that courts have worked out a sliding scale). The doctrine of unclean hands has been described as "tortious," including conduct that is fraudulent, willful, and negligent. LAYCOCK, REMEDIES, *supra* note 125, at 938 (describing unclean hands as illegal or tortious conduct); *see* Thompson v. Orcutt, 777 A.2d 670, 674 (Conn. 2001) (suggesting unclean hands includes fraud and intentional, negligent, and innocent misrepresentation); *see also* Paul Finn, *Unconscionable Conduct*, Nov. 27, 1994, at *18, 1994 JCL LEXIS 24 (considering equitable theories as developing a new breed of tort).

[310] Shinsaku Nagano v. McGrath, 187 F.2d 753, 758 (7th Cir. 1951) (pronouncing that it is not so much the effect of conduct, as the intent with which it is performed); Queiroz v. Harvey, 205 P.3d 1120, 1122 (Ariz. 2009) (en banc) (citing MacRae v. MacRae, 794 P. 280, 282-84 (Ariz. 1941)) (declaring that it is the moral intent of the party and not the actual injury done that is controlling in determining unclean hands).

unclean hands in trademark litigation, for instance, the Supreme Court held that if there is a willful false statement, it need not mislead.[311] Concomitantly, court opinions finding unclean hands for innocent misrepresentation generally show that the statement induced another to act to his or her detriment.[312] Consequently, appellate courts rarely detach the components of the clean hands doctrine and deny the district court discretion to collectively discern them.[313]

The sliding scale approach makes it more difficult to trace the development of the doctrine with any exactitude or evaluate its elements in isolation. The role of discretion, discussed below, also adds to the complexity of the defense.

VI. ROLE OF DISCRETION

Ancient equity practice and principle includes judicial consideration of the ethical ideals embodied in the defenses themselves as well as their subjugation to cases and other consequences, including statutory goals.[314] Because equitable defenses are discretionary in nature, history also directs the form of the defense as open-textured.[315]

An often-repeated refrain in judicial decisions is that flexibility is a corollary to equitable defenses.[316] State and federal cases follow this view.[317] With unclean hands in particular, the Supreme Court warned

311 Clinton E. Worden & Co. v. Cal. Fig Syrup Co., 187 U.S. 516, 531-32 (1903) (relying on English precedent cited with approval in *Manhattan Medicine Co. v. Wood*, 108 U.S. 218, 225 (1883)).

312 *See, e.g.*, Kackley v. Webber, 220 S.W.2d 587, 589 (Ky. 1949) ("[E]quity will not come to the aid of a party who has induced another to act to his detriment, even though the misrepresentations were innocently made.").

313 *See* Anenson & Mark, *supra* note 7, at 1461-87 (criticizing the majority in *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1292-93 (Fed. Cir. 2011) for changing the elements of inequitable conduct contrary to the tradition of unclean hands and removing them from the sliding scale).

314 *Id.* at 1502-05; Thomas Geu et al., *To Be or Not to Be Exclusive: Statutory Construction of the Charging Order in the Single Member LLC*, 9 DEPAUL BUS. & COMM. L.J. 83, 94 (2010) (codification of charging order derived from equity justified by equitable interpretation according to the policies of the statute).

315 *See, e.g.*, Anenson & Mark, *supra* note 7, at 1502-05 (explaining the discretionary nature of unclean hands); Anenson, *Triumph of Equity*, *supra* note 43, at 404-05 (describing the discretionary nature of equitable estoppel).

316 Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945); *see* Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944) (repeating the explanation); *see also* Yorio, *supra* note 14, at 1225-26 (noting flexibility and fairness benefits of equitable defenses); *cf.* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (stating that "[f]lexibility rather than rigidity" distinguishes equity).

317 DeCecco v. Beach, 381 A.2d 543, 546 (Conn. 1977) (explaining that the clean

against technical adherence to any formulae.[318] It has also declared that unclean hands "necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant."[319]

It bears repeating that the defense of unclean hands developed largely from the idea of equitable fraud designed to remedy the abuse of legal rights or other unfair advantage-taking where elasticity was necessary to capture conduct that is hard to predict in advance.[320] In short, "equity was aiming at a moving target."[321] Seen as a safety value, then, equitable defenses like unclean hands provide "individualized justice . . . illuminated by moral principles."[322] As discussed in Part I, the need for equitable discretion at the rights implementation stage dates to Aristotle.[323] Aristotle's insight was that no lawmaker could

hands maxim applies in the trial court's discretion and "is not one of absolutes").

[318] Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244-46 (1933) (declaring that the doctrine of unclean hands is not a rigid formula which "trammel[s] the free and just exercise of discretion" but is applied "upon considerations that make for the advancement of right and justice"). In *Hazel-Atlas*, the Court explained unclean hands as part of equitable relief that has "always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944).

[319] *Precision Instrument*, 324 U.S. at 815.

[320] *See* discussion *supra* INTRODUCTION and Part V. For an explanation of the equitable decision-making mode, see Smith, *Fiduciary Law*, *supra* note 23, at 264-65 (explaining that equity cannot be too predictable because opportunists will anticipate it and evade it as well as invent new ways of engaging in such behavior).

[321] Smith, *Fiduciary Law*, *supra* note 23, at 269; *see also* Anenson & Mayer, *supra* note 16, at 995 (discussing the contours of the clean hands doctrine and claiming that "[w]hat is 'unclean,' like what is fraud, necessitates some ambiguity to promote deterrence").

[322] Ryan, *supra* note 48, at 217 (citing Leonard J. Emmerglick, *A Century of New Equity*, 23 TEX. L. REV. 244, 254-55 (1944-45)); *see* Anenson, *Pluralistic Model*, *supra* note 14, at 651 (explaining the embryonic character of equitable doctrines); Anenson, *Triumph of Equity*, *supra* note 43, at 403-06 (describing the flexibility of equity and how estoppel has no exhaustive formula); *see also* Anenson, *Age of Statutes*, *supra* note 3, at 577 (showing that equitable defenses under Supreme Court jurisprudence continue to operate as safety valves); Anenson, *Treating Equity Like Law*, *supra* note 10, at 508 (discussing the role of equitable defenses as a significant safety valve); Gergen, Golden & Smith, *supra* note 76, at 237 (relating safety valve theory of equitable remedies).

[323] *See* Anenson, *Triumph of Equity*, *supra* note 43, at 426 (explaining equitable defenses in relation to the Aristotelian idea of *epikeia* (citing Anton-Hermann Chroust, *Aristotle's Conception of "Equity" (Epieikeia)*, 18 NOTRE DAME L. REV. 119 (1942-43))).

craft laws to cover every contingency and that discretion is needed to prevent the over- or under-inclusiveness of rules.[324]

A leading international treatise on equity explains that "the phrase 'clean hands' will be of sufficiently imprecise import to permit application of the maxim to be tailored in each case very much in personam."[325] For this reason, courts often define the maxim in the form of a tautology by equating unclean hands with equitable intervention.[326] The range of misbehaviors associated with the defense vary widely in terms of knowledge,[327] harm[328] or its foreseeability,[329]

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[324] *Id.*; *see also* Anenson & Mark, *supra* note 7, at 1514 (concluding that the Federal Circuit's failure to follow Supreme Court doctrine on ensuring equitable defenses are flexible made its former law of inequitable conduct overinclusive and its new law underinclusive).

[325] MEAGHER, GUMMOW AND LEHANE'S EQUITY, *supra* note 47, at 451. This is not necessarily bad, see Smith, *Fusion and Tradition*, *supra* note 23, at 24-25 (discussing equity's "liability conclusion[s]"), and, in any event, is similar to other equitable defenses. *See* Anenson, *Pluralistic Model*, *supra* note 14, at 646 (describing equitable estoppel as a chameleon that takes its color from the surrounding circumstances). The discrete application of the defense is not surprising given its standard-like quality that courts will give meaning to in individual cases. Anenson & Mark, *supra* note 7, at 1509-10 ("[T]he accumulated legacy of court work will provide guidance in the nature of Llewellyn's 'situation sense' for the district courts to conduct a contextual normative inquiry.").

[326] *See* Merck & Co. v. SmithKline Beecham Pharms. Co., No. 15443-NC, 1999 Del. Ch. LEXIS 242, at *157-58 (Aug. 5, 1999) (stating inquiry as whether the party had "'transgressed equitable standards of conduct' in a way that might justify application of the unclean hands doctrine" (quoting Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945))); Bellware v. Wolffis, 397 N.W.2d 861, 864 (Mich. Ct. App. 1996) ("Any wilful act concerning the cause of action which transgresses equitable standards of conduct is sufficient cause for the invocation of the clean hands doctrine.").

[327] *See, e.g.*, Bartlett v. Dunne, No. C.A. 89-3051, 1989 WL 1110258, at *3 (R.I. Super. Ct. Nov. 10, 1989) ("Plaintiff's deception is willful and it strikes at the very heart of the judiciary.").

[328] See, for example, Gaudiosi v. Mellon, 269 F.2d 873, 882 (3d Cir. 1959) (emphasis omitted), which quoted Judge Learned Hand's dissent in *Art Metal Works v. Abraham & Straus*, 70 F.2d 641, 646 (2d Cir. 1934) as follows:

> The doctrine [of unclean hands] is confessedly derived from the unwillingness of a court, originally and still nominally one of conscience, to give its peculiar relief to a suitor who in the very controversy has so conducted himself as to shock the moral sensibilities of the judge. It has nothing to do with the rights or liabilities of the parties; indeed the defendant who invokes it need not be damaged, and the court may even raise it sua sponte.

Gaudiosi, 269 F.2d at 882 (emphasis omitted).

[329] *See* Maldonado v. Ford Motor Co., 719 N.W.2d 809, 821-22 (Mich. 2006)

any admission of wrongdoing,[330] the effectiveness of lesser sanctions,[331] the nature of the relationship,[332] the role of the client as opposed to counsel,[333] and the public interests.[334] The discretionary nature of the decision recognizes these varied phenomena.[335]

The public policy criterion is particularly pronounced in equity and unclean hands.[336] Judges may expand or contract the unclean hands defense in the public interest.[337] When that interest is embodied in a

(holding that a substantial likelihood of harm to the case is sufficient to invoke unclean hands). A pattern of misbehavior by the litigant could also help establish the requisite foreseeability of harm to the court system. *Id.* at 821; Pierce v. Heritage Props., Inc., 688 So. 2d 1385, 1389 (Miss. 1997) (noting intentional nature, as well as the pattern of the plaintiff's conduct, which included deliberately providing false responses in three discovery mechanisms, should be considered in dismissal decision).

330 *See, e.g.*, Smith v. Cessna Aircraft Co., 124 F.R.D. 103, 107-08 (D. Md. 1989) (admission of perjury).

331 *See, e.g.*, Shelton v. Shelton, 653 So. 2d 283, 287 (Miss. 1995) (noting the alternative sanction of contempt is available to address a party's unclean hands).

332 A breach of fiduciary duties can constitute unclean hands. *See, e.g.*, Ross v. Moyer, 286 A.D.2d 610, 611 (N.Y. Ct. App. 2001); Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 26 (Tex. Ct. App. 2000).

333 *See Maldonado*, 719 N.W.2d at 824 (considering the Supreme Court's comment in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (1991), that an attorney is a key participant in the justice system and, therefore, the state can demand adherence to the precepts of the system in regulating their conduct); Stern, *supra* note 302, at 1289 (stating that courts are less likely to dismiss the case when it is the lawyer (as opposed to the client) who commits misconduct); *see also* Rose v. Nat'l Auction Grp., Inc., 646 N.W.2d 455, 467 (Mich. 2002) (applying unclean hands despite reliance on expert advice since conduct "violate[d] basic ethical norms").

334 *See, e.g.*, Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 492 (1942) (finding that a court of equity "may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest"), *abrogated by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) (concluding that a per se presumption of illegality for tying arrangements of patented products was no longer applicable given recent congressional amendments).

335 *See, e.g.*, Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 380 (1975) ("The obvious inappropriateness of denying discretion when a decision-maker must choose among an almost infinite number of alternatives on bases that are complex and yield uncertain conclusions.").

336 *See, e.g.*, Stevens, *supra* note 8, at 424-25 (noting one of the factors to influence a decision in equity was that special consideration was given to the public interest); *supra* Section V.B (discussing public interest exception to connection component). Typically, a court will recite the public interest to expand the defense to find a connection, yet restrict the defense pursuant to the public interest in the exercise of its residual discretion.

337 For example, the Supreme Court has used the public interest doctrine to expand and contract equitable defenses. *See* Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do go much further

statute, recent research revealed that the Supreme Court is structuring equitable defenses like unclean hands in light of legislative aims.[338] However, it has usually chosen to impose restrictions on their use rather than adopt them wholesale or deny their application altogether.[339] The Court has narrowed equitable defenses either by limiting their application to certain kinds of relief, to particular plaintiff classes, or through heightened criteria like exceptionalism.[340]

Even without increased appellate supervision in statutory cases, a critical part of the trial judge's discretion in determining unclean hands is to deny the defense or restrict its application. A well-known limitation on the doctrine was that courts would apply unclean hands only if it advanced, and did not defeat, the policies at issue in the case.[341] Thus, judges refuse the defense if they find the public interest outweighs its application in the case or it will otherwise work an

both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 382 (1983) ("The point [that equity courts may go further to give and withhold relief in the public interest] has been restated so often by federal courts that it has become an aphorism."). In endorsing unclean hands in patent law, the Supreme Court declared in *Precision Instrument*: "Where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions." *See* Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945). Correspondingly, the Court relied on the public interest criterion to constrain the employee misconduct defense, derived from unclean hands, in statutory actions. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360 (1995).

338 Supreme Court practice involving the application of unclean hands in federal legislation has accounted for the discretion to deny the defense. Anenson, *Age of Statutes*, *supra* note 3, at 559. The Supreme Court has similarly instructed the district courts to apply unclean hands' legal cousin — *in pari delicto* — only if barring recovery would not offend statutory policies. Pinter v. Dahl, 486 U.S. 622, 633 (1988).

339 Specifically, the Court has been constrained in supplying the substance of equitable defenses by external sources of custom and internal sources of precedent in alignment with statutory purposes. Anenson, *Age of Statutes*, *supra* note 3, at 554 (describing the Supreme Court's method of making equitable defenses). The Court has been hesitant to allow exclusively equitable defenses to cross the law-equity border. *Id.*

340 *Id.*; Anenson, *Statutory Interpretation*, *supra* note 3, at 37.

341 *See, e.g.*, Lyon v. Campbell, No. 01-1694, 2002 WL 470860, at *6 (4th Cir. Mar. 28, 2002) ("[E]ven if the district court might have been justified in applying the doctrine of unclean hands based on Lyon's false testimony, the court was not compelled to do so. Application of the doctrine of unclean hands is largely in the discretion of the district court . . . ."); *see also* Nakahara v. NS 1991 Am. Tr., 718 A.2d 518, 523 n.35 (Del. Ch. 1998) (citing cases refusing to apply unclean hands on public policy grounds); NEWMAN, EQUITY AND LAW, *supra* note 113, at 241-42 (citing cases).

inequitable result.[342] This inevitably involves a balancing process. While not uniform or always announced in the decision, courts can engage in two types of balancing. First, they compare the wrongdoing of the plaintiff and the defendant.[343] Second, they weigh and value the plaintiff's right against the wrong allegedly amounting to unclean hands.[344]

[342] For federal cases, see, for example, Citizens Fin. Grp., Inc. v. Citizens Nat'l Bank of Evans City, 383 F.3d 110, 130 (3d Cir. 2004) ("We hold that the District Court's heavy reliance on the doctrine of unclean hands to justify its denial of injunctive relief improperly weighted the evidence to the exclusion of the merits of CNBEC's claim and the public interest, and constituted an abuse of discretion."); EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 753-55 (9th Cir. 1991) ("[T]he clean hands doctrine should not be strictly enforced when to do so would frustrate a substantial public interest."); Katiroll Co. v. Kati Roll & Platters, Inc., No. 10-3620 (GEB), 2011 U.S. Dist. LEXIS 61281, at *2 (D.N.J. June 8, 2011) ("[I]n a trademark infringement action, 'the court must show solicitude for the public in evaluating an unclean hands defense.'"); Fund of Funds, Ltd. v. First Am. Fund of Funds, Inc., 274 F. Supp. 517, 519 n.1 (S.D.N.Y. 1967) ("[T]he doctrine of unclean hands should not be applied since the central concern of the law of unfair competition in this case is protection of the public from confusion in the securities market."). For state cases, see, for example, Health Maint. Network v. Blue Cross of So. Cal., 249 Cal. Rptr. 220, 232 (Cal. Ct. App. 1988); Burnette v. Void, 509 A.2d 606, 608 (D.C. 1986); *see also* CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11.07[a] n.1 (2017) (listing cases).

[343] *See* Northbay Wellness Grp., Inc. v. Beyries, 789 F.3d 956, 960 (9th Cir. 2015) (explaining that the unclean hands defense requires balancing the alleged wrongdoing of the parties and weighing the right of the plaintiff against the plaintiff's transgression to foreclose the right); Dunlop-McCullen v. Local 1-S, AFL-CIO-CLC, 149 F.3d 85, 90 (2d Cir. 1998) (declaring that the "doctrine of unclean hands also may be relaxed if [the] defendant has been guilty of misconduct that is more unconscionable than that committed by [the] plaintiff" (internal quotation marks omitted)); JP Morgan Chase Bank, N.A. v. MGM IV, LLP, No. 1 CA-CV 13-0145, 2016 WL 4249672, at *5 (Ariz. Ct. App. 2016) (declaring that equitable relief may be warranted even for a party who acts inequitably when the other party is more culpable for its actions (citing Coleman v. Coleman, 61 P.2d 441, 443 (Ariz. 1936))); Sword v. Sweet, 92 P.3d 492, 501 (Idaho 2004) (ruling that the court has discretion to determine the relative conduct of both parties in applying the clean hands doctrine); *see also* Chafee I, *supra* note 39, at 904-05 (commenting that parties seem to fare better against the unclean hands defense when bringing tort rather than contract claims). Weighing and comparing the parties conduct is equivalent to the balancing the equities criterion in determining whether to grant equitable relief. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (articulating balancing the hardships as one of a four-pronged approach to assessing equitable relief); *see also* Anenson, *Age of Statutes*, *supra* note 3, at 566 (outlining debate over the legitimacy of the balancing process for equitable remedies).

[344] *See* sources cited *supra* note 343; Blain v. Doctor's Co., 272 Cal. Rptr. 250, 255 (Cal. Ct. App. 1990) (advising that analogies may be helpful, "but more significant is the way the effect given to the plaintiff's misconduct depends on the nature of his wrong and the nature of the defendant's wrong").

The judge's residual discretion to deny the defense is a centuries-old condition. It is implicit in the application of equitable defenses and has been acknowledged explicitly in the state and federal courts.[345] As a result, part of a trial court's discretion is to account for all the circumstances, including any mitigating factors, before deciding that unclean hands defeats a plaintiff's remedy.[346] In applying the clean hands doctrine to a legal malpractice action in *Blain v. Doctor's Co.*,[347] for example, the court considered that denying the defense would deter attorneys from unsavory behavior.[348] Nevertheless, it determined that the societal interest in deterrence can be vindicated through criminal sanction or professional disciplinary proceedings.[349]

One consideration is whether there is an alternative sanction to barring suit.[350] In declining the defense despite proof of its dual components, judges will sometimes note that the danger posed by the clean hands doctrine can be addressed another way.[351] Alternative sanctions could be outside the lawsuit or within it, such as applying a narrower defense like *in pari delicto*, illegality, or estoppel.[352] Courts

[345] *See* Anenson & Mark, *supra* note 7, at 1521 n.533 (listing federal and state cases). The discretion to deny unclean hands was evidenced in *Hazel-Atlas* where the Supreme Court justified its dismissal after noting there were no intervening equities that should change the outcome. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944).

[346] *See, e.g.*, Byron v. Clay, 867 F.2d 1049, 1051 (7th Cir. 1989) (Posner, J.) ("The doctrine of unclean hands . . . gives recognition to the fact that equitable decrees may have effects on third parties — persons who are not parties to a lawsuit, including taxpayers and members of the law-abiding public — and so should not be entered without consideration of those effects."); *accord* YOUNG ET AL., *supra* note 109, at 183 (citing Australia, New Zealand, Hong Kong, and English cases).

[347] 272 Cal. Rptr. at 255.

[348] *Id.* at 258-59.

[349] *Id.*

[350] In *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944), a majority of the Supreme Court determined that the clean hands doctrine should not apply despite the potential violation of federal law because there were other ways to enforce the law and deter future violations. For state cases, see Bellino v. Bellino, No. A12–2319, 2013 WL 4045809, at *5 (Miss. Ct. App. Oct. 13, 2013) (indicating that respondent's removal as conservator would be a less drastic alternative remedy to barring suit under the clean hands doctrine); Bartlett v. Dunne, No. C.A. 89-3051, 1989 WL 1110258, at *3 (R.I. Super. Ct. Nov. 10, 1989) (finding litigant in contempt rather than precluding suit based on unclean hands).

[351] *See* cases cited *supra* note 350.

[352] *See* discussion *supra* INTRODUCTION; *accord* HEPBURN, *supra* note 263, § 15.4 (outlining Australian law preference for the application of narrower defenses). All of these equitable defenses rest, at least in part, on the rationale of preventing wrongdoers from taking advantage of their own wrong. *See, e.g.*, Anenson, *A Process-Based Theory*, *supra* note 2, at 566-67 (outlining same rationale for *in pari delicto*);

are, or at least should be, conscious of the plaintiff's right to be heard by employing the least restrictive means of addressing the risk. Applying the narrowest defense would also enhance clarity and coherence in an otherwise amorphous area of the law.

Evaluating other mechanisms to prevent the plaintiff from taking advantage of their own wrong and otherwise protecting the court or public would seem necessary where there is a presumption against the application of the defense. The presumption-like phraseology limits the defense to "extraordinary," "disfavored," or "exceptional" cases.[353] Presumptions are familiar to equitable jurisprudence, although only a handful of jurisdictions use them for unclean hands.[354] In those courts that have adopted the parlance for the clean hands doctrine, the default position should assist courts in deciding close cases. Courts resolve doubts against the defense both in terms of determining its existence and in its application.[355] Applying the clean hands doctrine as a last resort is reminiscent of the evaluation for equitable relief for only those controversies that have no adequate remedy at law.[356]

Anenson, *Pluralistic Model*, *supra* note 14, at 662 (describing one of the purposes of equitable estoppel as withholding aid to a wrongdoer); Anenson & Mark, *supra* note 7, at 1449-50 (explaining the rationale of unclean hands as preventing unfair strategic behavior).

353 Some jurisdictions narrow unclean hands and provide for its invocation only with prudence, see Milford Power Co. v. PDC Milford Power, LLC, 866 A.2d 738, 748 (Del. Ch. 2004), reluctantly, see Farmers' Educ. & Coop. Union of Am. v. Farmers Educ. & Coop. Union of Am., 141 F. Supp. 820, 824 (S.D. Iowa 1956), *enforced on other grounds*, Farmers' Educ. & Coop. Union of Am. v. Farmers Educ. & Coop. Union of Am., 150 F. Supp. 422 (S.D. Iowa 1957), *aff'd sub nom.* Stover v. Farmers' Educ. & Coop. Union of Am., 250 F.2d 809 (8th Cir. 1958), or in the exceptional case, see Markel v. Scovill Mfg. Co., 471 F. Supp. 1244, 1255 (W.D.N.Y. 1979) ("[C]ourts are reluctant to apply the unclean hands doctrine in all but the most egregious situations.").

354 The Supreme Court has resisted strong evidentiary presumptions for equitable relief, Gergen, Golden & Smith, *supra* note 76, at 219-30 (criticizing the Court's rejection of traditional evidentiary presumptions in determining equitable relief), while maintaining a legal (interpretative) presumption of equity under silent statutes. Anenson, *Statutory Interpretation*, *supra* note 3, at 52.

355 *See* Coca-Cola Co. v. Koke Co. of Am., 254 U.S. 143, 145 (1920) (unclean hands is "scrutinized with a critical eye"). Certain jurisdictions have noted that the doctrine of unclean hands is not favored. *See* Schivarelli v. Chi. Transit Auth., 823 N.E.2d 158, 168 (Ill. Ct. App. 2005) ("The application of the unclean doctrine has not been favored by the [Illinois] courts."); Foursquare Tabernacle Church of God in Christ v. Dep't of Metro. Dev. of the Consol. City of Indianapolis, 630 N.E.2d 1381, 1385-86 (Ill. Ct. App. 1994) ("The doctrine is not favored by the courts and is applied with reluctance and scrutiny."); Butler v. Butler, 114 N.W.2d 595, 619 (Iowa 1962).

356 *See* Anenson & Mark, *supra* note 7, at 1507 (explaining the Court's approach in *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) as developing mandatory

Writing in the mid-twentieth century, Chafee complained that unclean hands was a "mischievous" doctrine capable of causing harm due to the risks of a mechanical application.[357] Basically, certain courts had failed to exercise their discretion to consider the policies at stake. Later decisions, however, show that judges have taken Chafee's criticism to heart.[358] In deciding the clean hands doctrine, they are identifying and reconciling competing interests in the case.[359] That is not to say there is no room for improvement. In declining unclean hands, judges can better clarify whether the defense was not satisfied or whether, despite its existence, they have declined to apply it.[360] But these issues are no worse than other equitable doctrines, especially considering that defenses have not been studied for more than a century. Consequently, to continue the function of the clean hands doctrine, state and federal courts have retained its standard-like qualities and corresponding residual discretion.

reasoning requirements for the exercise of lower court discretion). Scholars have questioned whether *eBay*'s criteria that include an adequate remedy at law and irreparable injury constitute different inquiries. *Compare* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 8-9 (1991) (finding the two criterion equivalent), *with* Shreve, *supra* note 337, at 392-93 (locating differences between the doctrines). Notably, no adequate remedy at law was part of the statutory language of jurisdiction under the Judicature Act. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 548-49 (1985) (concluding that the adequate remedy requirement was jurisdictional whereas irreparable injury was a consideration for courts in exercising their discretion).

357 Chafee I, *supra* note 39, at 878-90. He further concluded that the use of "the clean hands maxim sometimes does harm by distracting [a judge's] attention from the basic policies which are applicable to the situation before them." CHAFEE, SOME PROBLEMS, *supra* note 101, at 94-95.

358 *See, e.g.*, Scattaretico v. Puglisi, 799 N.E.2d 1258, 1261 n.13 (Mass. App. Ct. 2003) ("The indispensable writing on the subject by Professor Chafee advises caution in using the maxim, with attention to the practical consequences to the parties and sometimes to outsiders as well.").

359 *See, e.g.*, Health Maint. Network v. Blue Cross of So. Cal., 249 Cal. Rptr. 220, 232 (Cal. Ct. App. 1988):

> The doctrine of unclean hands is not necessarily a complete defense . . . . It is well settled that public policy may favor the nonapplication of the doctrine as well as its application. Whenever an inequitable result would be accomplished by application of the clean hands doctrine, the courts have not hesitated to reject it.

Id. (internal quotations and citations omitted).

360 *Id.* In some early cases, it is difficult to discern whether judges are actually applying unclean hands or simply declining equitable relief. Cathcart v. Robinson, 30 U.S. 264, 276-77 (1831); *see supra* note 119.

CONCLUSION

Inquiries into equitable doctrines have been ad hoc and unsystematic in the United States. There is not even a well-recognized taxonomy of the defenses.[361] An extensive analysis of the state and federal case law concerning the clean hands doctrine allows for an exhaustive assessment and systematic critique that is lacking for many theories of equity.[362] Moreover, because several courts of last resort (including the Supreme Court of the United States) have yet to address the many modern issues involving the clean hands doctrine,[363] the analysis should assist them in contemplating the defense. This is especially true for the defense's expansion into more specific doctrines or its extension to statutory and legal relief.[364] The study also furthers research on the defense by Zechariah Chafee that is still relied upon by courts and scholars worldwide.

[361] *See* Anenson, *Triumph of Equity*, *supra* note 43, at 438-39 ("There has never been a book dedicated to equitable defenses."). The lack of clarity on equitable defenses has even been noted in the Commonwealth where equity still survives as a subject of study. *See* Smith, *Form and Substance*, *supra* note 69, at 339 ("There is little agreement amongst writers or courts as to the number of traditional bars, their names or the borders between them.").

[362] *See, e.g.*, Smith, *Equity in R3RUE*, *supra* note 31, at 1187-88 (commenting that equitable principles have suffered from a lack of systemization in comparison to the common law).

[363] *See* Anenson, *Limiting Legal Remedies*, *supra* note 2, at 111-12, 118 (advising that the issue of unclean hands at law is sui generis in many jurisdictions and explaining that confusion over fusion may be due to the lack of guidance in courts of last resort).

[364] The Supreme Court has recently decided two cases on the meaning and application of laches in intellectual property legislation. *See* Ferrey, *supra* note 4, at 670-72.