

Limiting Legal Remedies: An Analysis of Unclean Hands

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[T]he clean hands doctrine . . . ought not to be called a maxim of equity because it is by no means confined to equity . . .²

Zechariah Chafee, Jr.

INTRODUCTION

UNCLEAN hands is perhaps the most powerful and least containable defense that came from ancient courts of equity. Since the American Revolution, courts have been shooting off decisions on this equitable doctrine like Roman candles.³ “Broader”⁴ and “newer”⁵ than other

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² Zechariah Chafee, Jr., *Coming into Equity with Clean Hands*, 47 MICH. L. REV. 877, 878 (1949) [hereinafter Chafee I].

³ See T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455, 459 (2008) (“Despite its containment mainly to actions in equity, cases considering the doctrine during the present century already tally in the thousands.” (citation omitted)); see *infra* note 10 and accompanying text.

⁴ T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 51–52 (2005) [hereinafter Anenson, *Role of Equity*] (citations omitted) (explaining that unclean hands is broader in application than the defenses of equitable estoppel and waiver); see also T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L.J. 509, 566–72 (2010) [hereinafter Anenson, *Process-Based Theory of Unclean Hands*] (comparing unclean hands to estoppel as well as to the legal doctrines of *in pari delicto* and fraud on the court).

⁵ Anenson, *supra* note 3, at 466 n.63 (“Unclean hands is considerably newer than most equitable doctrines.”); see also ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 2 (1950) (unclean hands “is a rather recent growth”); *Id.* at 5 (describing unclean hands as “a child beside some other maxims . . . mature in Shakespeare’s day” (citation omitted)). Chief Baron Eyre of the English Court of Exchequer (which had equity powers) adopted the doctrine in *Dering v. Earl of Winchelsea*, (1787) 29 Eng. Rep. 1184 (Ch.) 1186; 1 Cox Eq. Cas. 318, 319–20.

equitable defenses, discretionary dismissals⁶ for unclean hands are not limited to illegality, but extend to any inequitable, unconscionable, or bad faith conduct that is connected to the case.⁷ For reasons of court and party protection, judges have invoked unclean hands to preclude an assortment of common law and statutory causes of action.⁸

Zechariah Chafee, Jr. was the first scholar to undertake a comprehensive analysis of the defense in the United States.⁹ In 1949, he remarked on the

6 Like other equitable doctrines, dismissal for unclean hands is discretionary in nature. Anenson, *supra* note 3, at 461 (citation omitted); *see also* ROBERT MEGARRY & P.V. BAKER, SNELL'S PRINCIPLES OF EQUITY 105–06 (27th ed. 1973); RALPH A. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 28 (1961) (“[R]elief in the court of the Chancellor was granted according to criteria which were not confined by rules of strict logic or by analogy to prior decisions.”). For the historical origin and evolution of equitable discretion generally, *see* T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 384–87 (2008).

7 *See, e.g.*, 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 as to be punishable as a crime or as to justify legal proceedings of any character. 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”); 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 399 (SPENCER W. SYMONS ED., 5TH ED. 1941) (“The dirt upon his [or her] hands must be his [or her] bad conduct in the transaction complained of.”).

8 *See generally* Anenson, *Process-Based Theory of Unclean Hands*, *supra* note 4, at 527–41 & nn.71–119 (citing cases articulating policies of unclean hands). The US Supreme Court in *Keystone Driller Co. v. General Excavator Co.*, articulated unclean hands as follows:

[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 [or her] prior conduct, then the doors of the court will be shut against him [or her] in limine; the court will refuse to interfere on his [or her] behalf, to acknowledge his [or her] right, or to award him [or her] any remedy.

Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244–45 (1933), (quoting JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 397 (4th ed. 1918)). In a later case, the Supreme Court explained the rationale of unclean 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 abettor of iniquity.’” *Id.* at 814 (quoting *Bein v. Heath*, 47 U.S. (6 How.) 228, 247 (1848)).

9 Zechariah Chafee, Jr., a practitioner and law professor at Harvard Law School, was a noted scholar of equity jurisprudence. *See* Chafee I, *supra* note 2, at 877 n.**; *see also* Edgar N. Durfee, *Foreword* to ZECARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY, at ix–xi (1950). 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* continue to be the primary description of the American experience with the equitable defense. *See, e.g.*, Chafee I, *supra* note 2; Zechariah Chafee, Jr., *Coming into Equity with Clean Hands*, 47 MICH. L. REV. 1065 (1949) [hereinafter Chafee II].

“astonishing number” of cases decided under the doctrine.¹⁰ Even then, the broad coverage of unclean hands comprised myriad forms of misbehavior barring an array of state and federal claims.¹¹ Chafee’s analysis focused solely on the defense in suits seeking equitable remedies,¹² and a long-standing treatise advises that it is not available in damages and other so called legal actions.¹³ But adjudications in state and federal courts evidence the expansion of unclean hands into matters of legal relief.¹⁴

Indeed, in a case of first impression, the Michigan Supreme Court recently recognized unclean hands and dismissed a damages action.¹⁵ Historically, other state supreme courts have limited its use to actions involving equitable relief.¹⁶ In the federal court system, the United States Supreme Court has avoided the question of whether a court has authority to invoke an equitable defense like unclean hands to bar an action for damages.¹⁷ As a result, the controversy continues in the intermediate appellate and trial courts of state and federal jurisdictions.¹⁸

10 CHAFEE, *supra* note 5, at 12; *cf.* Wesley Newcomb Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537, 550 (1913) (noting maxim of unclean hands to be of “slight importance” compared to other equitable doctrines (citation omitted)).

11 Chafee examined a total of eighteen different groups of cases considering unclean hands. *See* Chafee I, *supra* note 2, at 885–906 (listing eight different groups of cases); Chafee II, *supra* note 9, at 1065–96 (listing ten different groups of cases).

12 *See generally* Chafee I, *supra* note 2; Chafee II, *supra* note 9.

13 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* §2.4(2) (2d ed. 1993) (“The most orthodox view of the unclean hands doctrine makes it an equitable defense, that is, one that can be raised to defeat an equitable remedy, but not one that defeats other remedies.”). The original edition by Dobbs was the first treatise on the subject of remedies. Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 261 (2008). 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.

14 *See* discussion *infra* Part II.

15 *See* *Maldonado v. Ford Motor Co.*, 719 N.W.2d 809, 818 (Mich. 2006) (“The authority to dismiss a lawsuit for litigant misconduct is a creature of the “clean hands doctrine” and, despite its origins, is applicable to both equitable and legal damage claims” (quoting *Cummings v. Wayne Cnty.*, 533 N.W.2d 13 (1995))); *see also infra* notes 174–77 and accompanying text.

16 *See* discussion *infra* Part I.

17 The United States Supreme Court first recognized the doctrine of clean hands in equity in *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 158 (1795). By 1831, the Court called the defense “well settled.” *Cathcart v. Robinson*, 30 U.S. (5 Pet.) 264, 276 (1831).

18 *See* discussion *infra* Parts I–II. Courts generally reject the defense at law on the ground that the legislature limited the consolidation to the courts and their procedures. *See* *Anenson*, *supra* note 3, at 462–64; *see also* William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 489 (1938) (“Equitable defenses do not become legal defenses under code merger . . .”). As such, courts read the *procedural* union to exclude the *substantive* reception of unclean hands which was used before the merger exclusively against equitable remedies. *See* *Anenson*, *supra* note 3, at 462–64; *see also* WILLIAM QUINBY DE FUNIAK, *HANDBOOK OF MODERN EQUITY* § 4 (2d ed. 1956) (noting unification of law and equity in the United States was a merger of procedure

This Article examines the corpus of cases incorporating unclean hands into the common and statutory law. It provides for a fuller explanation of the defense in legal cases by looking more closely at its doctrinal underpinnings.¹⁹ Through a description of the arguments and justifications in the debate over the legal status of unclean hands, this Article seeks to inform on this divisive issue and aid its resolution.

During the centuries following the merger of law and equity, there has been continuous and vigorous discussion about the relationship between these two traditions in the United States and the rest of the common law world.²⁰ These “fusion wars” advance diverse views about the role of law and equity in the current legal framework.²¹ Battle lines have been drawn around an array of subjects like “property, choice of law . . . fiduciaries, unjust enrichment, [and] . . . remedies.”²² The equitable doctrine of “clean hands” is now included in that conversation.

The availability of unclean hands in damages actions has not been the subject of sustained analysis at an appellate level. It remains unresolved in many jurisdictions, with other courts addressing the issue in error or through

and not substance); NEWMAN, *supra* note 6, at 51 (explaining that the fusion of law and equity under federal law was restricted to procedure with the Enabling Act providing that “said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant”); *Id.* at 50 n.1 (discussing that the New York “legislative mandate to the Commissioners was reform in procedure—not alteration of the substantive rules of equity or the common law” (citations omitted)); cf. Harold Greville Hanbury, *The Field of Modern Equity*, in *ESSAYS IN EQUITY* 29 (1934) (discussing the same interpretation of equitable defenses given to the English procedural form). Therefore, despite the rhetoric of completing the union of law and equity, see Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1, 10 (1925) (“The union of law and equity is justly considered to be the foundation principle of the Code reform.” (citation omitted)); Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 26 (1905) (“[A] complete absorption or blending of the two systems into one . . . is now commonly predicted by jurists.”), the conventional interpretation of the procedural reforms forever banned this presumably substantive defense in legal cases. See Anenson, *supra* note 3, at 466. Under this view, the equitable defense of unclean hands is traditionally available against equitable (and not legal) remedies. *Id.* at 465–66 & nn.60–61 (citing cases).

19 In comparison to my other research, this Article does not use these cases as conceptual building blocks to derive a decision-making framework or to rethink the meaning of the merger of law and equity. See generally Anenson, *supra* note 3, at 455; Anenson, *Process-Based Theory of Unclean Hands*, *supra* note 4, at 509. Instead, this article is a retrospective account of the background data upon which those theories were based.

20 See Beverley McLachlin, *Foreword* to *EQUITY IN COMMERCIAL LAW*, at vii (Simone Degeling & James Edelman eds., 2005) (“[D]espite the passage of time, the fusion of law and equity remains a live issue today, subject to debate by academics, practitioners and judges alike.”); Tiong Min Yeo, *Choice of Law for Equity*, in *EQUITY IN COMMERCIAL LAW*, *supra*, at 147, 150 (“The extent of the fusion of the substantive rules of common law and equity remains a matter of great controversy today, and different legal systems in the common law tradition have adopted different approaches to this question.”).

21 McLachlin, *supra* note 20, at vii (using the term to refer to the discussion of the relationship of law and equity).

22 *Id.* at viii.

oversight.²³ Courts have also been frustrated with the lack of doctrinal and theoretical scholarship considering the availability of unclean hands to bar legal claims.²⁴ This Article aims to end the arbitrariness and judicial extremes on the subject of unclean hands in an effort to unify this fragmented area of law. By studying the defense of unclean hands, it celebrates and cultivates one of law's most remarkable inventions—equity.²⁵

Part I reviews court decisions that follow the conventional view that the equitable defense of unclean hands is limited to claims seeking equitable remedies. Part II explores the present decisional trend to consider the defense in cases seeking legal remedies. It studies how the cases are decided, how the precedents are used, and how the case law of unclean hands has evolved. It traces the incorporation process within and across state and federal jurisdictions.

Part III evaluates the future of unclean hands in light of the judicial justifications for and against the defense at law. It reveals how precedent and policy analysis dominate the thought processes of judges considering unclean hands and illustrates how the complex interplay between human facts and abstract laws that confounded ancient English chancellors continues to challenge contemporary American judges. This Part suggests that rather than denying the defense in legal actions in reliance on its

23 See Anenson, *supra* note 3, at 465–74 (discussing divided court positions on application of unclean hands at law); discussion *infra* Part III; see also *id.* at 480–81 (noting cases adopting unclean hands in legal actions without discussion); Anenson, *Process-Based Theory of Unclean Hands*, *supra* note 4, at 513, 517–18 (discussing cases rejecting unclean hands based on pre-merger precedent or none at all).

24 One court's perusal of the relevant authorities and precedents found there was "scant authority on the subject." *Unilogic, Inc. v. Burroughs Corp.*, 12 Cal. Rptr. 2d 741, 745 (Ct. App. 1992) (considering the availability of unclean hands to bar a legal claim). Another court specifically complained that Chafee's analysis was not helpful and otherwise noted the "sparse product" assisting in the application of the defense. *Blain v. Doctor's Co.*, 272 Cal. Rptr. 250, 256 (Ct. App. 1990) (dismissing a damages action for unclean hands). The court complained that Chafee's analysis "offers no detailed exposition of the case law." *Id.*; see also *Messick v. Smith*, 69 A.2d 478, 481 (Md. 1949) ("We have no occasion to pursue the details of Professor Chafee's interesting iconoclastic discussion, which is revolutionary in classification and nomenclature, not in application, of legal principles."). The *Blain* court was also not satisfied with Wigmore's synopsis of the defense and declared the *Restatement (Second) of Torts* § 889 commentary "unilluminating." *Blain*, 272 Cal. Rptr. at 256 ("What cases would lie in the first of Wigmore's categories is not self-explanatory."); accord *Ronald J. Allen & Ross M. Rosenberg, Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683, 690–95 (2002) (noting courts' and legislatures' general disregard of theoretical scholarship as opposed to doctrinal scholarship).

25 See, e.g., *NEWMAN*, *supra* note 6, at 255 ("The evolution of law is to a large extent the history of its absorption of equity."); Lionel Smith, *Fusion and Tradition*, in *EQUITY IN COMMERCIAL LAW*, *supra* note 20, at 19, 30 ("It is no doubt true that the presence of Equity allowed the common law to under-develop its own brand of equity, and to stand on the side of certainty and predictability, knowing all the while that in many cases, relief was available elsewhere."). See generally William T. Quillen, *Constitutional Equity and the Innovative Tradition*, *LAW & CONTEMP. PROBS.*, Summer 1993, at 29 (discussing Delaware's modern equity tradition).

historical pedigree, the trend of absorbing the equitable defense of unclean hands into the law will likely continue on the basis of policy.

This Article concludes by placing unclean hands in its broader equitable context. The cases applying the defense in actions seeking legal remedies are not only important for what they say, but also for what they represent. The laboratory that is unclean hands in damages actions could become a movement to eradicate the legal barrier to equity. To be sure, incorporating unclean hands into the law may help dissolve default notions of “law” and “equity” as unassailable symbols of an institution that has yet to grapple with its own coming of age.²⁶

I. THE PAST: UNCLEAN HANDS EXCLUSIVE TO EQUITY

Before discussing the growing body of law that recognizes unclean hands in lawsuits seeking legal remedies in Part II, and its implications for the future in Part III, this section surveys past court decisions rejecting unclean hands at law. Under these precedents, the defense is restricted to its traditional use in cases seeking equitable relief.

The two most recent jurisdictions to deny unclean hands in a lawsuit seeking damages did so almost a decade ago. The courts’ approach demonstrates a narrow outlook on the defense. In *Fremont Homes, Inc. v. Elmer*,²⁷ the Supreme Court of Wyoming supported its denial of the defense based on precedent considering unclean hands to solely ban equitable relief.²⁸ Correspondingly, the District of Columbia Court of Appeals in *In re*

²⁶ Zechariah Chafee, Jr., expressed his frustration with the continued reliance on law-equity labels:

How absurd for us to go on until the year 2000 obliging judges and lawyers to climb over a barrier which was put up by historical accident in 14th century England and built higher by the eagerness of three extinct courts to keep as much business as possible in their own hands, so that these hands might be full of fees!

Zechariah Chafee, Jr., *Foreword* to SELECTED ESSAYS ON EQUITY, at iii, iv (Edward D. Re ed., 1955); see also Keith Mason, *Fusion: Fallacy, Future or Finished?*, in EQUITY IN COMMERCIAL LAW, *supra* note 20, at 41, 65 (“The question of exemplary damages for breach of an exclusively fiduciary duty has been addressed recently in New Zealand, Canada and Australia and has proved a catalyst for discussion about the fusion of law and equity.” (citations omitted)); Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS., Summer 1993, at 53, 78 (describing law and equity as a “dysfunctional proxy for a series of functional choices”); Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 97 (2007) (“It would be salutary, I submit, for the profession to discard the nonfunctional terminology of separate legal and equitable discretion.”); Robert S. Stevens, *A Plea for the Extension of Equitable Principles and Remedies*, 41 CORNELL L.Q. 351, 351 (1956) (explaining that the distinction between law and equity was not necessary or essential, but historical).

²⁷ *Fremont Homes, Inc. v. Elmer*, 974 P.2d 952 (Wyo. 1999).

²⁸ *Id.* at 959 (lawsuit seeking damages for breach of employment contract). The Wyoming Supreme Court also cited section 102 of C.J.S. for support. *Id.* This C.J.S. section misstated

*Estate of Barnes*²⁹ was persuaded to deny the defense because “we know of no authority for applying this ‘maxim of equity’ to a legal claim for money.”³⁰ State supreme courts in Georgia,³¹ Iowa,³² Missouri,³³ and Pennsylvania³⁴ have reached similar conclusions, with high courts in Minnesota,³⁵ North Dakota,³⁶ and New Jersey³⁷ suggesting an identical outcome.

DiMauro v. Pavia, 492 F. Supp. 1051, 1068 (D. Conn. 1979), *aff’d* 614 F.2d 1286 (2d Cir. 1979). In considering the classic case of unclean hands to estop equitable relief, the *DiMauro* court instructed that unclean hands may be invoked “only to prevent affirmative relief.” *DiMauro*, 492 F. Supp. at 1068. The legal encyclopedia’s version inserted the word “equitable” between “affirmative” and “relief.” *See* 30A C.J.S. *Equity* § 109 (2007), wherein the earlier edition’s error remains uncorrected.

29 *In re Estate of Barnes*, 754 A.2d 284 (D.C. 2000).

30 *Id.* at 288 n.6. D.C. precedent on this point stems from *Truitt v. Miller*, 407 A.2d 1073 (D.C. 1979), which relied on *Tarasi v. Pittsburgh National Bank* for the proposition that unclean hands will not defeat legal relief. *Truitt*, 407 A.2d at 1079–80 (citing *Tarasi v. Pittsburgh Nat’l Bank*, 555 F.2d 1152, 1156–57, 1156 n.9 (3d Cir. 1977)); *see also* *First Am. Corp. v. Al-Nahyan*, 17 F. Supp. 2d 10, 29 (D.D.C. 1998) (citing *Johns v. Rozet*, 141 F.R.D. 211, 220 (D.D.C. 1992); *Truitt*, 407 A.2d at 1079–80 (“[U]nder D.C. law, unclean hands acts only as a defense to equitable, and not legal, actions.”)).

31 *Holmes v. Henderson*, 549 S.E.2d 81, 81–82 (Ga. 2001) (citing *Jones v. Douglas Cnty.*, 418 S.E.2d 19, 22–23 (Ga. 1992) (discussing the doctrine of laches)).

32 *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 184 (Iowa 1987); *see also* *Sisson v. Janssen*, 56 N.W.2d 30, 34 (Iowa 1952) (“It is of course a doctrine which may be invoked only to prevent affirmative equitable relief.” (citing *Spitler v. Perry Town Lot & Improvement Co.*, 179 N.W. 69, 70 (Iowa 1920) (ruling without citation that unclean hands does not bar defenses, only affirmative equitable relief)); (equitable relief case); *cf.* *Davenport Osteopathic Hosp. Ass’n v. Hosp. Serv., Inc.*, 154 N.W.2d 153, 162 (Iowa 1967) (equitable defense of laches is not a defense to a legal action for breach of contract unless estoppel also exists)).

33 *Russell v. Casebolt*, 384 S.W.2d 548, 553 (Mo. 1964); *see also* *Marvin E. Neiberg Real Estate Co. v. Taylor–Morley–Simon, Inc.*, 867 S.W.2d 618, 626 (Mo. Ct. App. 1993) (holding that the application of unclean hands is erroneous in an action at law for damages).

34 *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 244 A.2d 10, 14 (Pa. 1968); *see also* *Nedwidek v. Nedwidek*, 92 A.2d 536, 537 (Pa. 1952) (discussing Pennsylvania’s integration of law and equity in 1952).

35 *See* *Bieter Co. v. Blomquist*, 848 F. Supp. 1446, 1450–51 (D. Minn. 1994) (noting that “Minnesota courts have not directly addressed [the] issue” but concluding that the Minnesota Supreme Court would not recognize unclean hands in an action for damages (citing *Thorem v. Thorem*, 246 N.W. 674, 675 (Minn. 1933); *Hagberg v. Colonial & Pac. Frigidways, Inc.*, 157 N.W.2d 33, 35 (Minn. 1968); *LaValle v. Kulkay*, 277 N.W.2d 400, 403 n.3 (Minn. 1979)); *accord* *Foy v. Klapmeier*, 992 F.2d 774, 779 (8th Cir. 1993) (reaching the same conclusion under Minnesota law)).

36 *Landers v. Biwer*, 2006 ND 109, ¶ 9, 714 N.W.2d 476, 480 (“A litigant seeking the remedy of specific performance is held to a higher standard than one merely seeking money damages, and to receive equity he must ‘do equity’ and must not come into court with ‘unclean hands.’” (quoting *Sand v. Red River Nat’l Bank & Trust Co.*, 224 N.W.2d 375, 377–78 (N.D. 1974))).

37 *Merchs. Indem. Corp. v. Eggleston*, 179 A.2d 505, 514 (N.J. 1962) (citing federal pre-merger precedent from the United States Supreme Court); *see also* *Sprenger v. Trout*, 866 A.2d 1035, 1045 (N.J. Super. Ct. App. Div. 2005) (relying on Illinois precedent to bar unclean hands

The state supreme courts of Maine,³⁸ Mississippi,³⁹ and West Virginia,⁴⁰ to name a few, have refused to permit the defense of laches in legal cases.⁴¹ Laches shared the same pre-merger procedural posture as unclean hands,⁴² suggesting they would deny the latter defense for the same reasons.⁴³

The status of unclean hands is arguably an open question in Alabama. In *San Ann Tobacco Co., Inc. v. Hamm*, the Alabama Supreme Court declared that unclean hands “may not constitute a defense at law,”⁴⁴ but that decision pre-dated the state’s merger of law and equity in 1973.⁴⁵ In addition, the highest courts in Oregon⁴⁶ and Maryland⁴⁷ agreed to

in consumer fraud action for damages due to an absence of authority in New Jersey).

38 *Strickland v. Cousens Realty, Inc.*, 484 A.2d 1006, 1008 (Me. 1984) (banning the equitable defense of laches in legal actions under code pleading).

39 In *Aetna Ins. Co. v. Robertson*, 94 So. 7 (Miss. 1922), the court stated:

The rule that the enforcement of a right may be barred by laches is an application of the maxims, *Vigilantibus, non dormientibus, subveniunt leges*. . . . He who comes into equity must come with clean hands. . . . The defense of laches is peculiar to courts of equity and is not pleadable in actions at law.

Id. at 28 (citation omitted) (internal quotation marks omitted).

40 *Laurie v. Thomas*, 294 S.E.2d 78, 80–81 (W. Va. 1982).

41 The denial of laches in actions at law is the rule in many states. *See, e.g.*, *Kodiak Elec. Ass’n, Inc. v. DeLaval Turbine, Inc.*, 694 P.2d 150, 157 (Alaska 1984) (rejecting laches in legal action based on prevailing view and citing cases from Arkansas, California, Georgia, Minnesota, Missouri, and New Hampshire). *But see* *Moore v. Phillips*, 627 P.2d 831, 835 (Kan. Ct. App. 1981) (citing *McDaniel v. Messerschmidt*, 382 P.2d 304, 307 (Kan. 1963) (allowing equitable defense of laches in law actions)); *Dep’t of Banking and Fin. v. Wilken*, 352 N.W.2d 145, 149 (Neb. 1984) (declaring laches available to defeat actions at law); *Sutton v. Davis*, 916 S.W.2d 937, 941 (Tenn. Ct. App. 1995) (stating that “laches may also bar purely legal claims” (citing *Jansen v. Clayton*, 816 S.W.2d 49 (Ten. Ct. App. 1991))).

42 *See* John L. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 CATH. U. L. REV. 59, 66 (1961); E.W. Hinton, *Equitable Defenses Under Modern Codes*, 18 MICH. L. REV. 717, 719 (1920).

43 *Anenson*, *supra* note 3, at 463, 466 n.60; *see also* *USH Ventures v. Global Telesystems Grp., Inc.*, 796 A.2d 7, 20 & n.18 (Del. Super. Ct. 2000) (“It appears that in most Courts, laches cannot be asserted in an action at law.”).

44 *San Ann Tobacco Co., v. Hamm*, 217 So. 2d 803, 810 (Ala. 1968) (quoting *Harton v. Little*, 65 So. 951, 953 (Ala. 1914)). The quoted language, moreover, came from another equity case that did not address the issue of the application of unclean hands in legal actions. Rather, the case concerned what conduct would constitute unclean hands. The phrase was meant to explain that the 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. *Harton*, 65 So. at 952–53.

45 *See* *Wootten v. Ivey*, 877 So. 2d 585, 588 (Ala. 2003) (discussing merger of law and equity in 1973).

46 *Thompson v. Coughlin*, 997 P.2d 191 (Or. 2000).

47 *Adams v. Manown*, 615 A.2d 611, 616 (Md. 1992). Two dissenting justices would have denied the applicability of unclean hands to legal actions. *Id.* at 623 (Chasanow, J., concurring

address the adoptability issue, but ultimately avoided it on appeal.⁴⁸

The controversy concerning the common law recognition of unclean hands continues in the lower state courts.⁴⁹ Courts within New York⁵⁰ and Oregon⁵¹ have reached different conclusions on the subject. Decisions

and dissenting) (citing pre-merger precedent from the court as well as the United States Supreme Court). Notably, Maryland did not complete the merger of law and equity procedure until 1984. *See id.*

48 *Thompson*, 997 P.2d at 196 n.9; *Adams*, 615 A.2d at 617.

49 *See* *Gen. Dev. Corp. v. Binstein*, 743 F. Supp. 1115, 1133–34, 1134 n.4 (D.N.J. 1990) (applying Florida, Connecticut, and Massachusetts law to find that unclean hands was unavailable as a defense to claim for tortious interference seeking damages, but was applicable to request for injunctive relief) (“Unclean hands is an equitable defense. This defense therefore is only applicable with respect to the plaintiff’s claim for equitable relief . . .”); *Sprenger v. Trout*, 866 A.2d 1035, 1045 (N.J. Super. Ct. App. Div. 2005) (relying on Illinois precedent to bar unclean hands in consumer fraud action for damages).

50 *Compare* *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 75 (2d Cir. 1980) (applying New York law to conclude that unclean hands was available to bar legal relief), *and* *Smith v. Long*, 723 N.Y.S.2d 584, 586–87 (App. Div. 2001), *with* *Morrisania II Assocs. v. Harvey*, 527 N.Y.S.2d 954, 961 (Civ. Ct. 1988) (unclean hands inapplicable to legal claims) (citing *Hasbro Bradley, Inc. v. Coopers & Lybrand*, 515 N.Y.S.2d 461, 463 (App. Div. 1987)).

51 *Compare* *Kirkland v. Mannis*, 639 P.2d 671, 672 (Or. Ct. App. 1982) (rejecting application of unclean hands to legal action), *with* *Beldt v. Leise*, 60 P.3d 1119, 1121 (Or. Ct. App. 2003) (unclean hands unavailable in actions at law), *Thompson v. Coughlin*, 927 P.2d 146, 149 (Or. Ct. App. 1996), *rev’d on other grounds*, 997 P.2d 191, 196 n.9 (Or. 2000), *and* *Gratrek v. N. Pac. Lumber Co.*, 609 P.2d 375, 377–78 (Or. Ct. App. 1980). *See also* *McKinley v. Weidner*, 698 P.2d 983, 985–86 (Or. Ct. App. 1985) (acknowledging inconsistent decisions from the same court).

from Texas,⁵² Illinois,⁵³ Ohio,⁵⁴ Arizona,⁵⁵ Colorado,⁵⁶ and Massachusetts⁵⁷ have also refused to assimilate the defense of unclean hands. In the federal courts, the District Court for the Northern District of Illinois⁵⁸ along

⁵² See *McMahan v. Greenwood*, 108 S.W.3d 467, 494 (Tex. App. 2003); *Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd.*, 817 S.W.2d 160, 165–66 (Tex. App. 1991) (citing *Ligon v. E.F. Hutton & Co.*, 428 S.W.2d 434, 437 (Tex. Civ. App. 1968); *Furr v. Hall*, 553 S.W.2d 666, 672–73 (Tex. Civ. App. 1977)). Texas appellate courts have created an exception allowing unclean hands in law actions to the extent it works an estoppel. See, e.g., *Steubner Realty 19, Ltd.*, 817 S.W.3d at 165. These courts also acknowledge a separate defense at law of “unclean acts” that involve a knowing and willful violation of state criminal law. See *Shirvanian v. Defrates*, No. 14–02–00447–CV, 2004 Tex. App. LEXIS 182, at *41–44 (Tex. App. Jan. 8, 2004) (citing *Ward v. Emmett*, 37 S.W.3d 500, 503 (Tex. App. 2001)), *withdrawn and substituted on other grounds by*, 161 S.W.3d 102 (Tex. App. 2004).

⁵³ See *Chow v. Aegis Mortg. Corp.*, 286 F. Supp. 2d 956, 964 (N.D. Ill. 2003) (“Under Illinois law, unclean hands is an equitable remedy not applicable to claims for monetary relief.” (citing *RIV VIL, Inc. v. Tucker*, 979 F. Supp. 645, 659 (N.D. Ill. 1997))); *Zahl v. Krupa*, 850 N.E.2d 304, 309–10 (Ill. App. Ct. 2006); cf. *Villiger v. City of Henry*, 362 N.E.2d 120, 121 (Ill. App. Ct. 1977) (equitable defense of laches applies to both law and equity). Federal district courts in Illinois have allowed unclean hands in actions at law pursuant to federal law when legal and equitable claims are joined. See *Urecal Corp. v. Masters*, 413 F. Supp. 873, 876 (N.D. Ill. 1976) (diversity); *Energizer Holdings, Inc. v. Duracell, Inc.*, No. 01 C 9720, 2002 WL 1067688, at *3 (N.D. Ill. May 28, 2002) (Lanham Act).

⁵⁴ See, e.g., *Conklin v. Conklin*, No. 14–77–7, 1978 Ohio App. LEXIS 9357, at *24 (Ohio Ct. App. Feb. 9, 1978) (rejecting unclean hands in an action at law because it is “a strictly equitable doctrine”); *O’Brien v. Ohio State Univ.*, 139 Ohio Misc. 2d 36, 2006–Ohio–4346, 859 N.E.2d 607, at ¶ 57 n.3 (unclean hands doctrine does not defeat legal claim for damages); see also *May v. May*, 63 Ohio Misc. 2d 207, 209 (Ct. Com. Pl. 1993) (discussing Ohio history leading up the 1853 Code of Civil Procedure merging law and equity but noting that substantive distinctions still survive); cf. *Smith v. Smith*, 156 N.E.2d 113, 119–20 (Ohio 1959) (equitable defense of laches does not apply to bar legal claim under merged procedures).

⁵⁵ See *Tripati v. State*, 16 P.3d 783, 786 (Ariz. Ct. App. 2000); *Ayer v. Gen. Dynamics Corp.*, 625 P.2d 913, 915 (Ariz. Ct. App. 1980).

⁵⁶ See *Wilson v. Prentiss*, 140 P.3d 288, 293 (Colo. App. 2006) (“The doctrine of unclean hands enables a defendant to raise an equitable defense to defeat equitable remedies, but not remedies at law.”).

⁵⁷ *Howe v. Fiduciary Trust Co.*, No. 97–2206, 2001 Mass. Super. LEXIS 135, at *30–31 (Super. Ct. Apr. 19, 2001).

⁵⁸ *Lopez v. Autoserve, L.L.C.*, No. 05 C 3554, 2005 WL 3116053, at *1 (N.D. Ill. Nov. 17, 2005) (applying Illinois and federal law of unclean hands) (striking affirmative defense of unclean hands to bar violations of state and federal statutory employment law because the complaint sought only legal damages); see also *Miller v. Beneficial Mgmt. Corp.*, 855 F. Supp. 691, 716 n.28 (D.N.J. 1994) (equating an employer’s use of after-acquired evidence of an employee’s misconduct under federal discrimination laws with the defense of unclean hands that the court presumed was restricted to equitable remedies) (internal citations omitted). Another district court within the same circuit as *Lopez* accepted the defense. See *Decatur Ventures, L.L.C. v. Stapleton Ventures, Inc.*, No. 1:04–CV–0562–JDT–WTL, 2006 WL 1367436, at *4 (S.D. Ind. May 17, 2006) (citing Federal Rules of Civil Procedure 2 & 8), *order amended*, No. 1:04–cv–00562–JDT–WTL, 2006 WL 3305122 (S.D. Ind. Aug 16, 2006); *Columbus Reg’l Hosp. v. Patriot Med. Techs. Inc.*, No. IP 01–1404–C K/H, 2004 WL 392938, at *7 (S.D. Ind. Feb 11, 2004) (citing Federal Rules 2 & 8) (denying summary judgment on affirmative defense of unclean hands as a matter of federal law in a diversity case). The Seventh Circuit

with the Third Circuit Court of Appeals⁵⁹ rejected the defense at law.

Consequently, notwithstanding post–merger criticism calling for the consideration of all equitable defenses to legal claims,⁶⁰ unclean hands has been traditionally dependent on equity jurisdiction.⁶¹ But the customary reticence to recognizing unclean hands at law is changing. Courts recently have begun to absorb the defense. The next Part details its development into the law.

II. THE PRESENT LEGAL DEVELOPMENT OF UNCLEAN HANDS

The following analysis traces the doctrinal development of unclean hands into the state and federal law.

A. *State Court Adoption of Unclean Hands*

Courts from seven states have declared the doctrine of unclean hands available in an action at law.⁶² Its absorption has occurred in dozens of cases

Court of Appeals held unclean hands available in a legal action. *Maltz v. Sax*, 134 F.2d 2, 7 (7th Cir. 1943) (applying unclean hands to bar an action for damages under the Sherman Anti–Trust Act).

59 *Tarasi v. Pittsburgh Nat'l Bank*, 555 F.2d 1152, 1156 n.9 (3d Cir. 1977).

60 Zechariah Chafee logically concluded: “[T]he factors which divide judicial action from moral judgments seem to me the same whether the particular suit resembles what used to go on in chancery or what used to go on in the courts of common law.” CHAFEE, *supra* note 5, at 102; *see also* Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201, 1205–26 (1990) (summarizing criticisms of treating legal and equitable defenses differently).

61 “Equity jurisdiction” does not generally refer to power over the subject matter, persons, or property, but refers rather to equity jurisprudence. *E.g.*, DE FUNIAK, *supra* note 18, at 37–39 (discussing differing definitions of “equity jurisdiction” as either a court having no power to act or a court having power to act but that it should not act); Henry H. Ingersoll, *Confusion of Law and Equity*, 21 YALE L.J. 58, 60–61 (1911) (explaining that jurisdiction of any case in equity does not depend upon an absence of a remedy at law). Such jurisprudence is conditioned on an equitable remedy.

62 *See* discussion *infra* Part II.A.1–7. Federal courts sitting in diversity jurisdiction are divided on whether to use state or federal law to apply and/or define unclean hands in cases seeking legal relief. Some federal courts with diversity jurisdiction applied a federal law of unclean hands. *See* *Columbus Reg'l Hosp. v. Patriot Med. Techs. Inc.*, No. IP 01–1404–C K/H, 2004 WL 392938, at *7 (S.D. Ind. Feb 11, 2004); *Big Lots Stores, Inc. v. Jaredco, Inc.*, 182 F. Supp. 2d 644, 652–53 (S.D. Ohio 2002); *Smith v. Cessna Aircraft Co.*, 124 F.R.D. 103, 105–07 (D. Md. 1989); *Urecal Corp. v. Masters*, 413 F. Supp. 873, 874–76 (N.D. Ill. 1976); *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*, 544 F. Supp. 242, 244–45 (D.S.C. 1981). Other federal courts with diversity jurisdiction applied a state law of unclean hands. *See* *Chow v. Aegis Mortg. Corp.*, 286 F. Supp. 2d 956, 964 (N.D. Ill. 2003) (applying Illinois law of unclean hands); *Gen–Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 952 (S.D. Cal. 1996) (applying California law of unclean hands in diversity case); *Bieter Co. v. Blomquist*, 848 F. Supp. 1446, 1450–51 (D. Minn. 1994) (considering whether unclean hands is a valid defense to state law damage claims under Minnesota law); *Gen. Dev. Corp. v. Binstein*, 743 F. Supp. 1115, 1133–34, 1134 n.4 (D.N.J. 1990) (applying Florida, Connecticut and Massachusetts law

from California, Oregon, Maryland, Michigan, New York, Connecticut, and Rhode Island.⁶³ With the exception of Michigan, all the incorporation decisions have been rendered by lower courts.⁶⁴ The Supreme Court of Michigan recently affirmed the dismissal of a case seeking damages where the litigant's unclean hands amounted to litigation misconduct.⁶⁵

1. *California*.—California received unclean hands as part of the state common law almost fifty years ago.⁶⁶ As the earliest state to adopt the defense at law, it has the most cases on the subject.⁶⁷ Unlike Oregon and New York, discussed below, California courts are unanimous.⁶⁸ California courts of appeal have considered unclean hands in both tort and contract actions.⁶⁹ Decisions have made the defense available to preclude conversion, malicious prosecution, and legal malpractice, as well as to bar the foreclosure of a mechanic's lien.⁷⁰ While earlier opinions carefully considered whether

of unclean hands). Because many courts have not acknowledged the source of law issue for unclean hands, it is often difficult to discern. In this section on state court adoption, I have included only federal courts that have clearly used a state law of unclean hands.

63 See discussion *infra* Part II.A.1–7. While Kansas has no cases addressing the availability of unclean hands in actions at law, a court of appeals relied on the doctrine as a ground to apply the after-acquired evidence defense to bar damages in a contract claim for wrongful discharge. *Gassman v. Evangelical Lutheran Good Samaritan Soc'y, Inc.*, 921 P.2d 224, 230 (Kan. Ct. App. 1996), *as modified by* *Gassman v. Evangelical Lutheran Good Samaritan Soc'y, Inc.*, 933 P.2d 743, 744 (Kan. 1997) (affirming adoption of after-acquired evidence doctrine without discussion of unclean hands); *see also* *Moore v. Phillips*, 627 P.2d 831, 835 (Kan. Ct. App. 1981) (citing *McDaniel v. Messerschmidt*, 382 P.2d 304 (Kan. 1963) (allowing equitable defense of laches in law actions)).

64 See *Maldonado v. Ford Motor Co.*, 719 N.W.2d 809, 818 (Mich. 2006); *see also* discussion *infra* Part II.A.5.

65 *Maldonado*, 719 N.W.2d at 818.

66 See *Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists, Local 1304*, 39 Cal. Rptr. 64, 96–97 (Dist. Ct. App. 1964).

67 See *infra* Part II.A.2–7 (discussing incorporation of unclean hands into the law in states other than California).

68 See, e.g., *Bio–Psychiatric–Toxicology Lab., Inc. v. Radcliff & West*, 62 Cal. Rptr. 2d 853, 861 (Ct. App. 1997) (“In modern times the doctrine has been held applicable to suits for legal as well as equitable relief.” (citing *Fibreboard*, 39 Cal. Rptr. at 96–97)); *Vacco Indus., Inc. v. Van Den Berg*, 6 Cal. Rptr. 2d 602, 612 (Ct. App. 1992) (“This is a principle which has application in a legal action as well as one in equity . . .” (citation omitted)); *see also* *Al–Ibrahim v. Edde*, 897 F. Supp. 620, 626 (D.D.C. 1995) (applying California and Nevada law).

69 *Camp v. Jeffer, Mangels, Butler & Marmaro*, 41 Cal. Rptr. 2d 329, 340 (Ct. App. 1995) (“In California, the doctrine of unclean hands may apply to legal as well as equitable claims and to both tort and contract remedies.” (internal citation omitted)).

70 See *Unilogic, Inc. v. Burroughs Corp.*, 12 Cal. Rptr. 2d 741, 745–47 (Ct. App. 1992) (conversion); *Pond v. Ins. Co. of N. Am.*, 198 Cal. Rptr. 517, 521–23 (Ct. App. 1984) (malicious prosecution); *Blain v. Doctor's Co.*, 272 Cal. Rptr. 250, 256–58 (Ct. App. 1990) (legal malpractice); *Burton v. Sosinsky*, 250 Cal. Rptr. 33, 41 (Ct. App. 1988) (“California has taken the position that this defense is available in a legal action.” (citation omitted)); *see also id.* (“Although no case directly on point has been located, we see no reason why a successful defense of unclean

to apply the defense on a claim-by-claim basis, later opinions broadly echo its applicability in all cases.⁷¹

The process of integration began with *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304*.⁷² In a case of “first impression,” the appellate court questioned whether the equitable defense of unclean hands applies as a defense to a legal action.⁷³ It answered the question in the affirmative.⁷⁴ The court of appeals relied on language from prior Supreme Court of California cases interpreting the merger of law and equity.⁷⁵ While unclean hands was not at issue, these decisions declared that “under the system of Code pleading equitable defenses . . . may be set up in actions at law.”⁷⁶ The court of appeals in *Fibreboard*, however, affirmed the denial of the defense because it found a lack of evidence to satisfy the doctrine’s definitional elements.⁷⁷

hands should not bar the foreclosure of the mechanics’ lien.”).

⁷¹ *Compare* Gen–Probe, Inc. v. Amoco Corp., 926 F. Supp. 948, 952 (S.D. Cal. 1996) (applying California law) (declaring the defense available to bar legal conversion claims in reliance on *Unilogic*, 12 Cal. Rptr. 2d, at 745–748), *with* Alan Klarik Enters., Inc. v. Viva Optique, Inc., No. B179607, 2006 WL 2423552, at *5 (Cal. Ct. App. Aug. 23, 2006) (“[U]nclean hands applies not only to actions seeking equitable relief, but applies as well today as a defense to legal actions.”), *Travel Am., Inc. v. Camp Coast To Coast, Inc.*, Nos. G028513, G028738, 2003 WL 558563, at *4 (Cal. Ct. App. Feb. 27, 2003) (unclean hands operates as a bar to the entire lawsuit asserting legal and equitable claims), *and* Kendall–Jackson Winery, Ltd. v. Superior Court, 90 Cal. Rptr. 2d 743, 749 (Ct. App. 1999) (“The defense is available in legal as well as equitable actions.” (citations omitted)).

⁷² *Fibreboard*, 39 Cal. Rptr. 64.

⁷³ *Id.* at 96. The court cited two prior California appellate court cases. *Id.* at 96–97. A.I. Gage Plumbing Supply Co. v. Local 300 of the International Hod Carriers, 20 Cal. Rptr. 860, 865–66 (Dist. Ct. App. 1962) indicated that unclean hands was available to deny the right to seek damages, but did not find that the conduct constituted unclean hands and did not disclose whether any contention was made before the reviewing court that the defense was inapplicable. *Morrison v. Willhoit*, 145 P.2d 707, 710 (Cal. Dist. Ct. App. 1944) dealt generally with the use of equitable principles in a legal demand and did not address the issue of unclean hands.

⁷⁴ *Fibreboard*, 39 Cal. Rptr. at 97.

⁷⁵ *Id.* (citing *Carpentier v. City of Oakland*, 30 Cal. 439, 442 (1866) (fraud) and *Terry Trading Corp. v. Barsky*, 292 P. 474, 478 (Cal. 1930) (accounting)).

⁷⁶ *Terry Trading Corp.*, 292 P. at 478; *see also* *Carpentier*, 30 Cal., at 442 (“Under our system of practice a defendant is allowed to set up as many defenses as he may have, regardless of the question as to whether they are of a legal or equitable nature, because the distinction which exists under the common law system between actions at law and suits in equity and the forms thereof have been abolished.”).

A later case from the Supreme Court of California considering the right to trial by jury found that “cases legal and equitable have not been consolidated . . . [and] the distinction between law and equity is as naked and broad as ever.” *Philpott v. Superior Court*, 36 P.2d 635, 636–37 (Cal. 1934); *see also* *City of L.A. v. City of Alhambra*, 612 P.2d 24, 31 (Cal. 1980) (finding laches only available in equity).

⁷⁷ *Fibreboard*, 39 Cal. Rptr. at 98 (affirming denial and amendment to the answer pleading unclean hands because it found no connection between the plaintiff’s claim in tort and the

*Goldstein v. Lees*⁷⁸ followed *Fibreboard*'s ruling that unclean hands is available in a claim for damages.⁷⁹ It reversed the trial court ruling and applied the doctrine to deny an attorney recovery for services rendered in violation of professional ethics rules.⁸⁰ *Pond v. Insurance Co. of North America*⁸¹ also followed *Fibreboard* in applying unclean hands to bar a claim for malicious prosecution.⁸² The malicious prosecution cause of action in *Pond* was predicated on an unsuccessful indemnity suit filed by an insurer against an insurance agent arising out of a wrongful death action.⁸³ 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.⁸⁴ Because the agent's nondisclosures would have changed the outcome of the indemnity suit upon which he predicated his malicious prosecution claim, the court of appeals agreed with the trial court and barred his action for damages.⁸⁵

*Unilogic, Inc. v. Burroughs Corp.*⁸⁶ further extended the application of unclean hands to a conversion claim.⁸⁷ The case involved a business dispute in which both sides claimed various tort and contract violations arising out

defendant's alleged breach of contract and fraudulent misrepresentation). "It would amount to a straining of the doctrine to hold that defendants could escape liability for tort because *Fibreboard* breached its contract or because it was guilty of fraudulent misrepresentations." *Id.* at 97.

78 *Goldstein v. Lees*, 120 Cal. Rptr. 253 (Ct. App. 1975).

79 *Id.* at 255.

80 *Id.* at 255 n.2 (relying on unclean hands as alternative holding).

81 *Pond v. Ins. Co. of N. Am.*, 198 Cal. Rptr. 517 (Ct. App. 1984).

82 *Id.* at 522-23.

83 *Id.* at 521-23. The procedural history of the case is as follows: insurer defended insured in wrongful death action under reservation of rights. *Id.* at 519. Insured filed declaratory judgment action against insurer. *Id.* Insurer filed cross-complaint against the agent who issued the policy alleging his actions weakened its position and caused it to settle the original personal injury lawsuit. *Id.*

84 *Id.* at 519-20, 521-23. The court explained:

The coverage issue in the defense of the wrongful death case was whether the lower pilot minimums were the ones agreed upon, an issue left ambiguous by *Pond*'s conduct. It was upon this basis that the first suit was settled and INA's detriment incurred, largely as a result of *Pond*'s nondisclosures and misrepresentations.

Id. at 522.

85 *Id.* at 522-23 (characterizing the agent's conduct in bringing the malicious prosecution action as "classic 'chutzpah'" and affirming the dismissal for unclean hands (citation omitted)). The court of appeals alternatively held that summary judgment was appropriate because the insurer relied on the good faith advice of counsel negating the element of an absence of probable cause. *Id.* at 520-21.

86 *Unilogic, Inc. v. Burroughs Corp.*, 12 Cal. Rptr. 2d 741 (Ct. App. 1992).

87 *Id.* at 745.

of a failed joint project to develop new technology.⁸⁸ Unilogic alleged that Burroughs tortiously converted its new technology.⁸⁹ Burroughs claimed unclean hands based on Unilogic's failure to return certain proprietary software upon termination of the joint development project and its use of the software in attempting to sell products to Burroughs' competitors.⁹⁰

In considering the availability of unclean hands to bar the legal claim of conversion, the court found there was "scant authority on the subject."⁹¹ It noted that *Pond* and *Goldstein* cited *Fibreboard* with approval for the general proposition that "the unclean hands doctrine is not confined to equitable actions, but is also available in legal actions."⁹² It then affirmed the trial court's decision to apply the defense because "Unilogic has not provided us with any reason, based on policy or otherwise, for holding that the unclean hands defense is never available in a legal action for conversion."⁹³

Another line of California authority supporting the adoption of unclean hands began in *Blain v. Doctor's Co.*⁹⁴ Without discussing *Fibreboard* or its progeny, the court of appeals in *Blain* applied the defense to bar a legal malpractice action arising out of a medical malpractice lawsuit.⁹⁵ The client brought the claim against his attorney after relying on his counsel's advice to lie at his deposition.⁹⁶ In determining whether the perjury should constitute unclean hands, the court disregarded the application issue and focused on

88 *Id.* at 742–43.

89 *Id.* at 743–44.

90 *Id.*

91 *Id.* at 745.

92 *Id.* at 745 (quoting *Goldstein v. Lees*, 120 Cal. Rptr. 253, 255 n.2 (Ct. App. 1975)) (citing *Pond v. Ins. Co. of N. Am.*, 198 Cal. Rptr. 517, 522 (Ct. App. 1984)). *Unilogic* also reviewed the recognition of the defense in *Blain v. Doctor's Co.*, 272 Cal. Rptr. 250 (Ct. App. 1990), discussed *infra* notes 93–100 and accompanying text, to bar a legal malpractice action. *Unilogic*, 12 Cal. Rptr. 2d at 744.

93 *Unilogic*, 12 Cal. Rptr. 2d at 745. Citing both *Fibreboard* and *Unilogic*, the district court in *Gen-Probe, Inc. v. Amoco Corp.*, applied California law and declared the defense available to bar legal claims in general, and conversion claims in particular. *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 952 (S.D. Cal. 1996) (finding no connection between the conduct constituting unclean hands and the lawsuit). In *Gen-Probe*, two cases were pending before the court involving a business dispute over the ownership of a patent. *Id.* at 951. *Gen-Probe* was seeking to expedite and consolidate discovery with the related case set for trial where it was the defendant in order to better prepare its unclean hands defense. *Id.* at 951–952. The basis of its defense was the party opponent's filing of the related lawsuit with competitor funding. *Id.* at 951. While the court questioned whether the filing of a lawsuit could ever constitute unclean hands in the same case, it ultimately rejected the use of unclean hands because it found the funding issue unrelated to the specific issues in the complaint. *Id.* at 952.

94 *Blain v. Doctor's Co.*, 272 Cal. Rptr. 250 (Ct. App. 1990).

95 *Id.* at 258–259 (affirming dismissal on the basis that unclean hands precluded physician's damages for emotional distress and loss of ability to practice medicine).

96 *Id.* at 252.

the policies of the doctrine.⁹⁷ Quoting Chafee, the court explained that the unclean hands standard “gets most of its qualities in a given group of cases from the substantive law of the particular subject.”⁹⁸ It then discussed two out-of-state legal malpractice cases from Oregon and Pennsylvania arising from criminal convictions before affirming the trial court’s dismissal on grounds of unclean hands.⁹⁹

The Pennsylvania case of *Feld and Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot*,¹⁰⁰ reviewed by the *Blain* court, applied a general legal principle of *in pari delicto*.¹⁰¹ The Oregon case of *Kirkland v. Mannis*,¹⁰² analyzed in *Blain*, used unclean hands without discussion of its application in an action for damages.¹⁰³

97 *Id.* at 254–55; *see also* *London v. Marco*, 229 P.2d 401, 402 (Cal. Dist. Ct. App. 1951) (injunction) (misleading statements made to the court constitutes unclean hands); *Lazaro v. Lazaro (In re Marriage of Lazaro)*, No. A107473, 2005 WL 1332102, at *3 (Cal. Ct. App. June 6, 2005) (finding that presenting false testimony in a court proceeding in equity goes to the core of the unclean hands doctrine). California courts have used the paradigm provided in *Blain* to resolve subsequent cases involving unclean hands. *See* *Kendall–Jackson Winery, Ltd. v. Superior Court*, 90 Cal. Rptr. 2d 743, 749 (Ct. App. 1999) (“Whether the particular misconduct is a bar to the alleged claim for relief depends on (1) analogous case law, (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries.” (citing *Blain*, 272 Cal. Rptr. at 256.)).

98 *Blain*, 272 Cal. Rptr. at 256 (quoting Chafee II, *supra* note 9, at 1091–92).

99 *Id.* at 256–257 (citing *Kirkland v. Mannis*, 639 P.2d 671, 673 (Or. Ct. App. 1982); *Feld & Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot*, 458 A.2d 545, 551–52 (Pa. Super. Ct. 1983)). The *Blain* court found the cases persuasive, but differentiated them on the basis that recovery may have softened the effect of the penal sanction. *Id.* at 258.

100 *Feld & Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot*, 458 A.2d 545 (Pa. Super. Ct. 1983).

101 *Id.* at 551–552 (sustaining demurrers to the bulk of compensatory and punitive damages claims for malpractice and emotional distress); *see also id.* at 552–55 (denying the defense and allowing the action to proceed with respect to the claim for attorney fees on policy grounds). The Pennsylvania Superior Court justified its application of *in pari delicto*:

Were we to aid appellants—confessed perjurers—in their attempt to recover compensatory and punitive damages in excess of \$250,000, we should indeed “suffer the law to be prostituted.” For we should reward appellants, with a great deal of money, for their criminal conduct; we should soften the blow of the fines and sentences imposed upon them; and we should encourage others to believe that if they committed crimes on their lawyers’ advice, and were caught, they too might sue their lawyers and be similarly rewarded.

Id. at 551–52 (alteration in original) (citation omitted).

102 *Kirkland v. Mannis*, 639 P.2d 671 (Or. Ct. App. 1982). As discussed *infra* notes 105–11 and accompanying text, the same court later acknowledged that it had erroneously relied solely on equity cases in applying unclean hands to a legal action. *McKinley v. Weidner*, 698 P.2d 983, 985 (Or. Ct. App. 1985).

103 *Kirkland*, 639 P.2d at 671–73. In *Kirkland*, a prisoner claimed malpractice against his former criminal defense attorney because the attorney allegedly manufactured a story for his

2. *Oregon*.—Oregon appellate court decisions have not all aligned with *Kirkland v. Mannis*—some have reached the opposite conclusion.¹⁰⁴ In *McKinley v. Weidner*,¹⁰⁵ the same court had a chance to reconcile *Kirkland* with its prior ruling in *Gratrek v. North Pacific Lumber Co.*¹⁰⁶

In *Gratrek*, decided before the distinction between law and equity had been abolished in Oregon, the court rejected the defense of unclean hands in a legal action.¹⁰⁷ *Gratrek* distinguished the California Court of Appeal's reading of the California merger in *Fibreboard* because it found that Oregon law did not allow unclean hands.¹⁰⁸ By contrast, *Kirkland* was arguably

defense which formed the basis of his testimony. *Id.* at 671–72. Based on his acknowledged perjury, the court of appeals affirmed the trial court's dismissal on the basis of unclean hands. *Id.* at 673.

104 *Beldt v. Leise*, 60 P.3d 1119, 1121 (Or. Ct. App. 2003) (unclean hands unavailable in actions at law); *Thompson v. Coughlin*, 927 P.2d 146, 148–49 (Or. Ct. App. 1996), *rev'd on other grounds*, 997 P.2d 191, 196 n.9 (Or. 2000); *Gratrek v. N. Pac. Lumber Co.*, 609 P.2d 375, 378 (Or. Ct. App. 1980). Laches has also been denied in legal actions by the Supreme Court of Oregon. *Corvallis Sand & Gravel Co. v. State Land Bd.*, 439 P.2d 575, 578 (Or. 1968) (en banc) (declaring its decision as the “prevailing rule” and citing cases from New Jersey, Rhode Island, Arkansas, and Michigan). *See generally* Roger G. Rose, Note & Comment, *Equitable Defenses to Actions at Law*, 34 OR. L. REV. 55 (1954) (reviewing conflicting authority under Oregon law regarding the application of unclean hands to legal actions).

105 *McKinley*, 698 P.2d at 985.

106 *Gratrek*, 609 P.2d at 378.

107 *Id.* at 378 n.7; *see also* OR. REV. STAT. § 11.020 (2009), repealed 1979. In *Gratrek*, a party brought suit against his former employer claiming damages for tortious interference with his employment contract with a new employer. *Gratrek*, 609 P.2d at 376. The employer defended the case on the grounds that its conduct was justified under a valid restrictive covenant, *id.* at 376, and presumably sought a declaratory judgment to that effect. *See id.* at 376–77. The employee responded to the employer's request to declare the restrictive covenant valid by seeking to foreclose the defense on grounds of unclean hands. *Id.* at 377; *cf.* T. Leigh Anenson, *Litigation Between Competitors with Mirror Restrictive Covenants: A Formula for Prosecution*, 10 STAN. J.L. BUS. & FIN. 1, 4–8 (2005) (discussing *UZ Eng'rd Prods. Co. v. Midwest Motor Supply Co.*, 770 N.E.2d 1068 (Ohio Ct. App. 2001), *appeal not allowed*, 766 N.E.2d 1002 (Ohio 2002) (precluding challenge to validity of a non-compete agreement based on the defense of estoppel under a similar procedural posture)).

108 *Gratrek*, 609 P.2d at 378; *accord* *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 184 (Iowa 1987) (denying unclean hands at law despite the anomalous result that the same conduct may be a legal defense by another name) (citation omitted). While a statutory provision allowed equitable defenses to be pled to legal actions, the *Gratrek* court held that unclean hands was a “doctrine” and not a “defense” under the statute. *Gratrek*, 609 P.2d at 378; *see also* OR. REV. STAT. § 16.460(2) (2009), repealed 1979. The dissent disagreed. It found textual support in the merger statute that permitted the pleading of any “equitable matter,” of which unclean hands would be included. *Gratrek*, 609 P.2d at 379 (Thornton, J., dissenting). The dissent also noted the inconsistency of the majority's holding. *Id.* In *N. Pac. Lumber Co. v. Oliver*, 596 P.2d 931, 944 (Or. 1979), the Supreme Court of Oregon barred enforcement of the same non-compete agreement with the same employer on the basis of unclean hands under its equitable jurisdiction. *See also* Anenson, *supra* note 3, at 492–503 (criticizing the irrational reliance on fictional differences in legal and equitable remedies in the use of unclean hands and noting its absurd results in these analogous Oregon cases).

decided under the new *Oregon Rules of Civil Procedure*, which abolished all procedural distinctions between law and equity.¹⁰⁹ As such, the *McKinley* court could have conciled its two former decisions had it interpreted the new civil rules to allow unclean hands as a defense at law.¹¹⁰ The court of appeals, however, chose not to square its prior opinions in this manner. Instead, it held that *Kirkland's* reliance on unclean hands was misplaced and that *in pari delicto* should have been used to reach the same result.¹¹¹

The Oregon Supreme Court subsequently granted certiorari to decide the application of unclean hands in a different case, but decided the appeal on other grounds.¹¹²

3. *Maryland*.—Like Oregon, the highest court in Maryland also circumvented the issue of availability of unclean hands in legal actions.¹¹³ The intermediate appellate court in *Manown v. Adams*,¹¹⁴ however, found the defense applicable to an action at law despite its equitable roots.¹¹⁵

The plaintiff's legal action in *Manown* requested repayment for a series of loans.¹¹⁶ Adams filed the action to recover the funds, and Manown asserted unclean hands because Adams failed to list the transfer of assets in his bankruptcy proceeding and divorce action.¹¹⁷ Essentially, Manown claimed that Adams "defrauded both his wife and his creditors by hiding assets" in Manown's name and "perjured himself in the process."¹¹⁸ Adams did not contest Manown's allegations, but instead asserted that unclean hands was immaterial in an action at law.¹¹⁹

The the trial and appellate courts disagreed.¹²⁰ The appellate court

109 *McKinley*, 698 P.2d at 985; see also OR. R. CIV. P. 2: "There shall be one form of action known as a civil action. All procedural distinctions between actions at law and suits in equity are hereby abolished, except for those distinctions specifically provided for by these rules, by statute, or by the Constitution of this state."

110 *McKinley*, 698 P.2d at 985.

111 *Id.* at 985–86.

112 *Thompson v. Coughlin*, 997 P.2d 191, 196 n.9 (Or. 2000).

113 *Adams v. Manown*, 615 A.2d 611, 617 (Md. 1992).

114 *Manown v. Adams*, 598 A.2d 821 (Md. Ct. Spec. App. 1991), *rev'd on other grounds*, 615 A.2d 611, 612 (Md. 1992).

115 *Id.* at 825–27.

116 *Id.* at 823.

117 *Id.* One of the alleged loans included down payment on a house that Adams also did not claim any interest in his bankruptcy schedule. *Id.*

118 *Id.* at 825.

119 *Id.* at 824.

120 *Id.* at 825. While the appellate court accepted the trial court's ruling that unclean hands was applicable in the case, it ultimately reversed because it found the trial court erred in giving the issue of unclean hands to the jury. *Id.* at 826; cf. *Unilogic, Inc. v. Burroughs Corp.*, 12 Cal. Rptr. 2d 741, 746–47 (Ct. App. 1992) (trial court did not err in having jury consider unclean hands defense when legal claim and equitable defense involved interrelated facts).

emphasized that unclean hands served to protect the court and to suppress illegal and fraudulent transactions.¹²¹ The court then found such purposes to be furthered by the application of unclean hands in the case at bar.¹²² It also relied on two cases from the high court in Maryland that applied the legal defense of *in pari delicto* as authority for the rule that unclean hands may be invoked to bar suits “at law and in equity.”¹²³ The appellate court reasoned that “*in pari delicto* is merely a cognate principle to the unclean hands doctrine,” which justified the analogy.¹²⁴ The court additionally held that the “general trend” of merging procedures at law and equity supported its decision.¹²⁵

As discussed previously, the Maryland Court of Appeals¹²⁶ eschewed making a decision on the basis of the “clean hands” doctrine on further appeal and found instead that the bankruptcy trustee was the real party in interest.¹²⁷ The dissent criticized the unannounced shifting of doctrinal

121 *Manown*, 598 A.2d at 824–25.

122 *Id.* at 827. The court described court protection as “the idea being that judicial integrity is endangered when judicial powers are interposed to aid persons whose very presence before a court is the result of some fraud or inequity.” *Id.* at 824 (citing *Niner v. Hanson*, 142 A.2d 798, 803 (Md. 1958)); *see also* *WinMark Ltd. P’ship v. Miles & Stockbridge*, 693 A.2d 824, 830 (Md. 1997) (“The clean hands doctrine is not applied for the protection of the parties nor as a punishment to the wrongdoer; rather, the doctrine is intended to protect the courts from having to endorse or reward inequitable conduct.” (quoting *Adams v. Manown*, 615 A.2d 611, 616 (Md. 1992) (internal quotation marks omitted))). The appellate court also determined that deterring fraud is best accomplished by leaving the parties without remedy against each other. *Manown*, 598 A.2d at 825 (“The suppression of such illegal and fraudulent transactions is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and thus introducing a preventative check, than by enforcing them at the instance of one of the parties to the fraud.” (quoting *Roman v. Mali*, 42 Md. 513, 533–34 (1875) (alteration in original)); *Bland v. Larsen*, 627 A.2d 79, 85 (Md. Ct. Spec. App. 1993) (quoting *Manown*, 598 A.2d at 821)).

123 *Manown*, 598 A.2d at 825 (citing *Messick v. Smith*, 69 A.2d 478 (Md. 1949); *Shirks Motor Express Corp. v. Forster Transfer & Rigging Co.*, 133 A.2d 59 (Md. 1957)).

124 *Manown*, 598 A.2d at 826 n.6. *But see* *Adams*, 615 A.2d at 623 (Chasanow, J., concurring and dissenting) (finding the similarities between the defenses not sufficient to invoke unclean hands); *accord* *Truitt v. Miller*, 407 A.2d 1073, 1079–80 (D.C. 1979) (denying clean hands defense in action at law despite noting its similarity to *in pari delicto*); *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 184 (Iowa 1987) (citation omitted).

125 *Manown*, 598 A.2d at 825–26 (citing Md. R. Civ. P. 2–301). Relying in part on concerns over a jury trial, another Maryland appellate court had a contrary interpretation of the procedural unification and found that laches may not be raised as a defense to a legal claim. *Smith v. Gehring*, 496 A.2d 317, 322–23 (Md. Ct. Spec. App. 1985) (distinguishing between equitable affirmative relief and purely equitable defenses and holding that the procedural rules merging law and equity “do not extend to the elimination of distinctions between what defenses may be available to a legal claim as opposed to an equitable claim”).

126 Like New York, Maryland’s court of last resort is called the “Court of Appeals.”

127 *Adams*, 615 A.2d at 617–18; *accord* *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 244 A.2d 10, 14 (Pa. 1968) (refusing to apply unclean hands in part because it would penalize innocent creditors in bankruptcy). The Court of Appeals of Maryland, in *Winmark Ltd.*

focus.¹²⁸ These justices opined that the code merger was procedural only.¹²⁹ Referencing pre-merger precedent from Maryland and the United States Supreme Court, the dissent concluded that unclean hands applies only in equity.¹³⁰

4. *New York*.—Similar to the Maryland intermediate appellate decision of *Manowen v. Adams*, two courts applying New York law found unclean hands applicable to legal relief by reference to the defense of *in pari delicto*.¹³¹

In *Smith v. Long*,¹³² a New York appellate court allowed the defense of unclean hands to a legal claim when the plaintiffs attempted to perpetrate a fraud on the government.¹³³ The plaintiffs sought damages for the failure to transfer stock under a buy-back agreement arising out of the formation of a corporation gone awry.¹³⁴ The plaintiffs had transferred their stock to one of the defendants after the Small Business Administration (SBA) denied their application for a minority business enterprise, due in part to their ownership percentages.¹³⁵ The defendants asserted the claim should be barred under

Partnership & Miles v. Stockbridge, characterized the dilemma it had faced in *Adams*:

Indeed, there, liability of the defendant in the civil action to the discharged bankrupt had been determined by judgment. To the extent that the judgment was collectible, extinguishing it by applying the clean hands doctrine would have resulted in a windfall to the judgment debtor and would have deprived the bankrupt's creditors of an asset from which they should have benefited.

WinMark, 693 A.2d at 830. The court could have found unclean hands applied at law but found the perjury unrelated to the claim or not supported by policy reasons. *Id.* at 831.

128 *Adams*, 615 A.2d at 621 (Chasanow, J., concurring and dissenting).

129 *Id.* at 623.

130 *Id.*

131 *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 75 (2d Cir. 1980); see *Smith v. Long*, 723 N.Y.S.2d 584, 586–87 (App. Div. 2001).

132 *Smith*, 723 N.Y.S.2d at 587.

133 *Id.* at 587.

134 *Id.* The plaintiffs sought specific performance and damages, which raised the question of whether the court considered its power to invoke unclean hands a matter of resolving the requested legal relief under the equitable clean-up doctrine. *Id.* See generally A. Leo Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951); John E. Sanchez, *Jury Trials in Hybrid and Non-Hybrid Actions: The Equitable Clean-Up Doctrine in the Guise of Inseparability and Other Analytical Problems*, 38 DEPAUL L. REV. 627 (1989). See also Anenson, *supra* note 6, at 416–17 (discussing the practice of equity courts “cleaning up” any remaining legal issues is a remnant of the split system which enabled chancellors to provide complete relief and avoid a multiplicity of actions). Other cases that appear to allow unclean hands at law concerned both legal and equitable relief. See *Big Lots Stores, Inc. v. Jaredco, Inc.*, 182 F. Supp. 2d 644, 652 (S.D. Ohio 2002); *Urecal Corp. v. Masters*, 413 F. Supp. 873, 876 (N.D. Ill. 1976).

135 *Smith*, 723 N.Y.S.2d at 586. The plaintiffs had also previously had problems with SBA loans. *Id.*

the doctrine of unclean hands because the plaintiffs had perpetrated a fraud on the SBA.¹³⁶ In reversing summary judgment for the plaintiff, the intermediate court of appeals declared that unclean hands was available in “law or equity.”¹³⁷ Because the parties were allegedly accomplices in the same scheme, the court then defined the defense according to the parallel legal defense *in pari delicto*.¹³⁸ Subsequent decisions rendered under New York law have followed *Smith* and barred legal claims on the basis of unclean hands without discussion of the application issue.¹³⁹

Applying New York law before the decision in *Smith* and its progeny,¹⁴⁰ the Second Circuit Court of Appeals also considered unclean hands to bar claims for legal relief when the parties engaged in illegal activities.¹⁴¹ In *Mallis v. Bankers Trust Co.*,¹⁴² the plaintiffs brought an action under state and federal law to recover losses suffered from advancing money for the purchase of securities as a result of alleged misrepresentations by the defendant.¹⁴³ The defendant claimed that the plaintiffs also violated various state and federal laws in the securities transaction.¹⁴⁴ While ultimately reversing the lower court’s decision in favor of the defendant, the court of appeals considered the defense of unclean hands against the pendant state common law claims of fraud and negligent misrepresentation.¹⁴⁵ It used the term *in pari delicto* in considering whether the same conduct barred the federal securities law claim.¹⁴⁶ Perhaps because the court equated the

¹³⁶ *Id.*

¹³⁷ *Id.* (The appellate court held there was an issue of fact whether one of the plaintiffs executed the agreement to perpetrate a fraud on the SBA).

¹³⁸ *Id.* (“The unclean hands doctrine rests on the premise that one cannot prevail in an action to enforce an agreement where the basis of the action is immoral and one to which equity will not lend its aid.”) (internal citations omitted).

¹³⁹ *See* *Craig v. Bank of N.Y.*, 169 F. Supp. 2d 202, 210 (S.D.N.Y. 2001) (holding unclean hands bars breach of fiduciary duty and breach of contract claims under New York law); *Bistricher v. Bistricher*, 659 F. Supp. 215, 217 (E.D.N.Y. 1987) (indicating that unclean hands is available in legal action alleging breach of contract and fraud and noting that “[b]oth parties have treated the defense as applying to the claims under New York law”); *see also* *Welch v. DiBlasi*, 737 N.Y.S.2d 716, 717 (App. Div. 2001) (finding insufficient evidence of unclean hands without discussing its applicability due to the nature of the requested relief).

¹⁴⁰ As discussed *supra* note 62, federal courts sitting in diversity jurisdiction are in conflict concerning whether unclean hands is a matter of state or federal law.

¹⁴¹ *See* *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 75–76 (2d Cir. 1980).

¹⁴² *Mallis*, 615 F.2d 68.

¹⁴³ *Id.* at 71.

¹⁴⁴ *Id.* at 75. The defendant claimed that the plaintiff’s agreement to advance funds for the purchase of securities violated the state statute prohibiting usury. *Id.* The defendant additionally asserted that the plaintiff falsely characterized the purpose of the loan in violation of federal law. *Id.*

¹⁴⁵ *Id.* at 75–76.

¹⁴⁶ *Id.* The court ultimately found insufficient evidence of the defense and reversed the trial court because the plaintiffs’ alleged unclean conduct had no connection to the subject

two defenses,¹⁴⁷ it did not address the applicability of unclean hands to legal remedies and cited as support only cases applying the doctrine to bar equitable relief.¹⁴⁸

In contrast to *Smith* and *Mallis*, other New York courts have rejected unclean hands as a defense in actions at law.¹⁴⁹ Thus, akin to Oregon,¹⁵⁰ New York cases are divided on the legal incorporation of unclean hands after the merger.¹⁵¹

5. *Michigan*.—Rather than ruling the merger allows the universal use of unclean hands in legal and equitable remedies like some of the cases described above, Michigan courts have created an exception to the rule that unclean hands is inapplicable to legal claims in order to protect the judicial process.¹⁵² Put simply, regardless of the relief requested, Michigan allows unclean hands on the basis of litigation misconduct in the case before the court.¹⁵³ In contrast to the Maryland case of *Adams v. Manown*, the California case of *Blain v. Doctor's Co.* (both involving perjury in previous litigation),¹⁵⁴ and the New York case of *Smith v. Long* (concerning other conduct possibly

matter of the litigation, did not cause injury, and was not equal in guilt to the defendant. *Id.* at 75.

147 See *Furman v. Furman*, 34 N.Y.S.2d 699, 704 (Spec. Term 1941) (deciding res judicata bars subsequent legal action based upon adjudication of unclean hands in prior equity suit because unclean hands has element of equal guilt and corresponds to *in pari delicto* defense at law), *aff'd*, 30 N.Y.S.2d 516 (App. Div. 1941), *aff'd*, 40 N.E.2d 643 (N.Y. 1942). For cases differentiating unclean hands and *in pari delicto*, see *infra* note 312.

148 *Mallis*, 615 F.2d at 75.

149 See, e.g., *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 607 (2d Cir. 2005) (applying New York law) (“Unclean hands is an equitable defense to equitable claims. Because [defendant-counter claimant] seeks damages in an action at law, Aetna cannot avail itself of unclean hands as a defense.” (internal citations omitted)); *W. Alton Jones Found. v. Chevron U.S.A. Inc. (In re Gulf Oil/Cities Serv. Tender Offer Litig.)*, 725 F. Supp. 712, 742 (S.D.N.Y. 1989) (applying New York law); *Manshion Joho Ctr. Co. v. Manshion Joho Ctr., Inc.*, 806 N.Y.S.2d 480, 482 (App. Div. 2005) (“The doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages.” (citing *Hasbro Bradley, Inc. v. Coopers & Lybrand*, 515 N.Y.S.2d 461, 463 (App. Div. 1987))); *Pecorella v. Greater Buffalo Press, Inc.*, 486 N.Y.S.2d 562, 563 (App. Div. 1985); *Morrisania II Assocs. v. Harvey*, 527 N.Y.S.2d 954, 961 (Civ. Ct. 1988).

150 See discussion *supra* Part II.A.2.

151 Even after the Field Code’s abolishment of the distinction between actions at law and suits in equity, which precipitated the merger in other states and eventually the federal system, the courts of New York “returned to enforcing a distinction between law and equity in the pleadings.” Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 385 (2003). For discussion of the Field Code’s abolishment of the distinction between actions at law and suits in equity, see Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 328–38 (1988).

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

153 *Id.*

154 *Blain v. Doctor's Co.*, 272 Cal. Rptr. 250, 251 (Ct. App. 1990).

intended to defraud a government body),¹⁵⁵ Michigan's accommodation for unclean hands in damages actions is more closely connected to the court protection purpose of the defense.¹⁵⁶ In fact, Michigan courts have justified the departure from precedent precluding unclean hands in legal actions under their inherent authority.¹⁵⁷

In *Cummings v. Wayne County*,¹⁵⁸ a personal injury case in which monetary damages were sought, the trial court dismissed the action because the plaintiff attempted "to extort favorable evidence by death threats" and resorted to vandalism during the trial.¹⁵⁹ Finding that such flagrant misconduct of witness-tampering posed a danger to the judicial process, the trial court found it had inherent authority to dismiss under the doctrine of unclean hands.¹⁶⁰ The appellate court agreed.¹⁶¹

It distinguished a prior decision that denied unclean hands in actions at law for the reason that substantive distinctions survived the procedural merger.¹⁶² Citing *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*,¹⁶³ the appellate court declared: "we do not believe that the [substantive-procedural] distinction prevents a court of law from invoking the 'clean hands doctrine' when litigant misconduct constitutes an abuse of the judicial process itself and not just a matter of inequity between the parties."¹⁶⁴ The court emphasized that the doctrine of unclean hands "applies not only for the protection of the parties but also for the protection

¹⁵⁵ *Smith v. Long*, 723 N.Y.S.2d 584, 586–87 (App. Div. 2001).

¹⁵⁶ *See Anenson, Process-Based Theory of Unclean Hands*, *supra* note 4, at 542–57 (proposing four-phase procedural analysis for the legal incorporation of unclean hands by examining cases predicating the defense on 1) "misconduct in the present litigation that potentially interferes with the process," *id.* at 543; 2) "misconduct outside the present litigation that potentially interferes with the process," *id.* at 546; 3) "misconduct in prior litigation with no potential to interfere with the process," *id.* at 548; and, finally, 4) "nonlitigation misconduct with no potential to interfere with the process," *id.* at 553).

¹⁵⁷ *See, e.g., Maldonado*, 719 N.W.2d at 818; *Cummings v. Wayne Cnty.*, 533 N.W.2d 13, 14 (Mich. Ct. App. 1995).

¹⁵⁸ *Cummings*, 533 N.W.2d 13.

¹⁵⁹ *Id.* at 13–15.

¹⁶⁰ *Id.* at 14.

¹⁶¹ *Id.* (reviewing trial court dismissal under an abuse of discretion standard); *see also id.* (noting the civil rules permitting the court to dismiss an action for lack of progress and for discovery abuses).

¹⁶² *Id.* (citing *Clarke v. Brunswick Corp.*, 211 N.W.2d 101, 102–03 (Mich. Ct. App. 1973) (denying both estoppel and unclean hands); *cf. Grigg v. Robinson Furniture Co.*, 260 N.W.2d 898, 903 (Mich. Ct. App. 1977) ("At least since 1963, equitable and legal claims may be joined in a common complaint and equitable defenses can defeat legal claims.") (discussing the application of a different equitable defense).

¹⁶³ *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*, 544 F. Supp. 242 (D.S.C. 1981). *Buchanan Home* applied unclean hands as a matter of federal law and is discussed *infra* Part II.B.2.

¹⁶⁴ *Cummings*, 533 N.W.2d at 14.

of the court.”¹⁶⁵

The court then quoted from *Hazel–Atlas Glass Co. v. Hartford–Empire Co.*,¹⁶⁶ in which the United States Supreme Court invoked the historic power of equity to set aside a fraudulently begotten judgment:¹⁶⁷ “Tampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.”¹⁶⁸ The majority opinion in *Hazel–Atlas Glass* did not discuss “unclean hands” as such,¹⁶⁹ but the ruling emphasized the same fundamental purpose of the doctrine by refusing to aid a litigant who had perpetrated “a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.”¹⁷⁰ In *Cummings*, the Michigan Court of Appeals also cited to *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*,¹⁷¹ a post–*Hazel–Atlas Glass* decision of the United States Supreme Court that specifically applied the doctrine of unclean hands to a suit in equity involving perjury in the patent process.¹⁷²

The *Cummings* decision has been followed in other appellate cases in

165 *Id.* (citing *Buchanan Home*, 544 F. Supp. at 244).

166 *Hazel–Atlas Glass Co. v. Hartford–Empire Co.*, 322 U.S. 238, 246 (1944), *overruled on other grounds* by *Standard Oil Co. v. United States*, 429 U.S. 17, 18 (1976).

167 *Id.* at 245 (explaining the facts before noting that the fraud “demands the exercise of the historic power of equity to set aside fraudulently begotten judgments”).

168 *Cummings*, 533 N.W.2d at 14 (quoting *Hazel–Atlas Glass*, 322 U.S. at 246). For a discussion of the *Hazel–Atlas Glass* decision, 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, 703–05 (1998).

169 See Anenson, *Process–Based Theory of Unclean Hands*, *supra* note 4, at 570 n.266 (noting that the *Hazel–Atlas Glass* decision is the seminal case for the doctrine of “fraud on the court”). Ironically, because the circumstances suggested that *Hazel–Atlas Glass Co.* knew about the fraud and benefited from it, the three dissenting Justices raised the issue of unclean hands and preferred to have the district court resolve the dispute. *Hazel–Atlas Glass Co.*, 322 U.S. at 260–61, 270 (Roberts, J., dissenting); see also *id.* at 271 (Chief Justice Stone concurring with the dissent’s conclusion).

170 *Hazel–Atlas Glass*, 322 U.S. at 245 (emphasizing that the fraud concerned more than the litigants). *Hartford–Empire* had manufactured evidence to obtain approval of a patent and prove its subsequent infringement. *Id.* at 240–41.

171 *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806 (1945).

172 *Cummings v. Wayne Cnty.*, 533 N.W.2d 13, 14 (Mich. Ct. App. 1995) (citing *Precision Instrument Mfg.*, 324 U.S. at 814–15). The unclean hands case of *Precision Instrument Mfg.* relied on the fraud on the court case of *Hazel–Atlas Glass*. The Court in *Precision Instrument Mfg.* concluded that the application of unclean hands was justified because “[o]nly in that way can the Patent Office and the public escape from being classed among the ‘mute and helpless victims of deception and fraud.’” *Id.* at 818 (quoting *Hazel–Atlas Glass*, 322 U.S. at 246). The appellate court in *Cummings* also relied on the Supreme Court’s decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764–65 (1980), which recognized the inherent power of courts to sanction litigation misconduct. *Cummings*, 533 N.W.2d at 14.

Michigan.¹⁷³ In fact, *Cummings* was recently cited with approval by the Michigan Supreme Court in *Maldonado v. Ford Motor Co.*¹⁷⁴ The *Maldonado* court upheld the dismissal of a legal action alleging employment discrimination based on a party and her counsel's pretrial publicity of evidence intended to taint the jury pool.¹⁷⁵ Quoting *Cummings*, the Michigan Supreme Court announced the universal applicability of unclean hands based on litigation misconduct:

The authority to dismiss a lawsuit for litigant misconduct is a creature of the clean hands doctrine and, despite its origins, is applicable to both equitable and legal damages claims. The authority is rooted in a court's fundamental interest in protecting its own integrity and that of the judicial process. The clean hands doctrine applies not only for the protection of the parties but also for the protection of the court.¹⁷⁶

The Michigan Supreme Court rooted the trial court's dismissal power in its judicial authority under the state constitution.¹⁷⁷

6. *Connecticut*.—Unlike Michigan, the applicability of unclean hands to legal claims in Connecticut does not have the sanction of the state supreme court. Nevertheless, three cases from its trial courts declared unclean hands available in actions at law and denied motions to strike the defense.¹⁷⁸

173 *See* *Bygrave v. Van Reken*, No. 218048, 2001 WL 672375, at *2 (Mich. Ct. App. May 4, 2001) (extending *Cummings* to include monetary sanctions, not just dismissal); *Beagle v. Gen. Motors Corp.*, No. 245519, 2004 WL 2480484, at *1 (Mich. Ct. App. Nov. 4, 2004) (same); *Prince v. MacDonald*, 602 N.W.2d 834, 836 (Mich. Ct. App. 1999) (extending the *Cummings* line of precedent without mentioning "unclean hands" for filing bad faith bankruptcy petition to delay proceedings).

174 *Maldonado v. Ford Motor Co.*, 719 N.W.2d 809, 818 (Mich. 2006); *see also id.* at 816 n.15. *Contra* *Russell v. Casebolt*, 348 S.W.2d 548, 553 (Mo. 1964) (refusing to recognize unclean hands in a damages action and reversing trial court dismissal based on perjury).

175 *Maldonado*, 719 N.W.2d at 826. The plaintiff and her counsel had repeatedly publicized evidence ruled inadmissible at trial. *Id.* at 811–16. The decision in *Maldonado* was 4–3. The three dissenting judges found the dismissal of the case violated the plaintiff's right to free speech. *Id.* at 826–37 (Cavanagh, J., dissenting) (Weaver and Kelly, JJ., concurring in dissent). One of the judges in a separate dissent also found there was no legal foundation for the dismissal. *Id.* at 837 (Weaver, J., dissenting).

176 *Id.* at 818 (citations and quotation marks omitted).

177 *Id.* at 818–19; *id.* at 810. Consistent with *Maldonado*, courts around the country have remedied various kinds of litigation misconduct regardless of the relief requested under the doctrine of "fraud on the court." *See* *Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1074 n.1 (2d Cir. 1972); *Sun World, Inc. v. Lizarazu Olivaria*, 144 F.R.D. 384, 389–90 (E.D. Cal. 1992); *see also* *Lazaro v. Lazaro (In re Marriage of Lazaro)*, No. A107473, 2005 WL 1332102, at *3 (Cal. Ct. App. June 6, 2005) (indicating fraud on the court is unclean hands (citing *Katz v. Karlsson*, 191 P.2d 541, 544–45 (Cal. Ct. App. 1948) (fraud on the court))). Use of this doctrine obviates the need to address the effect of the consolidation of law and equity procedures on the defense of unclean hands.

178 *First Fairfield Funding, L.L.C. v. Goldman*, No. CV020465799S, 2003 WL 22708882,

Comparable to the intermediate appellate courts in California,¹⁷⁹ the Connecticut trial courts relied on the broad language of a case from their supreme court and declared it “well settled that equitable defenses or claims may be raised in an action at law.”¹⁸⁰

The attitude of the Connecticut courts also correlates to that of the California judiciary.¹⁸¹ Rather than requiring the party asserting unclean hands to find cases applying the doctrine to damages, for instance, the court in *First Fairfield Funding*¹⁸² placed the burden of case production on the party seeking to deny the defense.¹⁸³ In accepting the defense to ban legal claims for tortious interference with contract and unfair trade practices, the court reasoned:

In support of its first claim, the plaintiff cites a number of cases which stand for the proposition that the defense of unclean hands is available as a

at *1–2 (Conn. Super. Ct. Nov. 3, 2003); *Robarge v. Patriot Gen. Ins. Co.*, No. CV–91–0393211S, 1991 Conn. Super. LEXIS 2793, at *3 (Conn. Super. Ct. Dec. 4, 1991); *Jespersion v. Ponichtera*, No. CV88 0096615 S, 1990 WL 283884, at *1–2, (Conn. Super. Ct. Jul. 16, 1990); *accord* *Liberty Bank v. Holloway*, No. CV92–0703852 S, 1993 WL 408314, at *1 (Conn. Super. Ct. Sept. 28, 1993) (citing *Jespersion*) (laches).

179 *See* *Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists, Local 1304*, 39 Cal. Rptr. 64, 97 (Dist. Ct. App. 1964); *see supra* note 75.

180 *First Fairfield Funding*, 2003 WL 22708882, at *1 (quoting *Kerin v. Udolf*, 334 A.2d 434, 437 (Conn. 1973)) (granting equitable relief to the defendant who claimed to have deposited the money in the mail in suit for default on a note); *Robarge*, 1991 Conn. Super. LEXIS, at *3; *see also* *Hubley Mfg. & Supply Co. v. Ives*, 70 A. 615, 616 (Conn. 1908) (arguing that the “fundamental purpose” of the Practice Act of 1879 was so that “legal and equitable rights of the parties may be enforced and protected in one action”); *cf.* *Thompson v. Orcutt*, 777 A.2d 670, 676, 681 (Conn. 2001) (reversing appellate court finding that unclean hands was inapplicable on an action to foreclose a mortgage which the court noted was an “equitable proceeding”); *Samasko v. Davis*, 64 A.2d 682, 685 (Conn. 1949) (“Where a plaintiff’s [equitable] claim ‘grows out of or depends upon 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))).

Jespersion was a shareholder derivative action alleging wrongful conversion and breach of fiduciary duty by an officer and director who asserted the defense of unclean hands of the shareholders by participating in and benefitting from any wrongdoing. *Jespersion*, 1990 WL 283884, at *1. The *Jespersion* court cited *Grigg v. Robinson Furniture Co.*, 260 N.W.2d 898, 903 (Mich. Ct. App. 1977) (“equitable defenses can defeat legal claims”), as persuasive authority for the proposition that equitable defenses may defeat legal claims. *Jespersion*, 1990 WL 283884, at *1. *Grigg*, like *Kerin*, did not involve the defense of unclean hands. *Grigg*, 260 N.W.2d at 903. Two federal district court cases from Connecticut cited by the *Jespersion* court neither discussed the adoption question nor found that the proof offered sustained the defense. *See* *Matthies v. Seymour Mfg. Co.*, 23 F.R.D. 64, 93–96 (D. Conn. 1958) (applying Connecticut law), *rev’d on other grounds*, *Matthies v. Seymour Mfg. Co.*, 270 F.2d 365, 375 (2d Cir. 1959); *Burdy Corp. v. Teledyne Indus., Inc.*, 584 F. Supp. 656, 663 (D. Conn. 1984).

181 *See, e.g.*, *Unilogic, Inc. v. Burroughs Corp.*, 12 Cal. Rptr. 2d 741, 744–45 (Ct. App. 1992); *see also supra* notes 86–93 and accompanying text.

182 *First Fairfield Funding*, 2003 WL 22708882.

183 *See id.* at *1.

defense in action[s] seeking equitable relief. What the cases relied upon by the plaintiff do not say, however, is that the defense of unclean hands is not available in actions at law.¹⁸⁴

It further justified its decision on the basis that “[t]he integrity of the court is no less worthy of protection in action[s] at law, than in actions in equity.”¹⁸⁵ Accordingly, the court put policy over pedigree when no precedent precluded the universal application of unclean hands.¹⁸⁶

7. *Rhode Island*.—Like Connecticut, a Rhode Island opinion allowing unclean hands to be pled against legal claims occurred at the trial level.¹⁸⁷ Matching other state courts incorporating the defense into the law,¹⁸⁸ the ruling relied on the federal district court decision in *Buchanan Home*¹⁸⁹ as persuasive authority.¹⁹⁰

The Rhode Island Superior Court decision in *Bartlett v. Dunne*¹⁹¹ found that perjury warranted dismissal of a negligence claim for damages pursuant to unclean hands.¹⁹² During the trial, plaintiff lied under oath regarding his alcohol consumption prior to accident.¹⁹³ Because the court found that the “[p]laintiff’s deception [wa]s willful and [struck] at the very heart of the judiciary,” it determined that a finding of contempt was insufficient and instead invoked unclean hands to dismiss the action.¹⁹⁴

B. Federal Court Adoption of Unclean Hands

Federal courts have applied unclean hands to legal actions as a matter of federal law in both federal question and diversity cases.¹⁹⁵ As in state

184 *Id.* (citations omitted) (third-party defendant alleging unclean hands on the part of the plaintiff in connection with the plaintiff’s initial acquisition of a contract).

185 *Id.* at *2.

186 *See id.*

187 *Bartlett v. Dunne*, No. C.A. 89–3051, 1989 WL 1110258, at *3 (R.I. Super. Ct. Nov. 10, 1989).

188 *See, e.g., Cummings v. Wayne Cnty.*, 533 N.W.2d 13, 14 (Mich. Ct. App. 1995) (citing *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*, 544 F. Supp. 242, 244–45 (D.S.C. 1981)).

189 *Buchanan Home*, 544 F. Supp. at 244–45.

190 *Bartlett*, 1989 WL 1110258, at *3.

191 *Id.* at *1–3.

192 *Id.* at *3; *accord Smith v. Cessna Aircraft Co.*, 124 F.R.D. 103, 105–07 (D. Md. 1989) (pretrial perjury subject to unclean hands). For a discussion of *Smith*, see *infra* notes 234–37 and accompanying text.

193 *Bartlett*, 1989 WL 1110258, at *2.

194 *Id.* at *3 (discussing alternative sanction of contempt).

195 *Supra* note 62 (discussing federal courts with diversity jurisdiction using a federal law of unclean hands without the benefit of an *Erie* analysis). Some courts are not clear upon which law (federal or state) they rely on to apply and/or define unclean hands. For instance,

court jurisprudence,¹⁹⁶ some of the courts applied the defense without consideration of its application at law.¹⁹⁷ The following discussion analyzes federal courts of appeal and district court decisions from the Eleventh, Fourth, Ninth, Seventh, Sixth, and Fifth Circuits.

1. *Eleventh Circuit*.—The most recent decision considering the applicability of unclean hands at law comes from the Eleventh Circuit. In *Boca Raton Community Hospital, Inc. v. Tenet Healthcare Corp.*,¹⁹⁸ the District Court for the Southern District of Florida denied the plaintiff's renewed motion for class certification due in part to the potential availability of unclean hands as a defense to legal relief.¹⁹⁹

Boca sued Tenet for federal civil RICO violations due to its charging practices.²⁰⁰ Tenet claimed unclean hands based on Boca's own charging practices.²⁰¹ In concluding that the viability of "Tenet's unclean hands defense [was] more than a mere possibility," thus justifying an order to deny class certification, the district court reviewed recent decisions from the Eleventh Circuit.²⁰² "Although not definitive," the district court found that "the Eleventh Circuit's . . . pronouncements on this issue in *Sikes v. Teleline, Inc.*,²⁰³ and *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*²⁰⁴ indicate[d] that it would be receptive to Tenet's argument."²⁰⁵ The court noted that "[i]n *Sikes*, the Eleventh Circuit suggested that civil

a New York district court sitting in diversity in *Gala Jewelry, Inc. v. Haring* appears to follow federal law. It declared that "the law of this circuit restricts the 'unclean hands' doctrine to suits in equity, thereby categorically defeating defendant's attempted defense in this suit at law." *Gala Jewelry, Inc. v. Haring*, No. 05 Civ. 7713(GEL), 2006 WL 3734202, at *2 n.3 (S.D.N.Y. Dec. 18, 2006) (citing *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566 (2d Cir. 2005)). However, the *Aetna* decision actually applied New York law to determine the applicability of unclean hands to actions at law. *See Aetna Cas. & Sur. Co.*, 404 F.3d at 607. The court also cited a federal decision from the U.S. Supreme Court. *Id.* (citing *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245-46 (1933)).

196 *See* *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 75 (2d Cir. 1980) (applying New York law) (holding the defense inapplicable because plaintiffs' supposed misconduct was not sufficiently connected with the subject of litigation); *Blain v. Doctor's Co.*, 272 Cal. Rptr. 250, 255 (Ct. App. 1990); *Kirkland v. Mannis*, 639 P.2d 671, 671-73 (Or. Ct. App. 1982).

197 *See, e.g.*, *Big Lots Stores, Inc. v. Jaredco, Inc.*, 182 F. Supp. 2d 644, 652 (S.D. Ohio 2002).

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

199 *Id.* at 694.

200 *Id.* at 691.

201 *Id.* at 692.

202 *Id.* at 694.

203 *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1366 n.41 (11th Cir. 2002).

204 *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1148 (2006).

205 *Boca Raton Cmty. Hosp.*, 238 F.R.D. at 693 (internal citations omitted).

RICO claims based on illegal gambling were rare because ‘plaintiffs may be barred from bringing such a claim by the “unclean hands” doctrine.’”²⁰⁶ Moreover, citing a decision that applied the defense of *in pari delicto* (corresponding to rulings from the courts of Maryland and New York), the district court relied on *Edwards*, wherein the Eleventh Circuit held that this related legal defense applies in civil RICO actions.²⁰⁷ Furthermore, (similar to the rationale of the lower courts in California and Connecticut), the district court dismissed Boca’s argument that the “Eleventh Circuit has never found the availability of [an unclean hands] defense to a civil RICO claim,” with the rejoinder that “it is equally clear that the Eleventh Circuit has not held otherwise.”²⁰⁸ In light of the foregoing, the court ruled unclean hands a viable defense to a civil RICO claim for damages.²⁰⁹

2. *Fourth Circuit*.—The most widely-cited opinion of unclean hands as a viable defense at law is *Buchanan Home*.²¹⁰ Sitting in diversity, the District Court for the District of South Carolina applied the doctrine to defeat claimed damages for warranty, tort, and contract violations.²¹¹ A dealership

206 *Id.* (quoting *Sikes*, 281 F.3d at 1366 n.41).

207 *Id.* (citing *Official Comm. of Unsecured Creditors*, 437 F.3d at 1155–56); *see also* *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 75–76 (2d Cir. 1980) (finding unclean hands to bar legal relief for state law claims and considering *in pari delicto* to bar the same conduct under the federal securities law claim); *Manown v. Adams*, 598 A.2d 821, 825–26 (Md. Ct. Spec. App. 1991), *rev’d on other grounds*, 615 A.2d 611, 612 (Md. 1992) (relying on *in pari delicto* to justify the application of unclean hands); *Smith v. Long*, 723 N.Y.S.2d 584, 586–87 (App. Div. 2001) (using *in pari delicto* interchangeably with unclean hands without discussion of any difference between them).

208 *Boca Raton Cmty. Hosp.*, 238 F.R.D. at 693 (alteration in original); *see also* *Unilogic, Inc. v. Burroughs Corp.*, 12 Cal. Rptr. 2d 741, 745 (Ct. App. 1992); *First Fairfield Funding, L.L.C. v. Goldman*, No. CV020465799S, 2003 WL 22708882, at *1 (Conn. Super. Ct. Nov. 3, 2003).

209 *Boca Raton Cmty. Hosp.*, 238 F.R.D. at 694.

210 *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*, 544 F. Supp. 242 (D.S.C. 1981). Cases citing *Buchanan Home* include *Cummings v. Wayne County*, 533 N.W.2d 13, 14 (Mich. Ct. App. 1995) and *Bartlett v. Dunne*, No. C.A. 89–3051, 1989 WL 1110258, at *3 (R.I. Super. Ct. Nov. 10, 1989).

211 *Buchanan Home*, 544 F. Supp. at 245. The *Buchanan Home* opinion was authored by Judge Robert F. Chapman, who is now a Circuit Judge on the Fourth Circuit Court of Appeals. Despite diversity jurisdiction, the district court cited several federal decisions for the proposition that unclean hands applies to bar legal relief. *See id.* at 245–47. Thus, while it did not address the choice of law issue, the district court viewed the question of application as a matter of federal procedural law under the *Erie* Doctrine.

The Fourth Circuit Court of Appeals relied on Maryland law to define unclean hands in a diversity action between business partners. *See Lyon v. Campbell*, No. 99–2455, 2000 WL 991650, at *3 (4th Cir. July 19, 2000) (per curiam) (reversing trial court’s application of unclean hands for failing to disclose a conflict of interest in the potential sale as not sufficiently related to the breach of fiduciary duty claim to warrant application of the doctrine (citing *Bland v. Larsen*, 627 A.2d 79, 85 (Md. Ct. Spec. App. 1993); *Manown v. Adams*, 598 A.2d 821 (Md. Ct. Spec. App. 1991), *rev’d on other grounds*, 615 A.2d 611, 612 (Md. 1992))) (first appeal); *Lyon v. Campbell*, 33 Fed. App’x 659, 665 (4th Cir. 2002) (affirming trial court decision to impose

sued Firestone for damages associated with customer dissatisfaction with defects in a brand of its tires. Specifically, the plaintiff claimed that “it did not receive sufficient compensation for replacing and adjusting unserviceable Firestone 500 radial tires” under the terms of its dealership agreement.²¹²

Firestone paid the dealer “a handling fee for each tire replaced and adjusted” to account for its time replacing and adjusting tires.²¹³ The dealer also received “billing credit” as reimbursement for the cost of the replacement tire taken from its inventory.²¹⁴ Receipt of the handling fee and billing credit was conditioned on the return of the replaced tire along with an adjustment form signed by the customer.²¹⁵

The dealership, however, admitted to a scheme of defrauding Firestone out of thousands of dollars by falsifying and forging the adjustment forms.²¹⁶ The forms were necessary for Firestone to defend against the dealer’s claims because recovery required a determination of how many legitimate warranty claims the plaintiff had to process.²¹⁷

In granting Firestone’s motion to dismiss the complaint on grounds of unclean hands, the district court emphasized that the overriding reason for the defense is to “protect the integrity of the court.”²¹⁸ Because the dealership’s presence in the courtroom suggested a “danger to the administration of justice,” the district court applied the defense and barred its claims for monetary relief.²¹⁹

In reaching its conclusion that manufacturing evidence constitutes unclean hands, the district court drew an analogy to *Mas v. Coca-Cola Co.*,²²⁰ where the Fourth Circuit Court of Appeals applied unclean hands pursuant to its equity jurisdiction.²²¹ In *Mas*, the federal appellate court stated:

No court of equity [or court of law in this instance] ought to be required to listen to a man whose very presence suggests danger to the administration of justice and whose past conduct affecting the matter in litigation would

equitable relief of constructive trust and to deny unclean hands based on false trial testimony because it was collateral to the main issues in the case) (second appeal) (applying Maryland law).

²¹² *Buchanan Home*, 544 F. Supp. at 246.

²¹³ *Id.* at 243.

²¹⁴ *Id.*

²¹⁵ *Id.* at 244.

²¹⁶ *Id.*

²¹⁷ *Id.* at 246.

²¹⁸ *Id.* at 247.

²¹⁹ *Id.* (quoting *Mas v. Coca-Cola Co.*, 163 F.2d 505, 511 (4th Cir. 1947)).

²²⁰ *Mas*, 163 F.2d 505.

²²¹ *Buchanan Home*, 544 F. Supp. at 244–45 (citing *Mas*, 163 F.2d at 507–08). The plaintiff in *Mas* “used forged documents and perjured testimony in his attempts to establish priority of invention in the Patent Office.” *Mas*, 163 F.2d at 507; *see also* *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 244 A.2d 10, 15 (Pa. 1968) (citing *Mas* for the proposition that manufacturing evidence in the existing case constitutes unclean hands).

cast doubt upon the ability of the court to ascertain from him the truth with respect thereto.²²²

As to its decision to apply unclean hands at law, the district court declared that “rights not suited for protection at equity should not be protected at law.”²²³ It also noted that Chafee and other twentieth century commentators had called for the end to any distinction between law and equity after the integration.²²⁴ It explained: “Court opinions and commentaries since the procedural merger of law and equity in 1938 have expressed the view that the clean hands doctrine embodies a general principle equally applicable to damage actions”²²⁵

While the “court opinions” referenced by the district court are not directly on point, they do embody the idea of equal application of unclean hands in principle. For example, in *Union Pacific Railroad Co. v. Chicago & North Western Railway Co.*,²²⁶ the District Court for the Northern District of Illinois boldly proclaimed that “[t]he clean hands maxim is not peculiar to equity, but expresses a general principle equally applicable to damage actions.”²²⁷ However, the case concerned only equitable relief. In making the above statement, the court was attempting to justify its analogy to a case seeking damages that involved an illegal contract made in violation of securities laws.²²⁸

Additionally, the Fourth Circuit Court of Appeals decision in *Tempo Music, Inc. v. Myers*²²⁹ arguably did not apply unclean hands to bar the legal claims asserted.²³⁰ The case concerned a violation of federal copyright law, and the appellate court invoked unclean hands to defeat the request for equitable relief and equitable estoppel to estop the damages claim.²³¹ The district court in *Buchanan Home*, however, found *Tempo Music* to stand for the proposition that unclean hands applies “[w]hether designated as the

222 *Mas*, 163 F.2d at 511; *see also* *Mas v. Coca-Cola Co.*, 198 F.2d 380, 381 (4th Cir. 1952) (“One who has had the door of a court of equity closed in his face because of his fraud may not have relief by the simple device of beginning again and labeling his suit an action at law for damages.”) (upholding dismissal of patent action at law for damages, following dismissal of equitable suit on the ground of unclean hands involving same patent).

223 *Buchanan Home*, 544 F. Supp. at 245.

224 *Id.*

225 *Id.* (citing *Union Pac. R.R. Co. v. Chi. & N.W. Ry. Co.*, 226 F. Supp. 400 (N.D. Ill. 1964); *Tempo Music, Inc. v. Myers*, 407 F.2d 503 (4th Cir. 1969)).

226 *Union Pac. R.R. Co.*, 226 F. Supp. 400.

227 *Id.* at 410. (citing CHAFEE, *supra* note 5, at 94).

228 *See id.* (citing *A. C. Frost & Co. v. Coeur d’Alene Mines Corp.*, 312 U.S. 38, 43 (1941)).

229 *Tempo Music*, 407 F.2d at 507–08.

230 *Buchanan Home*, 544 F. Supp. at 245.

231 *Tempo Music*, 407 F.2d at 508 n.8 (noting that the infringer requested a list of copyrighted songs from owner that the owner neglected to supply).

principle underlying clean hands or as equitable estoppel.”²³²

Citing *Buchanan Home*,²³³ the District Court of Maryland, in *Smith v. Cessna Aircraft Co.*,²³⁴ prevented the recovery of damages under unclean hands after the plaintiff lied during his deposition regarding his tax returns.²³⁵ Among other damages, the plaintiff sought compensation for the income he lost while recuperating from injuries resulting from the crash of his plane.²³⁶ Because the plaintiff’s pre-trial perjury adversely affected an accurate assessment of potential liability, the court dismissed the claim relating to his lost income.²³⁷

3. *Ninth Circuit*.—Notwithstanding its somewhat limited precedential foundation, the logic of *Buchanan Home* and *Tempo Music* has been persuasive to some federal courts in California. Most of those decisions, in which the equitable doctrine of unclean hands was applied to bar actions for legal damages, arose in claims under federal intellectual property law or

²³² *Buchanan Home*, 544 F. Supp. at 245 (*Tempo Music* “justified application of the clean hands principle to the damages portion of the suit by stating that principles of equitable estoppel would apply to deny the plaintiff its right to plead and prove the copyright infringement.”); accord *Metro Publ’g, Ltd. v. San Jose Mercury News, Inc.*, 861 F. Supp. 870, 880 (N.D. Cal. 1994) (citing both *Buchanan Home* and *Tempo Music* as authority to apply clean hands to damages claims).

²³³ See *Smith v. Cessna Aircraft Co.*, 124 F.R.D. 103, 105–07 (D. Md. 1989); see also *Stratton v. Sacks*, 99 B.R. 686, 694 (D. Md. 1989) (“Although the clean hands doctrine is an equitable principle, it has been applied by a district court in this Circuit to defeat an action at law.” (citations omitted)); *McGovern v. Deutsche Post Global Mail, Ltd.*, No. Civ. JFM–04–0060, 2004 WL 1764088, at *10 n.6 (D. Md. Aug. 4, 2004) (noting in dicta that “[t]he clean hands doctrine originated in the courts of equity but now extends to actions at law” (citation omitted)).

²³⁴ *Smith*, 124 F.R.D. 103 (dismissing damages claim related to lost income).

²³⁵ *Id.* at 105–07.

²³⁶ *Id.* at 107.

²³⁷ The court explained:

It can hardly be disputed that Mr. Garner’s hands are unclean with respect to a matter at issue in this litigation. Mr. Garner has filed suit, seeking damages resulting from the crash of his plane. As part of those damages, he seeks compensation for the income he lost while recuperating from his injuries. His tax returns are critical to allowing the defendants to assess accurately their potential liability for these damages. By providing the defendants with tax documents that were admittedly false, and by lying in his deposition and answers to interrogatories, Mr. Garner has abused the discovery system and has deprived the defendants of essential information.

Id. (citing *Buchanan Home*, 544 F. Supp. at 246). The court summarized *Buchanan Home* writing, “Plaintiff’s fraud in submitting falsified adjustment forms to defendant hopelessly obscure[d] any possibility of accurately resolving validity of plaintiff’s claim.” *Id.* (internal quotation marks omitted). The court further explained that “the fact that the fraud and perjury are discovered before trial does not vitiate the taint upon the litigation process as a whole.” *Id.*

state unfair competition law.²³⁸ In copyright cases, unclean hands has even evolved into a special defense of “copyright misuse.”²³⁹

The Ninth Circuit Court of Appeals in *Supermarket of Homes, Inc. v. San Fernando Valley Board of Realtors*²⁴⁰ cited *Buchanan Home* and *Tempo Music* in announcing that unclean hands may bar a legal action for copyright infringement where the copyright holder misused the copyright.²⁴¹ The District Court for the Northern District of California in *Metro Publishing, Ltd. v. San Jose Mercury News, Inc.*²⁴² followed *Supermarket of Homes* in finding that unclean hands barred claims for damages on trademark infringement and dilution claims.²⁴³ The district court also noted the decisions from the Fourth Circuit in support of its judgment and quoted the following passage from *Buchanan Home*: “Court opinions and commentaries since the procedural merger of law and equity in 1938 have expressed the view that the clean hands doctrine embodies a general principle equally applicable to damage actions, and that rights not suited for protection in equity should not be protected at law.”²⁴⁴

In addition to borrowing cases from the Fourth Circuit to apply unclean hands at law, Ninth Circuit precedent has had a spillover effect in at least one other federal circuit.²⁴⁵

4. *Seventh Circuit.*—The District Court for the Northern District of Illinois

238 *See, e.g.*, *McCormick v. Cohn*, No. CV 90–0323 H, 1992 WL 687291, at *3 (S.D. Cal. July 31, 1992) (action for damages due to copyright infringement, trademark infringement, and unfair competition barred by unclean hands).

239 *See* *Magnuson v. Video Yesteryear*, No. C–92–4049 DLJ, 1994 WL 508826, at *5 (N.D. Cal. September 9, 1994) (“[Unclean hands] operates to deprive a copyright owner from asserting infringement and asking for damages when the infringement occurred by the claimant’s dereliction of duty.” (citing *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1408 (9th Cir. 1986))), *aff’d in part, rev’d in part on other grounds*, 85 F.3d 1424 (9th Cir. 1996); *Sega Enters. Ltd. v. Accolade, Inc.*, 785 F. Supp. 1392, 1399 (N.D. Cal. 1992) (“The defense of copyright misuse is a form of unclean hands.”), *aff’d in part, rev’d in part on other grounds*, 977 F.2d 1510 (9th Cir. 1992).

240 *Supermarket of Homes*, 786 F.2d 1400.

241 *Id.* at 1408 (citing *Tempo Music, Inc. v. Myers*, 407 F.2d 503, 507 (4th Cir. 1969); *Buchanan Home*, 544 F. Supp. at 245). The court did not apply the defense because it found the facts did not constitute unclean hands. *Id.* at 1408–09.

242 *Metro Publ’g., Ltd. v. San Jose Mercury News, Inc.*, 861 F. Supp. 870 (N.D. Cal. 1994).

243 *Id.* at 880 (citing *Supermarket of Homes*, 786 F.2d at 1408).

244 *Id.* (quoting *Buchanan Home*, 544 F. Supp. at 245 (citation omitted)); *see also id.* (citing *Tempo Music*, 407 F.2d at 507 & n.8 (4th Cir. 1969) (barring legal recovery due to unclean hands “where alleged infringer sought copyright holder’s assistance to avoid infringing copyright” and holder failed to assist)).

245 *See* *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 792 & n.80 (5th Cir. 1999) (explaining that the “[copyright misuse doctrine] has its historical roots in the unclean hands defense”) (citing *Qad, Inc. v. ALN Assocs., Inc.*, 974 F.2d 834, 836 (7th Cir. 1992); *Supermarket of Homes*, 786 F.2d at 1408).

in *Urecal Corp. v. Masters*²⁴⁶ followed the Ninth Circuit decision in *Hall v. Wright*.²⁴⁷ In a diversity action involving unfair competition, the *Urecal* court invoked the doctrine of unclean hands to bar both legal and equitable remedies.²⁴⁸ Aware of the adoption issue in damages actions, the court explained that the Federal Rules of Civil Procedure (Federal Rules) left intact a distinction between law and equity only for purposes of determining the right to trial by jury.²⁴⁹

The court's reasoning in *Urecal* has been approved in other cases when legal and equitable relief is joined.²⁵⁰ For instance, another Illinois district court, in *Energizer Holdings, Inc. v. Duracell, Inc.*,²⁵¹ applied *Urecal* as authority to address unclean hands in a claim under the Lanham Act seeking both money damages and equitable relief.²⁵² *Urecal's* holding, however, has not been extended to cases solely seeking damages.²⁵³

At least one decision from the Seventh Circuit interpreting the Federal Rules appears to disagree and deems unclean hands available in actions exclusively seeking damages.²⁵⁴ Soon after the merger, in fact, the court

246 *Urecal Corp. v. Masters*, 413 F. Supp. 873 (N.D. Ill. 1976).

247 *Id.* at 876. The district court reasoned: "In an unfair competition action like the case at bar, where equitable and legal claims are joined, the doctrine of 'clean hands,' if indicated by the facts, should preclude recovery on both claims." *Id.* (citing *Hall v. Wright*, 240 F.2d 787 (9th Cir. 1957) (affirming application of unclean hands)).

248 *See id.* at 874–76; *see also id.* at 876 (alternatively holding there was insufficient proof of damages). Despite the state law claims, the court applied unclean hands as a matter of federal law. *See id.*; cf. *Am. Nat'l Bank & Trust Co. of Chi. v. Levy*, 404 N.E.2d 946, 948–49 (Ill. App. Ct. 1980) (citing pre-merger precedent of the US Supreme Court to deny the defense in actions at law).

249 *Urecal*, 413 F. Supp. at 876 (citing *Rogers v. Loether*, 467 F.2d 1110, 1119 (7th Cir. 1972)).

250 *Parkman & Weston Assocs., Ltd. v. Ebenezer African Methodist Episcopal Church*, No. 01 C 9839, 2003 WL 22287358, at *6 (N.D. Ill. Sept. 30, 2003) ("[I]n certain situations the clean hands doctrine may bar 'a claim at law for damages.' For example, 'where equitable and legal claims are joined, the doctrine of 'clean hands,' if indicated by the facts, should preclude recovery on both claims.'" (quoting *Urecal*, 413 F. Supp. at 876)); *Rauland Borg Corp. v. TCS Mgmt. Grp., Inc.*, No. 93 C 6096, 1995 WL 242292, at *12–14 (N.D. Ill. Apr. 24, 1995) (denying summary judgment on unclean hands asserted to bar right to injunctive relief or damages).

251 *Energizer Holdings, Inc. v. Duracell, Inc.*, No. 01 C 9720, 2002 WL 1067688 (N.D. Ill. May 28, 2002).

252 *See id.* at *3. Other cases are in accord for Lanham Act claims, although they denied the defense for reasons other than its application at law. *See also Alpo Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 214 (D.D.C. 1989) ("The defense of unclean hands is available in an action brought under the Lanham Act seeking equitable and monetary relief." (citing *Am. Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 590 (S.D.N.Y. 1987))).

253 *See Lopez v. Autoserve, L.L.C.*, No. 05 C 3554, 2005 WL 3116053, at *1 (N.D. Ill. Nov. 17, 2005) (applying Illinois and federal law of unclean hands) (striking affirmative defense of unclean hands to bar violations of state and federal statutory employment law because the complaint sought only legal damages).

254 *Maltz v. Sax*, 134 F.2d 2 (7th Cir. 1943).

of appeals applied unclean hands to bar an action for damages under the Sherman Anti-Trust Act.²⁵⁵ Citing Rule 2 of the Federal Rules, the court stated in *Maltz v. Sax*:²⁵⁶ “As to unclean hands: The maxims of equity are available as defenses in actions at law.”²⁵⁷

While the Seventh Circuit has not addressed unclean hands since *Maltz*, the court has indicated a willingness to continue this precedent. In *Byron v. Clay*,²⁵⁸ for example, Judge Posner noted that while unclean hands is traditionally applicable to legal claims under the “clean up” doctrine in cases seeking both legal and equitable relief,²⁵⁹ it should perhaps no longer be limited to equitable suits in light of the merger of law and equity.²⁶⁰ He reasoned that even before the merger a counterpart legal doctrine to unclean hands—*in pari delicto*—existed, which forbade a plaintiff to recover damages if his fault was equal to the defendant’s.²⁶¹

Judge Posner’s comments in *Maksym v. Loesch*²⁶² regarding the application of the purely equitable defense of laches at law were also telling:

Not only is there a long tradition of applying equitable defenses in cases at law—indeed, fraud itself is an equitable defense typically interposed in suits at law for breach of contract—but with the merger of law and equity there is no longer a good reason to distinguish between the legal and equitable character of defenses, save as the distinction may bear on matters unaffected by the merger, such as the right to trial by jury in cases at law, a right preserved in federal courts by the Seventh Amendment²⁶³

Relying on the meaning of the merger as announced in *Maltz* and *Byron*, district courts in Indiana have held all equitable defenses—including unclean hands—available at law.²⁶⁴

²⁵⁵ *Id.* at 5.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 5 (citing federal statutory law and the Federal Rules).

²⁵⁸ *Byron v. Clay*, 867 F.2d 1049 (7th Cir.1989).

²⁵⁹ *Id.* at 1052 (citing *Medtronic, Inc. v. Intermedics, Inc.*, 725 F.2d 440, 442–43 (7th Cir. 1984)).

²⁶⁰ *Id.*

²⁶¹ *Id.* (citing *Holman v. Johnson*, (1775) 98 Eng. Rep. 1120 (K.B.); 1 Cowp. 341 (Mansfield, C.J.)).

²⁶² *Maksym v. Loesch*, 937 F.2d 1237 (7th Cir. 1991).

²⁶³ *Id.* at 1248 (citation omitted) (ultimately determining that laches would not apply to legal relief under Illinois law).

²⁶⁴ *See Columbus Reg'l Hosp. v. Patriot Med. Techs. Inc.*, No. IP 01–1404–C K/H, 2004 WL 392938, at *7 (S.D. Ind. Feb 11, 2004) (citing FED. R. CIV. P. 2; FED. R. CIV. P. 8) (denying summary judgment on affirmative defense of unclean hands as a matter of federal law in a diversity case); *see also Decatur Ventures, L.L.C. v. Stapleton Ventures, Inc.*, No. 1:04–CV–0562–JDT–WTL, 2006 WL 1367436, at *4 (S.D. Ind. May 17, 2006) (citing FED. R. CIV. P. 2; FED. R. CIV. P. 8), *order amended*, No. 1:04–cv–00562–JDT–WTL, 2006 WL 3305122 (S.D. Ind. Aug 16, 2006).

5. *Sixth Circuit*.—Consistent with the decisions from the district courts in Illinois, the District Court for the Southern District of Ohio in *Big Lots Stores, Inc. v. Jaredco, Inc.*²⁶⁵ also indicated that unclean hands is available to bar a claim for damages in a business dispute requesting both legal and equitable relief.²⁶⁶ Moreover, similar to the Northern District of Illinois in *Urecal Corp. v. Masters*,²⁶⁷ the court relied on federal law to define unclean hands in a diversity case.²⁶⁸ In contrast to *Urecal*, however, it did not explicitly discuss the extension of the defense to legal claims.²⁶⁹

In *Big Lots Stores*, a creditor sued a debt collection agency asserting state law claims for breach of confidentiality contract and conversion of customer accounts.²⁷⁰ The agency claimed unclean hands barred the lawsuit on two grounds.²⁷¹ First, it contended that the creditor fraudulently attempted to induce it to begin performance of the proposed agreement for purchase of uncollected checks.²⁷² Second, it alleged that the creditor engaged in litigation misconduct by various activities that amounted to suborning perjury.²⁷³ The court did not discuss the defense's application to legal claims, but instead held that there was insufficient evidence to establish the defense.²⁷⁴ The court also found the perjury claims to be "tangential" to the central issue in the case regarding breach of contract.²⁷⁵

6. *Fifth Circuit*.—The Fifth Circuit Court of Appeals in *Kuehnert v. Texstar Corp.*²⁷⁶ allowed unclean hands to bar a tippee from recovering losses against an insider/tipper for providing false information in federal securities litigation.²⁷⁷ Unlike the Seventh Circuit opinion considering unclean hands

265 *Big Lots Stores, Inc. v. Jaredco, Inc.*, 182 F. Supp. 2d 644 (S.D. Ohio 2002).

266 *See id.* at 653.

267 *Urecal Corp. v. Masters*, 413 F. Supp. 873, 876 (N.D. Ill. 1976).

268 *Big Lots Stores*, 182 F. Supp. 2d at 652–53. The court relied on precedent from the US Supreme Court, *see Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 814 (1945), to define unclean hands and cited case law from the Sixth Circuit, *see Kearney & Trecker Corp. v. Cincinnati Milacron Inc.*, 562 F.2d 365, 371 (6th Cir. 1977), to establish the appropriate burden of proof. *Big Lots Stores*, 182 F. Supp. at 652. *But see id.* at 644 (West Headnotes stating that unclean hands was decided as a matter of Ohio law).

269 *Big Lots Stores*, 182 F. Supp. 2d at 652.

270 *See id.* at 648–51.

271 *Id.* at 652–53.

272 *Id.* at 653.

273 *See id.* (alleging activities such as obtaining a temporary restraining order under wrongful or deceitful circumstances, preparing false affidavits, and exchanging debt forgiveness for friendly affidavits).

274 *Id.* at 652.

275 *Id.* at 653 n.2 (noting that the litigation misconduct claims, at most, go to damages).

276 *Kuehnert v. Texstar Corp.*, 412 F.2d 700 (5th Cir. 1969).

277 *Id.* at 704.

in another federal statutory action in *Maltz v. Sax*,²⁷⁸ the Fifth Circuit made no mention of the merger of law and equity or any potential barrier to the application of the equitable defense of unclean hands due to the law–equity distinction.²⁷⁹ It focused exclusively on whether the application of unclean hands and the legal defense of *in pari delicto* were consonant with the policies of the federal securities statute.²⁸⁰ Like *Mallis v. Bankers Trust Co.*, the court of appeals used the legal and equitable defenses without discussion of any difference between them.²⁸¹

Consequently, within the federal and state court systems, cases are incorporating unclean hands into the common law through a combination of utility, intuition, and oversight. As addressed below, a close examination of existing precedents also exposes the possibility for even broader application of the doctrine in the future.

III. THE FUTURE: FROM PEDIGREE TO POLICY

Parts I and II described the continuing conflict in the cases concerning the merger and its effect on the incorporation of unclean hands into the law. This Part moves beyond an examination of the results to explore more thoroughly the reasons behind the growing body of decisional rules incorporating unclean hands into the law and the principles upon which they stand. Understanding the premises of the precedents considering unclean hands provides inspiration for the future of the defense in damages or other legal actions.²⁸²

²⁷⁸ *Maltz v. Sax*, 134 F.2d 2, 5 (7th Cir. 1943) (citing federal statutory law and the Federal Rules)).

²⁷⁹ *Kuehnert*, 412 F.2d at 703–05.

²⁸⁰ *See id.* The majority explained: “The question must be one of policy: which decision will have the better consequences in promoting the objective of the securities laws by increasing the protection to be afforded the investing public.” *Id.* at 704; *see also id.* at 703 (citing cases establishing the availability of unclean hands in SEC proxy requirements); 703 n.6 (citing cases establishing the availability of unclean hands in labor disputes). The dissent disagreed with the application of unclean hands on policy grounds. *See id.* at 705 (Godbold, J., dissenting); *accord* *Nathanson v. Weis, Voisin, Cannon, Inc.*, 325 F. Supp. 50, 53 (S.D.N.Y. 1971); *E.F. Hutton & Co. v. Berns*, 682 F.2d 173, 176 n.6 (8th Cir. 1982) (citing securities law violation cases which either allow or deny the *in pari delicto* defense). Thus, the court divided solely on whether barring the lawsuit pursuant to unclean hands would promote the purposes of the federal securities statute. *See generally* Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524 (1982) (suggesting courts have less remedial discretion in statutory versus common law or constitutional causes of action).

²⁸¹ *Kuehnert*, 412 F.2d at 704–05. *But see* *Nathanson*, 325 F. Supp. at 52 (referencing the issue in *Kuehnert* as the application of *in pari delicto*). In *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 75–76 (2d Cir. 1980), however, the Second Circuit Court of Appeals considered unclean hands only against the pendant state claims.

²⁸² *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 889–90 (2006) (discussing how the reasons for rules announced in decisions may have normative weight and constrain future decisions); *see also* Richard B. Cappalli, *The Common Law’s Case Against*

Significantly, some decisions denying the defense at law have been made without the citation to any authority.²⁸³ Certain courts citing decisional law relied on opinions that pre-dated the merger of law and equity²⁸⁴ or that otherwise were not on point.²⁸⁵ Moreover, many cases rejecting the defense in damages actions are distinguishable because they contain qualifying language and have been subject to alternative holdings.²⁸⁶

In particular, a review of those decisions denying the defense at law reveals some hesitancy in the holdings: words such as “generally”²⁸⁷ or “usually”²⁸⁸ often precede the rule of denial. For example, the Delaware Superior Court explained in *USH Ventures v. Global Telesystems Group, Inc.* that “[t]he defense of ‘unclean hands’ is *generally* inappropriate for legal remedies.”²⁸⁹ While the use of such conditional terms may express a willingness to find favor in the doctrine’s application at law in the future, it also provides grounds for the court to create a policy exception like the

Non-Precedential Opinions, 76 S. CAL. L. REV. 755, 784 (2003) (noting changing nature of judicial decisions from common law to statutory substitutes); Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1187–88 (2007) (describing the textualization of the common law and the greater interpretative constraints on those who apply it). In analyzing the issue of fusion of legal and equitable doctrines, Justice Keith Mason, of the New South Wales Court of Appeals of Australia, related his view that “the accumulated judicial wisdom of the ages remains a starting (and usually finishing) point for decision-making, even at the appellate level.” Mason, *supra* note 26, at 72.

283 See *Gen. Dev. Corp. v. Binstein*, 743 F. Supp. 1115, 1133–34 (D.N.J. 1990) (applying Florida, Connecticut, and Massachusetts law); *Spitler v. Perry Town Lot & Improvement Co.*, 179 N.W. 69, 70 (Iowa 1920) (ruling without citation that unclean hands does not bar defenses, only affirmative equitable relief); *Wilson v. Prentiss*, 140 P.3d 288, 292–93 (Colo. App. 2006); *Hasbro Bradley, Inc. v. Coopers & Lybrand*, 515 N.Y.S.2d 461, 463 (App. Div. 1987); *cf. Rodriguez v. Dicoa Corp.*, 318 So. 2d 442, 446 (Fla. Dist. Ct. App. 1975) (“No authority is required” in reversing equitable attachment in legal action).

284 See, e.g., *Merchs. Indem. Corp. v. Eggleston*, 179 A.2d 505, 514 (N.J. 1962) (citing federal pre-merger precedent from the United States Supreme Court).

285 See discussion of cases cited *supra* notes 27–30 and accompanying text (denying unclean hands from precedent considering the defense to ban equitable relief); see also *supra* note 45 (discussing Alabama case relying on purported decisional law to deny unclean hands in a damages action based on precedent that did not address the issue).

286 See *infra* notes 287–96 and accompanying text.

287 *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 244 A.2d 10, 14 (Pa. 1968) (“[I]t *generally* has been held that the doctrine operates only to deny equitable, and not legal, remedies.”) (citations omitted) (emphasis added); *Russell v. Casebolt*, 384 S.W.2d 548, 553 (Mo. 1964) (discussing the “inapplicability of the doctrine *generally* in cases at law” (citation omitted) (emphasis added)); see also *Sandobal v. Armour & Co.*, 429 F.2d 249, 257 (8th Cir. 1970) (laches “is rarely, if ever, invoked” in an action at law).

288 *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 971 (5th Cir. 1986) (“Laches is *usually* available only in suits . . . in equity . . .”) (citations omitted) (emphasis added); *DiMauro v. Pavia*, 492 F. Supp. 1051, 1068 (D. Conn. 1979) (“The principle of unclean hands is *usually* applied only to prevent affirmative relief . . .”) (citations omitted) (emphasis added).

289 *USH Ventures v. Global Telesystems Grp., Inc.*, 796 A.2d 7, 20 n.16 (Del. Super. Ct. 2000) (citations omitted) (emphasis added).

Cummings and *Maldonado* courts in Michigan.²⁹⁰ Specifically, the District Court for the Southern District of New York in *Gala Jewelry, Inc. v. Haring*²⁹¹ struck an unclean hands defense to damages claims but contemplated its application in the future: “Even if, as defendant insists, there may be exceptions to that rule where circumstances and justice require, this case presents no such exceptional circumstance.”²⁹²

Another possible ground of distinction is hedging in the form of alternative holdings.²⁹³ Such additional, independent reasons are frequently found in the decisions denying the defense in cases of legal relief. These reasons include the failure to satisfy the elements of unclean hands²⁹⁴ and that its application would be inconsistent with the policies or equities in the case.²⁹⁵ Even cases refusing the defense against legal remedies exclusively due to its equitable origin can be explained on other grounds.²⁹⁶

Furthermore, changing rationales for applying the defense to legal cases suggests the possibility of less judicial resistance to unclean hands in the future. Indeed, despite the chaotic jurisprudence, the most promising aspect of the judicial reasoning process seems to be a shift in attitude.²⁹⁷ Many of the post–merger cases rejecting unclean hands did so without precedential support actually denying the defense in actions for damages.²⁹⁸ The courts

290 *See* *Maldonado v. Ford Motor Co.*, 719 N.W.2d 809, 818 (Mich. 2006) (creating exception to general rule against unclean hands in cases seeking legal relief on grounds of court protection); *Cummings v. Wayne Cnty.*, 533 N.W.2d 13, 14 (Mich. Ct. App. 1995) (same); *see also* discussion *supra* notes 152–77 and accompanying text.

291 *Gala Jewelry, Inc. v. Haring*, No. 05 Civ. 7713(GEL), 2006 WL 3734202, at *2–3 (S.D.N.Y. Dec. 18, 2006) (granting motion to strike unclean hands defense to damages claims for breach of contract, negligence, and conversion).

292 *Id.* at *2 n.3 (citing *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245–46 (1933)).

293 *See* *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 184 (Iowa 1987) (alternative holding). The courts *applying* the doctrine of unclean hands to bar legal relief have also found other grounds to support their decision. *See* *Urecal Corp. v. Masters*, 413 F. Supp. 873, 876 (N.D. Ill. 1976) (alternatively holding there was insufficient proof of damages even if unclean hands did not apply to bar legal relief).

294 Courts typically find there is no connection between the case and the unclean conduct. *See* *Karpierz v. Easley*, 68 S.W.3d 565, 572 (Mo. Ct. App. 2002); *Hasbro Bradley, Inc. v. Coopers & Lybrand*, 515 N.Y.S.2d 461, 463 (App. Div. 1987); *Birk v. Jackson*, 75 S.W.2d 918, 920 (Tex. Civ. App. 1934). Courts may also find that the conduct does not rise to the level of unclean hands. *See* *Beldt v. Leise*, 60 P.3d 1119, 1122 (Or. Ct. App. 2003).

295 *See, e.g.*, *Billes v. Bailey*, 555 A.2d 460, 462–63 (D.C. 1989); *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 244 A.2d 10, 15 (Pa. 1968) (finding unclean hands inapplicable to legal claims as one of three alternative holdings).

296 *See, e.g.*, *Swisher v. Swisher*, 124 S.W.3d 477, 483–84 (Mo. Ct. App. 2003).

297 *See* *USH Ventures v. Global Telesystems Grp., Inc.*, 796 A.2d 7, 19 (Del. Super. Ct. 2000) (“Courts of law have become increasingly flexible and have abandoned the worship of formalism and technicality that spawned the development of the split system of law and equity in England.”).

298 *See, e.g.*, *Tarasi v. Pittsburgh Nat’l Bank*, 555 F.2d 1152, 1156 n.9 (3d Cir. 1977) (stating

relied on an absence of authority applying the doctrine to legal claims and cited only equitable relief cases applying unclean hands.²⁹⁹ Now, courts like *First Fairfield Funding* in Connecticut and *Unilogic* in California are making the opposite assumption.³⁰⁰ Rather than requiring counsel to find cases that apply the defense at law, these courts mandate counsel to find cases rejecting it.³⁰¹ If none exist, the defense of unclean hands is available to defeat legal relief.³⁰²

Even courts following the law–equity distinction to dictate the denial of unclean hands in actions at law have found ways to invoke the defense by expanding the categories on both sides of the “equitable action or relief” equals “equitable defense” equation. Courts apply unclean hands (or other equity–dependent doctrines) by construing the case or claim to be equitable in nature as opposed to origin.³⁰³ This penumbral phenomenon can be seen

rule without authority); discussion *supra* Part I.

299 See *In re Estate of Barnes*, 754 A.2d 284, 288 n.6 (D.C. 2000) (denying unclean hands because “we know of no authority for applying this ‘maxim of equity’ to a legal claim for money.” (citations omitted)); *Freemont Homes, Inc. v. Elmer*, 974 P.2d 952, 959 (Wyo. 1999) (supporting denial of the defense solely from precedent considering unclean hands to ban equitable relief); discussion *supra* Part I; cf. Mason, *supra* note 26, at 68 (“Chancery’s unwillingness to award damages during the early nineteenth century was seen by some writers at the time to have been jurisdictional, in the sense of establishing an absence of power.” (citing PM McDERMOTT, *EQUITABLE DAMAGES* (1994)).

300 See *First Fairfield Funding, L.L.C. v. Goldman*, No. CV020465799S, 2003 WL 22708882, at *1 (Conn. Super. Ct. Nov. 3, 2003); *Unilogic, Inc. v. Burroughs Corp.*, 12 Cal. Rptr. 2d 741, 745 (Ct. App. 1992); *Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, 238 F.R.D. 679, 693–94 (S.D. Fla. 2006); *Burton v. Sosinsky*, 250 Cal. Rptr. 33, 41 (Ct. App. 1988) (“Although no case directly on point has been located, we see no reason why a successful defense of unclean hands should not bar the foreclosure of the mechanics’ lien.”).

301 *Boca Raton Cmty. Hosp.*, 238 F.R.D. at 693; *Unilogic*, 12 Cal. Rptr. 2d at 745; *First Fairfield Funding*, 2003 WL 22708882, at *1.

302 See *Boca Raton Cmty. Hosp.*, 238 F.R.D. at 693; *Unilogic*, 12 Cal. Rptr. 2d at 745; *First Fairfield Funding*, 2003 WL 22708882, at *1.

303 See *Sender v. Mann*, 423 F. Supp. 2d 1155, 1167–68 (D. Colo. 2006) (applying Colorado law) (finding bankruptcy trustee’s fraudulent conveyance claims were equitable in nature and subject to unclean hands even though trustee only sought money damages); see also *C&K Eng’g Contractors v. Amber Steel Co.*, 587 P.2d 1136, 1138–41 (Cal. 1978) (evaluating promissory estoppel for purposes of determining the right to trial by jury); *Philpott v. Superior Court*, 36 P.2d 635, 640–41 (Cal. 1934) (en banc) (discussing confusion with quasi–contract that originated in law but that is equitable in nature); *Corvallis Sand & Gravel Co. v. State Land Bd.*, 439 P.2d 575, 578 (Or. 1968) (en banc) (reviewing case determining that quo warranto was equitable in nature despite being denominated as an action at law under the statute for the purpose of applying laches); MEGARRY & BAKER, *supra* note 6, at 6 (discussing dual meaning of “equity”). In many cases, it is difficult to discern the origin of the equitable claim or relief due to its mixed heritage. See Anenson, *supra* note 3, at 497 (“[R]emedies have become so intertwined in this post–merger world that it is difficult to discern what is or was equity versus law. The advent of statutory causes of action compounds the problem.”) (citations omitted) (providing examples); Mason, *supra* note 26, at 46 (“Very few causes of action or remedies will be exclusively equitable in historical derivation and even these are now statutory in most cases.”); see also Yeo, *supra* note 20, at 168 (arguing that the mixed and uncertain heritage of

in opinions referencing “quasi-equitable” relief,³⁰⁴ or in contradistinction, “purely”³⁰⁵ or “strictly”³⁰⁶ legal rights.

Whether the foregoing circumstances reflect a changing attitude or not, it is enough to observe that a handful of states across the country have begun the process of assimilation.³⁰⁷ An increasing number of federal courts have also applied the defense to bar legal claims.³⁰⁸ In incorporating unclean hands into the law, courts focus their reasoning on the purpose of the merger statutes and rules.³⁰⁹ They also use other authoritative sources of interpretation, such as precedent, in allowing unclean hands to be considered in legal cases.³¹⁰ For instance, courts ruling on cases of first impression often apply unclean hands at law by analogy to decisions that recognized comparable unclean conduct against equitable remedies.³¹¹ Alternatively, cases concerning legal remedies should apply a kindred legal defense like *in pari delicto*,³¹² or an equitable defense like estoppel may

equitable doctrines will unduly complicate choice of law analysis for equity).

304 *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 169 (8th Cir. 1995) (quoting *Maksym v. Loesch*, 937 F.2d 1237, 1248 (7th Cir. 1991) (laches)), *abrogated on other grounds*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *see also* *Russell v. Casebolt*, 384 S.W.2d 548, 553 (Mo. 1964) (“wholly or partially in equity”).

305 *Ashley*, 66 F.3d at 169; *Maksym*, 937 F.2d at 1248; *Corvallis Sand*, 439 P.2d at 578 (quo warranto).

306 *Am. Nat'l Bank & Trust Co. of Chi. v. Levy*, 404 N.E.2d 946, 948 (Ill. App. Ct. 1980) (unclean hands); *see also* *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 971 (5th Cir. 1986) (laches).

307 *See* discussion *supra* Part II; *cf.* Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1173–77 (2005) (finding that judges are more ideological and prone to decide based on policy preferences in cases without doctrinal direction than in those governed by precedent).

308 *See* discussion *supra* Part II.

309 *See* Anenson, *supra* note 3, at 474–76; discussion *supra* Part II. None of the opinions incorporating unclean hands into the law appeared to acknowledge the historical distinction between the different kinds of equitable defenses based on their pre-merger pleading practices. *See, e.g.*, *Jespersion v. Ponichtera*, 2 Conn. L. Rptr. 105, 105 (Super. Ct. 1990) (“Another recognized principle is that equitable defenses may be interposed against actions at law.” (citation omitted)).

310 *See* discussion *supra* Part II; *cf.* Frederick Schauer, *Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy*, 3 PERSP. ON PSYCHOL. SCI. 454, 457–58 (2008) (distinguishing principle of precedent from reasoning by analogy).

311 *See, e.g.*, *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*, 544 F. Supp. 242, 247 (D.S.C. 1981) (citing *Mas v. Coca-Cola Co.*, 163 F.2d 505 (4th Cir. 1947)); *see also* *Stratton v. Sacks*, 99 B.R. 686, 694 (D. Md. 1989) (“Although the clean hands doctrine is an equitable principle, it has been applied by a district court in this Circuit to defeat an action at law.” (citations omitted)). A number of courts have been persuaded to extend unclean hands to legal remedies by reference to the United States Supreme Court equity decision in *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945). *See, e.g.*, *Kendall-Jackson Winery, Ltd. v. Superior Court*, 90 Cal. Rptr. 2d 743, 749 (Ct. App. 1999); *Cummings v. Wayne Cnty.*, 533 N.W.2d 13, 14 (Mich. Ct. App. 1995).

312 *See* discussion *supra* Part II. Courts have also used the terms *in pari delicto* and unclean hands interchangeably or have relied on the similarity between unclean hands and this

be used to justify a court's decision.³¹³ But the most persuasive principle seems to be policy.³¹⁴

kindred legal defense in justifying the availability of unclean hands in legal cases. *See, e.g.*, *Blain v. Doctor's Co.*, 272 Cal. Rptr. 250, 258 (Ct. App. 1990) (recognizing unclean hands at law by accepting guidance from the Pennsylvania case of *Feld & Sons, Inc. v. Pechner, Dorfman, Wolfe, Rounick & Cabot*, 458 A.2d 545, 551–52 (Pa. Super. Ct. 1983) in which the general legal principle of *in pari delicto* was applied); *Manown v. Adams*, 598 A.2d 821, 825 n.6 (Md. Ct. Spec. App. 1991) (equating unclean hands and *in pari delicto* defenses), *rev'd on other grounds*, 615 A.2d 611, 612 (Md. 1992); *Smith v. Long*, 723 N.Y.S.2d 584, 586–87 (App. Div. 2001) (holding unclean hands applicable to legal relief by reference to the defense of *in pari delicto* and declaring unclean hands available in “law or equity”). *But see* *Truitt v. Miller*, 407 A.2d 1073, 1079–80 (D.C. 1979) (citation omitted) (denying unclean hands defense in action at law despite noting its similarity to *in pari delicto*); *Ellwood v. Mid States Commodities, Inc.* 404 N.W.2d 174, 184 (Iowa 1987) (willing to apply illegality or against public policy but not unclean hands); *Russell v. Casebolt*, 384 S.W.2d 548, 553 (Mo. 1964) (same). Judge Posner's dictum in *Byron v. Clay* also compared unclean hands and *in pari delicto* in concluding that unclean hands should no longer be limited to equitable actions. *Byron v. Clay*, 867 F.2d 1049, 1052 (7th Cir. 1989) (citing *Holman v. Johnson*, (1775) 98 Eng. Rep. 1120 (K.B.); 1 Cowp. 341 (Lord Mansfield C.J.)). Similar to unclean hands, the doctrine of *in pari delicto* preserves the dignity of the courts and deters illegal behavior. *See* *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985) (“[C]ourts should not lend their good offices to mediating disputes among wrongdoers; . . . denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.” (citations omitted)). But the defenses are not an exact match. *See* Anenson, *Process-Based Theory of Unclean Hands*, *supra* note 4, at 566–69. *In pari delicto* requires a common scheme and imposes a guilt differential between the parties (i.e. that the claimant's guilt be less than the respondent). *Bateman Eichler*, 472 U.S. at 307, 310–11 (confining the application of *in pari delicto* under federal anti-trust laws and federal securities laws to the doctrine's traditional limitations, which require that the plaintiff bear “at least substantially equal responsibility for the violations he seeks to redress”); *id.* at 306 (“In a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one.” (quoting BLACK'S LAW DICTIONARY 711 (5th ed. 1979) (alteration in original) (internal quotation marks omitted))); *Nathanson v. Weis, Voisin, Cannon, Inc.*, 325 F. Supp. 50, 53 n.11 (S.D.N.Y. 1971) (explaining under the securities laws that *in pari delicto* is narrower than unclean hands as it contemplates “equal and simultaneous participation by the parties in the same illegal activity”).

313 *See, e.g.*, *Tempo Music, Inc. v. Myers*, 407 F.2d 503, 507–08 (4th Cir. 1969); *Buchanan Home*, 544 F. Supp. at 245; *see also* discussion *supra* notes 231–32 and accompanying text. Some courts have converted laches into an estoppel in order to apply the defense at law. *See, e.g.*, *Maksym v. Loesch*, 937 F.2d 1237, 1248 (7th Cir. 1991) (“It is really a doctrine of estoppel rather than a substitute for a statute of limitations.” (citation omitted)); *Davenport Osteopathic Hosp. Ass'n v. Hosp. Serv., Inc.*, 154 N.W.2d 153, 162 (Iowa 1967); *Moore v. Phillips*, 627 P.2d 831, 835 (Kan. Ct. App. 1981). In other countries that share our common law heritage, there has been considerable debate concerning the fusion of legal and equitable principles and doctrines by analogy. Anthony Mason, *Fusion, in EQUITY IN COMMERCIAL LAW*, *supra* note 20, at 11, 12; *see also* *Smith*, *supra* note 25, at 22 n.15 (defining a “fusion fallacy” as “a belief in substantive fusion” (citation omitted)); James Edelman, A “*Fusion Fallacy*” Fallacy, 119 LAW Q. REV. 375, 379–80 (2003) (discussing the possible grounds for supporting fusion by analogy and the academic justifications for such an approach).

314 *See* Anenson, *supra* note 3, at 476–508 (analyzing policies in favor of considering unclean hands in legal cases and the cases supporting them); T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 660 (2007) (suggesting that policy analysis be the preferred method of interpretation

Courts are engaging in implicit and explicit policy analysis in incorporating unclean hands into the law.³¹⁵ An indirect policy-oriented approach is evident from the fact that some courts cite decisions allowing analogous legal and fully-fused equitable defenses against legal relief, as well as cases applying unclean hands to equitable relief.³¹⁶ A decision justifying the application of unclean hands in damages actions by relying on the defense's use in equity cases levels the fictional severity or superiority between legal and equitable forms of relief.³¹⁷ These analogies also acknowledge equivalency between not only the conduct supporting these legal and equitable defenses, but also the interests and purposes they serve.³¹⁸ In particular, by matching the kinds of conduct deserving

in equitable estoppel cases); *see also id.* at 659 (noting that equity has come to be regarded as public policy and that both equity and public policy promote the same purpose of change based on modern morality); Robert S. Stevens, *A Brief on Behalf of a Course in Equity*, 8 J. LEGAL EDUC. 422, 424–25 (1956) (noting one of the factors to influence a decision in equity was that special consideration was given to the public interest).

Analyzing the fusion of legal and equitable doctrines in Australia, Justice Mason explained: “Investigation of pedigree is being eclipsed by the greater need to have regard to the function served by a particular right or remedy and to the overlap of the parallel or discordant strands suggested by historical enquiries about ‘legal’ and ‘equitable’ rules.” Mason, *supra* note 26, at 42; *see also id.* at 71.

315 Given the indeterminacy associated with the range of choice, including the selection of policy goals and the process of balancing the competing policies, policy analysis has been described as the most subjective type of legal argument. *See* WILSON HUH, THE FIVE TYPES OF LEGAL ARGUMENT 68 (2002); *see also id.* at 54 (tracing policy analysis to the “ends-means” philosophy of teleology (citation omitted)).

316 HUH, *supra* note 315, at 120 (explaining that deeming another decision a “precedent” based on a similarity in values is a form of policy analysis); *see* discussion *supra* notes 311–314 and accompanying text.

317 *See* William J. Lawrence, III, Note, *The Application of the Clean Hands Doctrine in Damage Actions*, 57 NOTRE DAME LAW. 673, 681 (1982) (calling for recognition of unclean hands in cases seeking legal relief because damages are often as severe as equitable remedies); Anenson, *supra* note 3, at 490–96 (listing lack of differential in relief as one reason to recognize unclean hands at law); *see also id.* at 490 (“Even if damages are less harmful in a particular case, such severity does not derive from any purported difference between law and equity.” (citation omitted)); *cf.* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 701 (1990) (concluding that a remedial hierarchy of legal and equitable relief no longer exists with respect to the irreparable injury rule requiring “no adequate remedy at law” before equitable relief); DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 265–76 (1991) (same); *see also* USH Ventures v. Global Telesystems Grp., Inc., 796 A.2d 7, 15 (Del. Super. Ct. 2000) (concluding that “we need to desert the whole idea of hierarchy between law and equity”); CHAFEE, *supra* note 5, at 29; Garvey, *supra* note 42, at 67–68. Professor Newman concluded long ago that the assumption that the enforcement of equitable rights is not a matter of right, but rather a privilege, “has long since become obsolete.” NEWMAN, *supra* note 6, at 38. *But see* DOBBS, *supra* note 13, §2.4(2), at 69 (endorsing rights versus privilege dichotomy in denying unclean hands at law).

318 HUH, *supra* note 315, at 120 (explaining that judicial opinions become precedents by a matching of facts and/or values). Justice Cardozo found the practice of drawing analogies to the facts of the case without also considering the values involved incomplete: “Some judges

dismissal in these decisions with unclean hands, courts are making a value judgment that litigants (and courts) should be treated the same in legal and equitable actions.³¹⁹

In addition to achieving policy objectives indirectly through the precedential form of analysis,³²⁰ courts have also declared their policy preferences directly. In adopting unclean hands in legal cases, for example, the Superior Court of Connecticut concluded: "The integrity of the court is no less worthy of protection in action[s] at law, than in actions in equity."³²¹ The district court in *Buchanan Home* likewise invoked unclean hands against claims for legal relief because "rights not suited for protection at equity should not be protected at law."³²² In fact, it is the unity of facts and values between legal defenses and unclean hands that caused Professor Chafee's comment that the defense "ought not to be called a maxim of equity because it is by no means confined to equity."³²³

seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20 (1921); see also Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 756-57 (1993).

319 Mason, *supra* note 313, at 15 ("There is no place for inconsistent treatment of like cases."); Smith, *supra* note 20, at 23 ("This goal [of treating like cases alike] is part of the rule of law, but only, I think, because it is rational to treat like cases alike, and if the law is not rational it loses its normative force."). Case analysis depends on what points of similarity and dissimilarity are deemed important. HUHNS, *supra* note 315, at 120; Anenson, *supra* note 314, at 641 ("[T]he technique of developing grounds of decision based on reported judicial experience is an art." (citation omitted)). How the judge answers the question of importance determines whether the prior decisional rule will be distinguished or applied. See STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 83 (1985); see also Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 1016 (1996) (explaining grounds to apply cases by analogy and to distinguish them); John Dickinson, *The Law Behind Law: II*, 29 COLUM. L. REV. 285, 290 (1929) (discussing the value judgments made by judges when choosing one analogy over another).

320 Wilson Huhn describes the types of legal argument under his proposed pluralistic model of law as a system of legal reasoning techniques because they are interrelated. HUHNS, *supra* note 315, at 81-82. In a single argument, one may utilize multiple arguments at the same time and in such a way that they may be distinguishable from each other. *Id.*

321 First Fairfield Funding, L.L.C. v. Goldman, No. CV020465799S, 2003 WL 22708882, at *1 (Conn. Super. Ct. Nov. 3, 2003).

322 *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*, 544 F. Supp. 242, 245 (D.S.C. 1981); accord *Metro Publ'g, Ltd. v. San Jose Mercury News, Inc.*, 861 F. Supp. 870, 880 (N.D. Cal. 1994) (quoting *Buchanan Home*).

323 Chafee I, *supra* note 2, at 878 (quoted in *Messick v. Smith*, 69 A.2d 478, 481 (Md. 1949)). Justice Brandeis had a similar motivation in expressing his opinion of the universal nature of unclean hands: "The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law." *Olmstead v. United States*, 277 U.S. 438, 483-84 (1928) (Brandeis, J., dissenting) (citations omitted). Brandeis' dissents in *Olmstead* and other cases were later adopted by the majority

The failure in many jurisdictions to consult equitable theories like unclean hands in legal cases that redress the same interests sought in suits in equity threatens to create inconsistencies across these analogous areas and endangers the overall capacity of the law to treat similarly situated parties the same.³²⁴ The post-merger trend of adopting unclean hands into the law establishes that courts are no longer satisfied that traditional differences in form³²⁵ support different treatment in substance.³²⁶ What

of the Supreme Court under the so-called supervisory power doctrine. See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1443 (1984) (citing, e.g., *McNabb v. United States*, 318 U.S. 332 (1943)). Under this doctrine, the Court accepted Brandeis's view that litigation misconduct principally harms the court and not the litigant. *Id.* at 1452.

324 See Anenson, *supra* note 3, at 477 (criticizing the continued discrimination against unclean hands on the basis of an alleged historical impediment given the similarities of the defense to legal and other fully incorporated equitable defenses); accord James Edelman & Simone Degeling, *Introduction to EQUITY IN COMMERCIAL LAW*, *supra* note 20, at 1,1 (advocating structural approach to the fusion of legal and equitable principles and doctrines in other common law countries); see also Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1220–23 (1996) (noting the importance of identifying and reconciling the justifications underlying other ancillary bodies of law). Failing to account for similar policies and purposes in deciding cases is especially pernicious given that the historical differences in form have been eradicated with the merger of law and equity in most jurisdictions. Anenson, *supra* note 3, at 478 (“[T]he absurdity of courts climbing over a barrier built by historical accident is amplified now that that barrier no longer exists.”); accord Mason, *supra* note 313, at 14 (“The unsatisfactory and confused state into which the law in this area has fallen is little short of a disgrace.” (citation omitted)); see also Anenson, *supra* note 3, at 492 (illustrating past and present cases reaching opposite outcomes) (comparing *Carmen v. Fox Film Corp.*, 269 F.928 (2d Cir. 1920), *reversing*, 258 F.703 (S.D.N.Y. 1919) (equity) with *Carmen v. Fox Film Corp.*, 198 N.Y.S. 766 (N.Y. App. Div. 1923) (law) and *N. Pac. Lumber Co. v. Oliver*, 596 P.2d 931 (Or. 1979) (equity) with *Gratrek v. N. Pac. Lumber Co.*, 609 P.2d 375 (Or. Ct. App. 1980) (law)). Indeed, the doctrine of *stare decisis* embodies the ideal that like cases be treated alike. HUH, *supra* note 315, at 16; *id.* at 41–43 (precedent supports the stability and predictability of law as a guide to future action); see also Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 815, 827–29 (2008) (placing precedent within federal procedural common law).

325 For a discussion of how the different remedies were a conflict in substantive rights and duties of citizens, but not a conflict in the form of the rules themselves, see generally William Searle Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 YALE L.J. 1 (1916); I AUSTIN WAKEMAN SCOTT, *THE LAW OF TRUSTS* § 1 (2d ed. 1956) (“There is no conflict in form . . . there is only a conflict in substance.”).

326 See MEGARRY & BAKER, *supra* note 6, at 7 (“There is much truth in the view that equity is a historical accident.”) (quoting the Honorable Robert Megarry of the Chancery Division of the High Court of England); Stevens, *supra* note 26, at 351 (explaining that the distinction between law and equity was not necessary or essential—but historical); see also *Philpott v. Superior Court*, 36 P.2d 635, 637 (Cal. 1934) (discussing the “parity of law and reason which governs both species of courts” (quoting II COOLEY’S BLACKSTONE § 436, at 1181–82 (4th ed.))); Edelman & Degeling, *supra* note 324, at 2 (explaining that Justice Keith Mason denies any particular characteristic of equitable doctrine apart from historical development); cf. *id.* (noting that Sir Anthony Mason and Professor Lionel Smith accept there are unique characteristics of

was equal in fact is becoming equal in law.³²⁷ To be sure, courts seem less likely to ignore the inconsistent outcomes associated with the unequal treatment of unclean hands when the interests at stake are their own.³²⁸ Thus, discrimination against unclean hands in legal cases is doubtful when the application of the defense achieves a targeted and immediate instrumental aim of court protection rather than merely furthering the overall, albeit more abstract, objectives of justice, fairness, and equality.³²⁹ The recent decisions in Michigan, creating a policy-based exception to the conventional prohibition against unclean hands at law when litigation misconduct obstructs the judicial function, illustrate this phenomenon.³³⁰

equity that may limit analogies to the common law in certain cases).

327 The “structural” approach to legal analysis that involves inferring rules from the relationship among ancillary doctrines was popularized by Philip Bobbitt, a constitutional scholar, as one of six heuristic devices (“modalities”) of interpreting the Constitution. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991). Others have adapted Bobbitt’s structural argument outside the constitutional law discussion. See T. Leigh Anenson, *Creating Conflicts of Interest: Litigation as Interference with the Attorney–Client Relationship*, 43 AM. BUS. L.J. 173, 203–05 (2006) (using the structural argument in borrowing from groundless litigation theories in litigious interference cases redressing a separation of client and counsel); Gergen, *supra* note 324, at 1178 & n.16 (interference tort); Dennis Patterson, *The Pseudo–Debate over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235, 240–242, 242 n.16 (1993) (contract); see also William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990) (outlining an analogous model of statutory interpretation). In particular, Wilson Huhn articulated a pluralist model of analysis that may be applied to all areas of the law and described Bobbitt’s structural, ethical, and prudential methods of legal reasoning as “policy” arguments consisting of a predictive portion and a value judgment. See Wilson R. Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 456 (2000–01).

328 See Anenson, *Process–Based Theory of Unclean Hands*, *supra* note 4, at 511, 518–20, 526, 530–32 (explaining that the courts consider the court protection policy paramount in applying unclean hands at law); see also Yeo, *supra* note 20, at 157 (“Unconscientiousness in the exercise of legal rights provides the reason for the intervention [of equity].”); cf. Chafee I, *supra* note 2, at 895 (discussing the overall policy behind unclean hands is that “a court of justice should be very reluctant to do injustice”). Cases emphasize unclean hands as a protector of the process. See, e.g., *Manown v. Adams*, 598 A.2d 821, 826 (Md. Ct. Spec. App. 1991), *rev’d on other grounds*, 615 A.2d 611, 620 (Md. 1992) ([T]he policy underlying the clean hands doctrine is institutional. The objective is to prevent the court from assisting in fraud or other inequitable conduct.”); *Maldonado v. Ford Motor Co.*, 719 N.W.2d 809, 818 (Mich. 2006) (“The ‘clean hands doctrine’ applies not only for the protection of the parties but also for the protection of the court.” (citation omitted)); see also discussion *supra* Part II.

329 See Anenson, *Process–Based Theory of Unclean Hands*, *supra* note 4, at 542–43 (proposing process-based theory of unclean hands where application at law is based on sliding scale between court and party protection); see also Anenson, *supra* note 314, at 662–63 (listing similar policies for courts to create exceptions to the elements of equitable estoppel); cf. HUHNS, *supra* note 315, at 135 (describing the range of policies as “abstract values . . . instrumental concerns . . . or targeted societal goals”).

330 For conduct considered unclean hands that interferes with the judicial mission by tainting the jury pool, see *Maldonado v. Ford Motor Co.*, 719 N.W.2d 809, 815–18 (Mich. 2006) or obstructing witness testimony, see *Cummings v. Wayne Cnty.*, 533 N.W.2d 13, 14 (Mich. Ct.

Perhaps courts are still drawn to equity because it seems less possible (and rewarding) to approach the world through the myth of objectivity.³³¹ As in art or literature, similitude is often more revealing than verisimilitude.³³² Judges turn to equity and discretionary defenses like unclean hands to draw meaning from the bombardments of experience.³³³ With its malleability,

App. 1995). *See also* Smith v. Cessna Aircraft Co., 124 F.R.D. 103, 105–07 (D. Md. 1989) (perjury); Bartlett v. Dunne, No. C.A. 89–3051, 1989 WL 1110258, at *2–3 (R.I. Super. Ct. Nov. 10, 1989) (perjury). Ancient equity courts exercised their power to remedy abuses of the common law process. *See* Hohfeld, *supra* note 10, at 556, 560–61 (citing examples); Mason, *supra* note 26, at 52–53, 75 (noting the judicial power in equity to prevent abuse of the common law process); *cf.* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 339 (1999) (Ginsburg, J., concurring in part and dissenting in part) (justifying the jurisdictional basis of the modern English practice of *Mareva* injunctions on “equity’s traditional power to remedy the ‘abuse’ of legal process” (citation omitted)).

331 *See* Morton J. Horwitz, *The Changing Common Law*, 9 DALHOUSIE L.J. 55, 62–63 (1984) (discussing the realist attack on the intellectual foundations of conceptualism and formalism); Nim Razook, *Obedying Common Law*, 46 AM. BUS. L.J. 55, 69–73 (2009) (discussing how realist scholars like Frank, Llewellyn, and Holmes saw their role as one of refuting legal determinism); *see also* HUHNS, *supra* note 315, at 10–11 (“Rules of law do not describe objective truth, they reflect subjective intentions.”); *see id.* at 57 n.149 (explaining that H.L.A. Hart’s criticism of legal formalism was not due to “its reliance upon logic, but its failure to acknowledge the . . . ambiguity of legal rules” (internal parenthetical omitted) (citing Douglas Lind, *Logic, Intuition, and the Positivist Legacy of H.L.A. Hart*, 52 SMU L. REV. 135, 152–57 (1999))); RICHARD A. POSNER, *OVERCOMING LAW* 405 (1995); *accord* Durfee, *supra* note 9, at x (commenting that Chafee, a practitioner, professor, and scholar of equity jurisprudence, looked at law as a “kit of tools” to repair, sharpen, or redesign). Justice Cardozo described the diverse and opposing values served by law in attempting to do justice:

The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law. . . . We fancy ourselves to be dealing with some ultra-modern controversy, the product of the clash of interests in an industrial society. The problem is laid bare, and at its core are the ancient mysteries crying out for understanding

BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 4 (3d prtng. 2006); *see also* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 61 (1897), *reprinted in* 110 HARV. L. REV. 991, 1000 (1997) (urging educators to train lawyers to consider the “social advantage” of the rule and to educate them to see that “they were taking sides upon debatable and often burning questions”).

332 In literary terms, a version of verisimilitude is where the reader is willing to suspend disbelief. *See* Robert P. Ashley, *What Makes a Good Novel?*, 60 ENG. J. 596, 596–97 (1971) (discussing Samuel Coleridge’s version of verisimilitude); *cf.* *Truthlikeness*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2007), <http://plato.stanford.edu/archives/spr2007/entries/truthlikeness/> (noting that the literary idea of verisimilitude has been applied in the philosophical context). In legal parlance, verisimilitude could be equated to legal fictions like the labels “law” and “equity.” *Cf.* Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 STAN. L. REV. 971, 1018 (2009) (characterizing the fixed and unyielding nature of jurisdiction as a “noble lie” in that it does not actually deceive); L.L. Fuller, *Legal Fictions* (pt. 1), 25 ILL. L. REV. 363, 367 (1930) (“For a fiction is distinguished from a lie by the fact that it is not intended to deceive.”).

333 *Cf.* NEWMAN, *supra* note 6, at 13 (“Twenty-three centuries ago Aristotle said that

ingenuity, immediacy, and complexity—the doctrine of “clean hands” provides a fresh way to make sense of the world.³³⁴

Be it equity or law, however, the nature of jurisprudence is that it “often accretes by fragments, taking shape mosaically—its import visible only when one stands back and sees it whole.”³³⁵ But the “stories it tells may be no more than metaphors.”³³⁶ It is notable that decisions both for and against use of the defense at law have been made without expressly considering the meaning of the merger.³³⁷ Other opinions are ambiguous as

equity is that idea of justice which contravenes the written law.” (citation omitted)); Anton-Hermann Chroust, *Aristotle's Conception of "Equity" (Epieikeia)*, 18 NOTRE DAME LAW. 119, 125–26 (1942) (explaining the meaning of equity as a component of justice); Darien Shanske, Note, *Four Theses: Preliminary to an Appeal to Equity*, 57 STAN. L. REV. 2053, 2054 (2005) (“Aristotle’s account of equity has been received into the legal tradition many times and this reception is ongoing today.”). See generally Anenson, *supra* note 3.

334 The equitable defense of unclean hands has been most recently suggested as a supplement to the regulatory regime in the current financial crisis in an effort to reduce or eliminate excessive executive compensation. See generally T. Leigh Anenson & Donald O. Mayer, “Clean Hands” and the CEO: *Equity as an Antidote for Excessive Compensation*, 12 U. PA. J. BUS. L. 947 (2010) (explaining unclean hands as a defense to contract law and outlining its use in the executive pay context). Equity has been used to understand administrative law, Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 303 (1938), alternative dispute resolution, Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 57–60 (2004), and, most recently, presidential powers, Eric A. White, Note, *Examining Presidential Power Through the Rubric of Equity*, 108 MICH. L. REV. 113 (2009). Cf. Anenson, *supra* note 314, at 669 (concluding that the invocation of equitable estoppel “enables juridical actors to create magic—what Pound called ‘juristic chemistry’”—in resolving cases (quoting Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 643 (1923))).

335 Deborah Tall & John D’Agata, *The Lyric Essay*, HOBART AND WILLIAM SMITH COLLEGES, (2010), <http://www.hws.edu/academics/senecareview/lyricessay.aspx> (describing the lyric essay as a unique style of literature published in the *Seneca Review*). What Helen Vendler says of the lyric poem is true of jurisprudence: “It depends on gaps. . . . It is suggestive rather than exhaustive.” *Id.* (internal quotation marks omitted). Another literary reference squares with the idea of common law-making: “It might move by association, leaping from one path of thought to another by way of imagery or connotation, advancing by juxtaposition or sidwinding poetic logic.” *Id.* (describing the lyric essay as a genre of literature). As Holmes put it, through jurisprudence we might hope to “connect . . . with the universe and catch an echo of the infinite.” Holmes, *supra* note 331, at 1009; see also Karl N. Llewellyn, *The Case Law System in America*, 88 COLUM. L. REV. 989, 991 (1988).

336 Tall & D’Agata, *supra* note 335.

337 For courts applying unclean hands without discussion of its application to legal relief, see *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 74–76 (2d Cir. 1980); *Kuehnert v. Texstar Corp.*, 412 F.2d 700, 704 (5th Cir. 1969); *Blain v. Doctor’s Co.*, 272 Cal. Rptr. 250, 258–59 (Ct. App. 1990); *Kirkland v. Mannis*, 639 P.2d 671, 673 (Or. Ct. App. 1982); see also *A.I. Gage Plumbing Supply Co. v. Local 300 of the Int’l. Hod Carriers*, 20 Cal. Rptr. 860, 865–66 (Dist. Ct. App. 1962) (considering unclean hands in damages action without discussing the merger of law and equity). Correspondingly, courts precluding unclean hands in actions at law tend to rely on pre-merger precedent or none at all. See, e.g., *Gen. Dev. Corp. v. Binstein*, 743 F. Supp. 1115, 1133–34 (D.N.J. 1990) (applying Florida, Connecticut, and Massachusetts law); *Hasbro Bradley, Inc. v. Coopers & Lybrand*, 515 N.Y.S.2d 461, 463 (App. Div. 1987).

to whether they are making new law and extending unclean hands to legal relief or are merely a remnant of the ancient equitable clean-up doctrine.³³⁸ Lower federal courts in diversity actions are inconsistent in choosing state or federal law for the application and/or definition of unclean hands.³³⁹ Nor do they seem to address their source of authority to apply unclean hands in statutory versus common law causes of action.³⁴⁰ Significantly, these unanswered questions as to sources of law hold importance for the constitutional doctrines of separation of powers and federalism.³⁴¹

The fact that some courts have not directly addressed the issue of incorporation (or related issues) involving unclean hands is perhaps a consequence of the omission of equity from the standard law school curriculum.³⁴² As a result, “[l]awyers often advocate doctrines of law and equity without consciousness of the historic boundary between them.”³⁴³ The con-

338 See *Big Lots Stores, Inc. v. Jaredco, Inc.*, 182 F. Supp. 2d 644, 652 (S.D. Ohio 2002); *Urecal Corp. v. Masters*, 413 F. Supp. 873, 876 (N.D. Ill. 1976); discussion *supra* note 134; see also Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 253–54 (2003) (discussing the ambiguity left by the decision of *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), regarding the availability of equitable relief when both legal and equitable remedies are pled and whether the issue should be determined by discerning if equity “predominates” or alternatively, if it is “ancillary” or “incidental” to the legal relief claimed).

339 See discussion *supra* note 62.

340 See *Kuehnert v. Texstar Corp.*, 412 F.2d 700, 704 (5th Cir. 1969) (finding the application of unclean hands furthers the purposes of the statute); *Bieter Co. v. Blomquist*, 848 F. Supp. 1446, 1449 (D. Minn. 1994) (deciding the applicability of unclean hands in statutory cause of action per the policies of the statute).

341 See Anenson, *Process-Based Theory of Unclean Hands*, *supra* note 4, at 532–35 (analyzing how the source of authority to invoke unclean hands has implications for the horizontal and vertical structures of our government (citing Barrett, *supra* note 324; Beale, *supra* note 323)); see also *id.* (discussing potential differences in implied power between the state and federal benches).

342 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.’”); Douglas Laycock, *Remedies: Justice and the Bottom Line*, 27 REV. LITIG. 1, 7 (2007) (“The short explanation is that courses in damages, equity, and restitution were combined into a single course in remedies.”) (citing Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008)); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 272 (“[E]quity was taught as a separate course until the 1950s.”); see also Edward D. Re, *Introduction to SELECTED ESSAYS ON EQUITY*, *supra* note 26, 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.”); Stevens, *supra* note 314, at 422 (criticizing trend of law schools that do not offer a separate course in equity). *But see* Hohfeld, *supra* note 10, at 537–38 (agreeing with Maitland’s view to eliminate a separate course in equity so as not to preserve the distinctiveness of equity).

343 Anenson, *supra* note 3, at 480 (citation omitted); see also *id.* (“It may also explain why courts have applied unclean hands to actions at law without discussion.” (citation omitted)). Erosion of the law–equity distinction has been so complete in certain cases that courts and

fusion surrounding some of these decisions is possibly also reflective of the lack of guidance from the courts of last resort.³⁴⁴ Only recently in Michigan has a high court accepted unclean hands, albeit in a potentially narrow class of cases involving litigation misconduct.³⁴⁵ The United States Supreme Court has not taken a position on unclean hands during the seventy-year period following the consolidation of procedures in the federal system.³⁴⁶ With the legal status of unclean hands unsettled in most federal and state jurisdictions, it is time for more courts to begin a conversation about the merger and what it now means for the defense of unclean hands. Notably, the fusion of unclean hands into claims for legal relief will likely have implications for other equitable defenses like laches that traditionally were

commentators mistake their origins. *See* Decatur Ventures, L.L.C. v. Stapleton Ventures, Inc., No. 1:04-CV-0562-JDT-WTL, 2006 WL 1367436, at *4 (S.D. Ind. May 17, 2006) (plaintiff's mistaken belief that *in pari delicto* defense was equitable), *order amended*, 2006 WL 3305122, at *1-3, *13 (S.D. Ind. Aug. 16, 2006). Professor Laycock cited two cases to make the point that "judges and lawyers no longer understand what such references mean." Laycock, *supra* note 26, at 70, 81 (citing *In re De Laurentiis Entm't Grp. Inc.*, 963 F.2d 1269, 1272 (9th Cir. 1992) (mis-describing quasi-contract as an equitable remedy); *Mertens v. Hewitt Assocs.*, 500 U.S. 248 (1993) (construing 29 U.S.C. § 1132(a)(3) (1988))). In applying precedent that bans pure discretionary equitable defenses like unclean hands or laches, courts have erroneously banned fully incorporated equitable defenses like estoppel. *See* *Howe v. Fiduciary Trust Co.*, No. 97-2206, 2001 Mass. Super. LEXIS 135, at *30-31 (Super. Ct. Apr. 19, 2001); *Clarke v. Brunswick Corp.*, 211 N.W.2d 101, 102-03 (Mich. Ct. App. 1973); *Russell v. Casebolt*, 384 S.W.2d 548, 553 (Mo. 1964). While this oversight may initially appear to contribute to the fusion of law and equity, *see* Mason, *supra* note 26, at 62, it actually adds to the lack of coherence and consistency in the law and undermines its development.

344 The lack of guidance from state supreme courts could be both a cause of the confusion in the lower courts and a consequence of the lack of education and training on equitable principles and doctrines. Notably, the US Supreme Court has made errors in its decisions regarding what theories are historically equitable. *See* John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003). In an effort to provide new direction in patent law, the Federal Circuit Court of Appeals has decided to rehear en banc the issue of inequitable conduct and review its link to equity and unclean hands. *Therasense, Inc. v. Becton, Dickinson & Co.*, 374 F. App'x 35 (Fed. Cir. 2010). *See* Randall R. Rader, *Always at the Margin: Inequitable Conduct in Flux*, 69 AM. U. L. REV. 777, 784 (2010) (discussing the Federal Circuit's failure to restrain the doctrine). *See also* Robert J. Goldman, *Evolution of the Inequitable Conduct Defense in Patent Litigation*, 7 HARV. J.L. & TECH. 37, 67 (1993) ("Over a period of 37 years, various circuits experimented with three different standards of materiality and two different standards of intent.") (discussing the inequitable conduct defense derived from unclean hands before the creation of the Federal Circuit Court of Appeals).

345 *See* *Maldonado v. Ford Motor Co.*, 719 N.W.2d 809, 818 (Mich. 2006); *see also* discussion *supra* notes 174-77 and accompanying text. For a discussion of the state supreme courts that have rejected the defense at law, *see supra* Part I.

346 The Supreme Court has not considered the issue of unclean hands despite expressly incorporating other equitable defenses like estoppel into legal actions even prior to the federal merger of law and equity in the 1938 *Federal Rules of Civil Procedure*. *See* *Kirk v. Hamilton*, 102 U.S. 68, 78 (1880) (declaring that "there would seem no reason why its application should be restricted in courts of law"); *see also* discussion *supra* note 17 and accompanying text.

exclusive to equity.³⁴⁷

A century ago, Roscoe Pound feared the disappearance of equity in a merged system.³⁴⁸ Since then, scholars have debated the merits of more or fewer equitable principles and procedures in our unified systems.³⁴⁹ But there has been consistent recognition by the legal community that the labels “law” and “equity” should cease to determine the outcome of cases.³⁵⁰ At

347 See discussion *supra* notes 38–43 and accompanying text. The Supreme Court had the opportunity to resolve the fusion debate in the context of the equitable defense of laches, but avoided it and ruled on other grounds. See *Cnty. of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 244–45 (1985) (discussing but not deciding whether equitable defense of laches applies to bar legal relief); *cf.* *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 217, 221 (2005) (invoking laches to bar equitable relief). The Second Circuit later adopted laches at law. See *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 273–74, 276 (2d Cir. 2005). The legal adoption of laches in the area of Indian land claims has been the focus of scholarly attention. See, e.g., Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579 (2008); Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009).

348 Pound, *supra* note 18, at 35; *supra* note 25 and accompanying text; *cf.* Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 179–81 (1936) (predicting the future of equity is good and certain because it is a flexible tradition for allowing growth in the law).

349 See Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 495–507, 514 (2003) (calling for more equity–like civil procedures); Mason, *supra* note 26, at 75 (“Debate about the fusion of law and Equity goes back for centuries.”); Nolan–Haley, *supra* note 334, at 59 n.15 (calling for a return to the values of equity in mediation) (citing Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993)); *id.* at 67–70 (same); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 975–1002 (1987) (arguing for less equity–like civil processes); see also Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753 (1945) (reviewing history of equity to demonstrate that the traditional theory of the equitable process can help solve modern problems).

350 See, e.g., Chafee, *supra* note 26, at iii–iv; Laycock, *supra* note 317, at 693 (noting that law–equity jurisdictional “rules . . . have become obstacles to decision instead of guides”); Laycock, *supra* note 26, at 78; Pound, *supra* note 18, at 35; see also CHAFEE, *supra* note 5, at 303 (“One of the chief troubles with the frequent preoccupation of judges with questions of power is that it makes them slide over much more important questions of wisdom and fairness which ought to receive careful attention.”); NEWMAN, *supra* note 6, at 29–30; Garvey, *supra* note 42, at 67. Certain judges are in accord with legal scholars on this point. See, e.g., *Maksym v. Loesch*, 937 F.2d 1237, 1248 (7th Cir. 1991) (Posner, J.) (“[W]ith the merger of law and equity there is no longer a good reason to distinguish between the legal and equitable character of defenses, save as the distinction may bear on matters unaffected by the merger, such as the right to trial by jury in cases at law, a right preserved in federal courts by the *Seventh Amendment*.” (citation omitted)); *USH Ventures v. Global Telesystems Grp., Inc.*, 796 A.2d 7, 15–16 (Del. Super. Ct. 2000); Mason, *supra* note 26, at 70 (“Labels can operate as signposts, but they can also be misleading either because they may conflate separate concepts or (when different labels are seized upon as automatic indicators of distinctive legal concepts) because they may impede parallels or analogies being drawn (that is, principled fusion).”). Outside the United States, there have been strong opponents of fusion. See Edelman & Degeling, *supra* note 324, at 1; see also Mason, *supra* note 26, at 45 (commenting that academic cultures have also done their part to preserve them in Australia).

minimum, my research on this subject aims to extend that reasoning to the equitable defense of unclean hands.³⁵¹

Critics may complain of unclean hands on its own merits—that the defense may allow judges to go off on an uncharted course through interlocking webs of idea, circumstance, and language.³⁵² With any discretionary decision, there is the possibility of uncertain and inconsistent outcomes.³⁵³ But before condemning the defense in this manner, courts should first expose unclean hands to the whole of law and not deprive litigants of its utility in an entire class of cases where they are seeking legal relief.³⁵⁴ The experiential process of precedent moves legal precepts from

351 See generally Anenson, *supra* note 3; Anenson, *Process-Based Theory of Unclean Hands*, *supra* note 4.

352 See, e.g., Chafee I, *supra* note 2, at 878 (calling unclean hands a mischievous doctrine capable of causing harm); see also HENRY L. MCCLINTOCK, HANDBOOK OF EQUITY 29 (1936) (noting that the “brevity and generality” of the maxims of equity “prevent them from having much utility” in predicting court action in a certain situation); cf. CARDOZO, *supra* note 318, at 23 (“The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.” (quoting MUNROE SMITH, JURISPRUDENCE 21 (1908))). See also Anenson, *supra* note 3, at 507 (“[W]hile discretionary doctrines such as unclean hands may be criticized by lawyers as lacking legal certainty and predictability, they paradoxically provide legal certainty for laypersons and foster legitimacy in our courts.”); accord Llewellyn, *supra* note 335, at 991 (explaining that Llewellyn justified the case law system in America by explaining how judicial decisions provide congruence between legal rules and “real-life norms” which fosters legitimacy in our courts).

353 See, e.g., Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982); Steve Hedley, *Rival Taxonomies Within Obligations: Is There a Problem?*, in EQUITY IN COMMERCIAL LAW, *supra* note 20, at 77, 87 (advocating the continued use of equity but noting that there will be legitimate concerns over the degree of flexibility that should be allowed) (citing articles on debate over “discretionary remedialism” (citation omitted)); Rendleman, *supra* note 26, at 64 (citing articles devoted to discretion in substance, procedure, and jurisprudence); see also NEWMAN, *supra* note 6, at 15–16 (citing “equality” as one of the necessary virtues of justice (quoting FREDERICK POLLOCK, JURISPRUDENCE 37 (5th ed. 1923))); Robert G. Bone, *Who Decides?: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1975–2002 (2007) (questioning trial judge discretion to properly administer procedure); Main, *supra* note 349, at 444 (“[T]here is no more fundamental social interest than that law should be uniform and impartial.” (citation omitted)). Notably, the lack of reconciliation between relevant legal and equitable bodies of law is also detrimental to the certainty and predictability of law. See Anenson, *supra* note 327, at 205; Gergen, *supra* note 324, at 1221–22.

354 See Anenson, *supra* note 3, at 508 (commenting that the defense has “served as a significant safety valve in equity cases for more than two hundred years” and arguing that the rule of relatedness provides a reasonable prescription for the application of the defense (citation omitted)); accord Smith, *supra* note 20, at 38 (discussing the relationship between equity and law and noting that discretion is not necessarily an injustice); see also Anenson,

the abstract to the particular and *placed*.³⁵⁵ Eliminating an arbitrary and irrational legal barrier to unclean hands—a doctrine that is by turns formal and experimental, discursive and fragmentary—will allow courts to build, at the intersection of appearing law and disappearing equity, a defense that may account for and preserve the integrity of both.³⁵⁶

CONCLUSION

The merger of law and equity may not have remade the world of civil procedure, but it changed the terms of discourse sufficiently that

Process-Based Theory of Unclean Hands, *supra* note 4, at 562 (noting that attempting to eradicate unclean hands from our case law is not within the realm of reality as lawyers are asserting it and some courts are listening). In addition to litigant protection, the defense of unclean hands also serves the interests of the court in providing a fair and impartial administration of justice. *Id.* at 522–41 (discussing primary purpose of unclean hands is court protection and proposing a process-based theory of application).

³⁵⁵ Wilson Huhn's insight was that standards evolve into rules through the use of formalistic analogies that identify the factual similarities in the cases that apply the standard. *See* Wilson Huhn, *The Stages Of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 378–79 (2003). Rules evolve into standards through the use of realistic analogies that identify the interests justifying exceptions to the rule. *Id.* at 307 (proposing that precedent bridges the transition between formalism and realism and vice versa); *see also* Anenson, *supra* note 314, at 643–51 (illustrating the phenomena in cases considering the equitable defense of estoppel); *cf.* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1072 (2003) (“Allowing an issue to be hashed out multiple times compensates for the imperfections—the very humanness—in the process of decisionmaking. It allows the courts to see a more complete picture before rushing to judgment.”).

³⁵⁶ *See* Smith, *supra* note 20, at 27 (calling for a balanced approach to the fusion of law and equity). Stephen Burbank explained:

We have been fortunate that our system has included, most of the time and in most American jurisdictions, both law and equity, each of which requires the other and both of which, in combination, have helped us over more than two hundred years to make social and economic progress. That progress has often not come easily, and there is much of it still to be made.

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, 1346 (2000); *see also* Hedley, *supra* note 353, at 87 (“A certain amount of theoretical incoherence is a necessary price for allowing both common law and equity to develop; allowing both to develop is necessary if they are not to become irrelevant to the needs of today.” (citation omitted)). Emily Sherwin reminds us that there is restraint in the common law construction process. Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1186–97 (1999) (explaining the benefits of judge-made law as providing numerous data for decision-making, representing the collaborative efforts of judges over time, correcting the biases that might lead judges to discount the force of precedent, and exerting a conservative force in the law to change at a gradual pace); *see also* Anenson, *supra* note 314, at 659–60 (discussing how equitable defenses are “built brick by brick on the backs of numerous judges bound by past precedents in saying what the law is—one case at a time” (citation omitted)).

expectations have been simultaneously raised and dashed.³⁵⁷ Even the Herculean efforts of scholars have not been able to write the labels “law” and “equity” into non-existence.³⁵⁸ And in the ensuing confusion over the status of unclean hands at law, conflicting decisions rule the day.³⁵⁹

This Article has analyzed past and present adjudications of unclean hands that may have implications for its future. The digression into court decisions is an effort to explain the doctrinal role of the defense in legal cases. Assessing these episodes of adoption additionally helps to diagnose the impasse about the meaning of the merger in state and federal civil procedure that is at the heart of the debate over the legal incorporation of unclean hands. To be sure, the foregoing case-based analysis shows how competing concepts of “law and “equity” crash into each other, leaving behind the smoking wreckage of dogma. The continued reliance on fictions

357 See Burbank, *supra* note 356, at 1292 (“It did not take long after Professor Chayes celebrated the triumph of equity in public law litigation to recognize that the announcement was premature—part prophecy, partly unfulfilled—at least if equity meant what he thought or hoped it meant.” (citations omitted) (internal quotation marks omitted)); accord Edelman, *supra* note 313, at 380 (“[T]he dream has been a long time coming.’ It seems, in Australia at least, that the dream still has some time to come.” (quoting Justice Mason of the New South Wales Court of Appeals in reference to Maitland’s prophesy)); see also Mason, *supra* note 313, at 17 (listing examples of judges who “fashioned new principles applicable at common law or equity by drawing upon the companion body of law”); Smith, *supra* note 25, at 26 (citing Mansfield and Blackstone as passionate advocates of substantive fusion). Compare Clark, *supra* note 18, at 2 (“The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law” (quoting FREDERIC WILLIAM MAITLAND, EQUITY 20 (1910))), and Sward, *supra* note 151, at 385 (discussing how the original drafters of the Field Code intended to abolish “not only the *forms* but the “inherent” distinctions’ between law and equity” (citation omitted)), with T.A. GREEN, A GENERAL TREATISE ON PLEADING AND PRACTICE IN CIVIL PROCEEDINGS AT LAW AND IN EQUITY UNDER THE CODE SYSTEM 51–52 (1879) (advising that the “substance of [common law and equitable actions] remains unchanged and wholly unchangeable, and cannot be united, fused or commingled into one by any human legislation”); see also NEWMAN, *supra* note 6, at 53 (“reform . . . came too soon” for the newer equitable doctrines (quoting Roscoe Pound (citation omitted), Address before the Nebraska State Bar Association (Nov. 24, 1908))); Anenson, *Process-Based Theory of Unclean Hands*, *supra* note 4, at 517–18 (“Despite the rhetoric of completing the union of law and equity, procedural reform was initially interpreted by most courts to forever bar this presumably substantive defense in legal cases.” (citations omitted)); Pound, *supra* note 18, at 26.

358 As discussed *supra* note 26 and accompanying text, Zechariah Chafee, and more recently, Douglas Laycock, have advocated the removal of the labels “law” and “equity” since unification. See *supra* note 350 (referencing Judge Posner of the US Court of Appeals for the Seventh Circuit, and Justice Mason of the Court of Appeals of New South Wales, Australia); accord ANDREW BURROWS, FUSING COMMON LAW AND EQUITY: REMEDIES, RESTITUTION AND REFORM 44 (2002) (Hochelaga Lectures 2001) (asserting “to see the two strands of authority, at law and in equity, moulded into a coherent whole” (citation omitted)); Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 OXFORD J. LEGAL STUD. 1, 4 (2002); see also Smith, *supra* note 25, at 22–23 (noting that “terminological fusion, non-substantive in itself, is liable to lead to substantive fusion”).

359 See discussion *supra* Parts I–II; cf. Mason, *supra* note 313, at 14 (noting confused state of equity in Australia due to lack of principled fusion).

developed during a long–obsolete form of judicial organization is the very antithesis of the time–honored tradition of equity in law.³⁶⁰

Understandably, law–equity talk will be abandoned when new arguments are sufficiently established to stand on their own.³⁶¹ Yet judges must be receptive to the idea of unclean hands at law for these new notions to take root. Roscoe Pound advised that decisional rules will not change until the picture of the law also changes in the minds of judges.³⁶² Unfortunately, given the number of cases rejecting or accepting unclean hands at law without discussion, the depiction of unclean hands in legal cases seems to be gathering “more dust than light.”³⁶³ Surveying the legal landscape through the lens of unclean hands is meant to spotlight the debate to allow an accurate view of the defense that will (hopefully) stimulate contemplation over its social utility in the future.

Equity is hard law.³⁶⁴ The surprising absence of scholarly commentary on

360 See, e.g., Hohfeld, *supra* note 10, at 567 n.23 (explaining that equity resulted in “a liberalizing and modernizing of the law” (citation omitted)); Laycock, *supra* note 26, at 67–68 (explaining that common law without equity would have been a functioning system, but in many applications it would have been “barbarous, unjust, absurd” (quoting 1 FREDERICK WILLIAM MAITLAND, *EQUITY* 19 (2d ed. 1936))); Mason, *supra* note 26, at 74 (commenting that “the Court of Chancery flowered ‘to soften and mollify the Extremity of the Law’” (citation omitted)); Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 350 (1905) (concluding that “the rise of the court of chancery preserved [our legal system] from medieval dry rot”); see also Oliver Wendell Holmes, *Early English Equity*, 1 LAW.Q. REV. 162, 162–63 (1885) (discussing substantive doctrines developed in chancery); cf. Laycock, *supra* note 26, at 67 (calling equity without common law “a castle in the air” given that the imposition of equitable duties presupposed legal rights (quoting MAITLAND, *supra*)).

361 Laycock, *supra* note 317, at 693; see also CARDOZO, *supra* note 318, at 35 (stating that the justification of judicial decisions ultimately depends on the judgment of lawyers).

362 See Pound, *supra* note 334, at 660; accord Hohfeld, *supra* note 10, at 557 (noting how modes of thought and language may perpetrate the old dual system long after the merger of law and equity).

363 *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 698 (2d Cir. 1966) (Judge Friendly writing for the majority) (discussing the irreparable injury rule of remedies). It would be better that courts address the matter of unclean hands at law directly and correctly. See generally Anenson, *supra* note 3, at 508–09 (calling for such explicit recognition of unclean hands in legal cases); see also HUHNS, *supra* note 315, at 63 (“The disclosure of the true reasons for a decision performs a valuable function: the stated premises of the law will over time be empirically tested” (citation omitted)); Karl Llewellyn, Book Reviews, 52 HARV. L. REV. 700, 703 (1939) (reviewing O. PRANSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)) (emphasizing that “[c]overt tools are never reliable tools”); NEWMAN, *supra* note 6, at 261 (noting that the indirect method of adoption is a form of common law resistance to the expansion of equity that retards wider acceptance of the doctrine).

364 The difficulty of equity is recognized even in those countries that continue a strong equity tradition. Justice Gummow of the High Court of Australia explained that “[e]quity is hard law, even to those who have spent much of their professional lives wrestling with it.” William Gummow, *Conclusion, in EQUITY IN COMMERCIAL LAW*, *supra* note 20, at 515, 518. Disputes raising equitable theories tend to be legally and factually complex. See generally DOUG RENDLEMAN, *COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT* (2010). The complicated nature of cases raising equitable issues is due in part to

the fusion of equitable defenses has no doubt contributed to the differing decisional law of unclean hands in cases seeking legal relief.³⁶⁵ With the issue *sui generis* in many jurisdictions, the doctrinal analysis provided in this Article may be a reference for those courts that find themselves suspended between progress and tradition, unable to move authoritatively in either direction.³⁶⁶ Of course, the hermeneutic delay of our case law system means that whether unclean hands is a dinosaur or a phoenix can only be known in the fullness of time.³⁶⁷ The foregoing case-based analysis is intended to enable an informed choice through the exploration of the methodological stances of modern jurists who, like ancient chancellors, devote their energies and compassion to the search for just solutions.

the historical content of the rules themselves as well as their foundation in philosophy. *See, e.g.,* Re, *supra* note 342, at iv, xii (commenting that no other subject “offers as rich an opportunity to delve into problems of jurisprudence and the philosophy of law as does equity”). US Supreme Court jurisprudence on equitable issues has been far from clear or accurate. *See, e.g.,* Langbein, *supra* note 344, at 1338–66 (criticizing historical errors of the US Supreme Court concerning what theories arose in equity in ERISA litigation); Laycock, *supra* note 13, at 168 (citing the Supreme Court’s confusion over the tests for permanent and preliminary injunctions in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), as “a spectacular example of the confusion that can result from litigating a remedies issue without a remedies specialist”). *See also supra* note 24.

365 Twenty-five years before my research regarding the fusion of unclean hands at law, *see* Anenson, *supra* note 3; Anenson, *Process-Based Theory of Unclean Hands*, *supra* note 4, there was a student note addressing the topic. *See* Lawrence, *supra* note 317; *see also* Rose, *supra* note 104 (note discussing fusion of unclean hands in Oregon).

366 *See* Llewellyn, *supra* note 335, at 991 (discussing Llewellyn’s confidence that legal scholarship can contribute to the improvement of doctrine); Mason, *supra* note 26, at 61 (commenting on the influence of judges and academics on the issue of fusion and the progress of the law); *see also* Emerson H. Tiller & Frank B. Cross, Essay, *What is Legal Doctrine?*, 100 Nw. U. L. Rev. 517, 532–33 (2006) (“Do legal scholars play a role in limiting the use of certain legal doctrines or, perhaps, introducing or endorsing legal doctrines that courts will use?”). Even in those jurisdictions that have a single precedent rejecting unclean hands in cases seeking legal relief, courts should reconsider its application at law. *See* Barrett, *supra* note 355, at 1072–74 (proposing that the precedential value of “thin” versus “thick” precedent is different in that “[i]t is the existence of the line of cases, not any one case, that gives a proposition its force”).

367 Patterson, *supra* note 327, at 272 (“Lawyers have always recognized the effects of ‘hermeneutic delay’—that is, the meaning of today’s precedent can only be known in the fullness of time.” (citation omitted)). Of course, there is the remote possibility of legislative correction explicating that unclean hands is available against causes of action seeking legal relief.