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Introduction

Equity, in America at least, has fallen on hard times. From antiquity to the end of the nineteenth century, equity was one of the enduring legal subjects.[1] By the mid-twentieth century, however, it had largely been forgotten in the United States. Contributing to its demise was the unification of law and equity courts and their procedures.[2] The study of equity was later relegated to a remedies course and scattered among the many legal topics in the contemporary law school

[1] The regimes of law and equity began with the royal prerogative of English kings to do justice in any case between their subjects. Roger L. Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 90–91 (1934). Over time, it became customary for the king to delegate his authority to administer justice to his secretary, the chancellor. William F. Walsh, *Equity Prior to the Chancellor's Court*, 17 GEO. L.J. 97, 100–06 (1929). The chancellor was the head of Chancery and a great officer in the nature of a secretary of state or prime minister. Garrard Glenn & Kenneth R. Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 761 (1945). The process of referring petitions to the chancellor was common at the time of Edward I, but it was Edward III in 1349 that confirmed the procedure and ordered the chancellor to base his decision on "Honesty, Equity, and Conscience." 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA §§ 33–35, 38–40 (Spencer W. Symons ed., Bancroft-Whitney 5th ed. 1941). The High Court of Chancery emerged as a separate forum for the administration of equity in the fourteenth century. RALPH A. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 22–23 (1961); *see also* 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW 3 (2d ed. 1898) (explaining that Chancery was known at that time as the *Curia Cancellariae*). The court began as a marble table and chair at the upper end of Westminster Hall on the right hand side of the entryway, opposite to the King's Bench on the left. Glenn & Redden, *supra*, at 762 (citing 1 JOHN LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS 206 (1878)). The rules that were administered in that court came to be known as equity due to derivation from the Latin *aequitas* or leveling. PHILIP S. JAMES, INTRODUCTION TO ENGLISH LAW 29 (8th ed. 1972). For a discussion of the historical evolution of the separate judicial systems, see ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 27 (1921).

[2] The Field Code in New York abolished common law forms and united law and equity in a simplified procedure in 1848. Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 314 (1988); discussion *infra* Chapter 4. It precipitated the merger in other states and eventually the federal

curriculum.[3] Not surprisingly, scholarship on American equitable principles waned in the wake of these phenomena.[4] Court confusion over equitable principles soon followed.[5] Consequently, while the merger of law and equity was billed as the triumph of equity,[6] it appeared to be nothing more than a caricature. Roscoe Pound was prescient when he claimed that "reform came too soon"; that is, before the integration of law and equity had been accomplished through the judicial method.[7]

But the world may be turning again. New federal and state cases have highlighted the enduring significance of equity. As such, American legal scholars are beginning to study and reflect on the subject that might herald the revival of one of England's most remarkable inventions.

This book addresses an important modern question about ancient equity jurisprudence. It investigates the availability and desirability of equitable defenses to prevent legal remedies, with a particular focus on the clean hands doctrine.

For centuries, judges have relied on their discretion when considering whether equitable defenses preclude actions seeking legal relief. As part of that process, courts have incorporated many equitable defenses into the law.[8] This trend is known

system. Subrin, *supra*. The formal separation of law and equity procedure in the federal system was not eliminated until 1938 when the Federal Rules of Civil Procedure went into effect. *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 929 (1987). There is no current, comprehensive historical description of the fusion of law and equity in the United States. *See* George P. Smith II & Walter W. Nixon III, *La Dolce Vita: Law and Equity Merged at Last!*, 24 Ark. L. Rev. 162, 176–77 nn.54–56 (1970) (surveying authorities and showing inconsistencies over which states belong to which classes of equity jurisdiction).

For an account of the virtually simultaneous reform effort underway in England culminating in the abolishment of the Court of Chancery, see, for example, Gunther A. Weiss, *The Enchantment of Codification in the CommonLaw World*, 25 Yale J. Int'l L. 435, 486–88 (2000) (discussing an 1828 speech by Lord Brougham as the catalyst for procedural change); Mr. Justice Lurton, *The Operation of the Reformed Equity Procedure in England*, 26 Harv. L. Rev. 99, 100–01 (1912) (discussing the English Judicature Acts of 1873 and 1875).

3 *See* Edward D. Re, *Introduction* to Selected Essays on Equity xiv (Edward D. Re ed., 1955) ("[T]he elimination of a separate course in equity in many of the law schools in the United States has caused much that is truly valuable in the study of equity to be either completely lost or scattered to the point of useless dilution in various courses."); Douglas Laycock, *Remedies: Justice and the Bottom Line Introduction*, 27 Rev. Litig. 1, 7 (2007) (explaining that the prior courses in equity, damages, and restitution were combined into a single course in remedies (summarizing Douglas Laycock, *How Remedies Became a Field: A History*, 27 Rev. Litig. 161 (2008)) [hereinafter Laycock, *How Remedies Became a Field*].

4 T. Leigh Anenson, *Public Pensions and Fiduciary Law: A View from Equity*, 50 U. Mich. J.L. Ref. 251–90 (2017); Zechariah Chafee, Jr., *Foreword* to Selected Essays on Equity, *supra* note 3, at iii ("The absence of a collection of leading articles on Equity has long been a serious lack among law books."); discussion *infra* Chapter 2.

5 *See* discussion *infra* Chapters 3–5.

6 *See* Douglas Laycock, *The Triumph of Equity*, 56 Law & Contemp. Probs. 53, 53 (1993); *infra* Chapters 2 and 3.

7 Newman, *supra* note 1, at 53 (quoting Roscoe Pound, *The Etiquette of Justice* 3, in address before the Nebraska State Bar Association, Nov. 24, 1908).

8 *See* 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, 979–80 (2010); discussion *infra* Chapters 2 and 4.

as "fusion." And commonlaw legal systems throughout the world have experienced fusion – from the United States to England to Australia. This concept is noteworthy because it informs much of our jurisprudence: "The evolution of law is to a large extent the history of its absorption of equity."[9]

Despite this trend, some state and federal courts reject fusion. Historically, law and equity occupied carefully delineated spheres.[10] In that context, unclean hands – like

[9] Newman, *supra* note 1, at 255.

[10] Early American courts were modeled upon the dual English system, with separate courts given jurisdiction to administer law and equity. *See, e.g.*, William F. Walsh, Outlines of the History of English and American Law 69–70 (1923); George Tucker Bispham, Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery 26 (Baker, Voorhis & Co., 11th ed. 1934) (advising that many state constitutions provided for the establishment of a separate equity court patterned after the High Court of Chancery in England). For a hundred years before the Revolution, however, equity had been bitterly attacked in a majority of the colonies. Charles Warren, *New Light on the History of the Federal Judiciary Act*, 37 Harv. L. Rev. 49, 96 (1923); *see* Calvin Woodward, *Joseph Story and American Equity*, 45 Wash. & Lee L. Rev. 623, 641 (1988) (explaining that equity was not popular because "one of the most common grievances in the colonies was the arbitrary and capricious behavior of Crown officials"). Massachusetts, not surprisingly, never had equity courts, and its trial court was not permitted to exercise equity power until 1870. Frank August Schubert, Introduction to Law and the Legal System 12 (2014). Moreover, during the colonial period, chancery courts, common law courts, and legislatures had equity powers. *See* S.D. Wilson, *Courts of Chancery in the American Colonies*, 779, *in* 2 Select Essays in Anglo-American Legal History (AALS ed. 1908); Sidney G. Fisher, *The Administration of Equity Through Common Law Forms in Pennsylvania*, *id.* at 810. Professor Warren summarizes the status of fusion in 1787 when the Constitution was drafted:

> There were Courts of Chancery . . . in New York, South Carolina, Maryland, Virginia, and to some extent New Jersey; in Pennsylvania, Delaware and North Carolina, there were no such courts, though the common law courts had certain equity powers; in Connecticut and Rhode Island the Legislature exercised some powers of the Court of Chancery; in Massachusetts and New Hampshire, there were common law courts only, having a few very limited equity powers; Georgia had only common law courts.

Warren, *supra*, at 96; *see also* Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6 N.C. L. Rev. 283, 284 (1928) ("[C]hancery and the admiralty retained their separate existence in most colonies, and even these failed to take root in some of the colonies."). At the time of the adoption of the Constitution in 1790, the majority of states administered equity in chancery courts as a system separate from the common law. *Id.* at 283–84. States entering the union also established chancery courts. Henry M. Utley & Byron M. Cutcheon, Michigan as a Province, Territory and State: The Twenty-Sixth Member of the Federal Union 94–95 (1906) (outlining the creation and abolishment of Michigan's equity courts for a ten-year period from 1836–47). Therefore, equity had separate courts, judges, and procedures. Congress did not create separate national courts of law and equity in the federal system yet provided for different procedures for their administration. *See* McCormick, *supra*, at 284; Robert von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. Pa. L. Rev. 287 (1927); *see also* Jesse G. Reyes, *The Swinging Pendulum of Equity: How History and Custom Shaped the Development of the Receivership Statute in Illinois*, 44 Loy. U. Chi. L.J. 1019, 1034 (2013) ("One of the leading Chancery lawyers of the period [after independence], Alexander Hamilton, was an outspoken proponent of equity jurisdiction in the federal courts.").

Most state systems gradually integrated law and equity within one court but allowed for their administration by separate procedural rules. *See* Wesley Newcomb Hohfeld, *The Relations*

other equitable defenses such as laches – was used almost exclusively to deny equitable relief.[11] But the law is not stagnant. Law and equity have also merged. Since the merger, judges have applied the clean hands doctrine to bar legal relief in both commonlaw and statutory actions.[12] Courts holding otherwise generally do so without citing any authority, by clinging to outdated case law predating the union of law and equity, or by misunderstanding the meaning of the merger.[13] In these jurisdictions, then, the merger was just a means of attaining freedom but not synonymous with it.

By studying discretionary limits on legal remedies, this book adds an American perspective to the current and contentious conversation about fusion in the Commonwealth.[14] The narrative provides a descriptive and normative account of

between Equity and Law, 11 MICH. L. REV. 537, 549 (1913) (relating the three versions of the administration of equity as two courts, two procedures such as in New Jersey, one court and two procedures like in Illinois and the federal system, and one court and one procedure as found in New York and California); McCormick, *supra* note, at 284 (explaining that thirty of forty-eight states had merged their courts and procedures by 1928); *supra* note 2. Some states did not merge law and equity until the twenty-first century. Arkansas merged its law and equity courts in 2000. John J. Watkins, *The Right to Trial by Jury in Arkansas After Merger of Law and Equity*, 24 U. ARK. LITTLE ROCK L. REV. 649, 649 (2002). Virginia did not merge its law and equity courts until 2012. Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1402 (2016) [hereinafter Rendleman, *Stages of Equitable Discretion*].

Today, six states (Delaware, Illinois, New Jersey, South Carolina, Tennessee, Mississippi) preserve separate courts (or divisions) of law and equity. *See* T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455, 456 n.5 (2008) [hereinafter Anenson, *Treating Equity Like Law*]; *see also* Samuel L. Bray, The *System of Equitable Remedies*, 63 UCLA L. REV. 530, 537 (2016) (noting that Georgia distinguishes equity for trial and appellate jurisdiction and that Iowa has unified courts that administer what the state constitution calls "distinction and separate jurisdictions" for law and equity). South Carolina, for instance, has special masters-in-equity courts in certain counties which are a division of the circuit court. S.C. CODE ANN. § 14–11-10 *et seq.* Illinois separates law and equity in Cook County. *See Chancery Division*, CIR. CT. COOK COUNTY, (last visited Feb. 10, 2018) http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/ChanceryDivision.aspx (noting that the Chancery Division of the Circuit Court of Cook County is established pursuant to General Order 1.2, 2.1 (b) [amended, effective Jan. 1, 2008] of the General Orders of the Circuit Court of Cook County and is divided into two sections: General Chancery Section and the Mortgage Foreclosure/Mechanics Lien Section); *see also* Roger L. Severns, *Equity and Fusion in Illinois*, 18 CHI.-KENT. L. REV. 333, 358 n.79 (1940) (surmising that in Cook County the designation of certain judges as chancellors for the term made the separation probably more complete there than elsewhere in the state). New Jersey has separate divisions of law and equity in the same court. *See* N.J. REV. STAT. § 4:3–1(a)(1) (2018). Delaware, Tennessee, and Mississippi continue to have courts of chancery. Del. Code Ann. tit. 10 § 341 (2014); Miss. Const. art. VI § 159; Tenn. Code Ann. § 16–11-101 (2018); *see also* Rendleman, *Stages of Equitable Discretion*, *supra*, at 1402 ("Delaware Chancery, the nation's premier business court, will be with us for the foreseeable future.").

[11] *See* discussion *infra* Chapters 3 and 4.

[12] *See* discussion *infra* Chapters 3 and 4.

[13] *See* discussion *infra* Chapters 3 and 4.

[14] *See* Keith Mason, *Fusion: Fallacy, Future or Finished?*, *in* EQUITY IN COMMERCIAL LAW 41, 75 (James Edelman & Simone Degeling eds., 2005) (Justice Keith Mason, New South Wales Court of Appeals) ("Debate about the fusion of law and Equity goes back for centuries.").

the equitable maxim of unclean hands. Its storyline clarifies the conflicting case law and advances the idea of a principled fusion of law and equity. The book's broader aim is to demonstrate a need for equity – its cultivation, preservation, and celebration.

1.1 OVERVIEW OF THE BOOK

This book addresses the following question: Can and should the equitable defense of unclean hands be available to bar legal relief including damages? *Yes*.

For hundreds of years, the defense of unclean hands has prevented recovery for equitable (and not legal) relief. In spite of the dirt on their hands, litigants could still be compensated in damages. Even the union of law and equity did not dislodge the defense from its confinement to equity actions. Fifty years ago, however, state and federal courts in the United States began to apply the defense regardless of the remedy requested. The doctrine now precludes a wide variety of common law and statutory claims.

America's break with tradition is a narrow axis upon which to engage the wider debate over the legitimacy of using once exclusively equitable principles in law. The movement of unclean hands across the law–equity divide provides evidence upon which to test the philosophical and practical foundations for and against fusion. Drawing attention to the use of the unclean hands defense in the United States also provides an in-depth look at a doctrine that has been discredited and disregarded. This book attempts to scrape off and refurbish the clean hands doctrine by demonstrating not only the defense's appropriateness in curtailing damages but also its continued importance today.

After introducing the clean hands doctrine, this book examines the corpus of cases incorporating unclean hands into the common and statutory law in the United States. It provides an extensive explanation of unclean hands in legal cases by looking more closely at the defense's doctrinal underpinnings. Describing the arguments and justifications in the debate over the legal status of unclean hands seeks to inform this divisive issue and aid its resolution. The availability of unclean hands in damages actions has not been the subject of sustained analysis at an appellate level in state and federal law. It remains unresolved in many jurisdictions, with other courts addressing the issue in error or through oversight. Judges have also expressed their frustration with the lack of doctrinal and theoretical scholarship

A conference on the interplay of common law and equity in modern commercial law was held in Sydney, Australia, in December 2004, culminating in a book of essays on the topic of fusion with case examples from England, Australia, New Zealand, and Canada. James Edelman & Simone Degeling, *Introduction* to Equity in Commercial Law, *supra*. Another conference, "Law and Equity: Fusion and Fission," was held more recently at St. Catharine's College, Cambridge.

considering the availability of unclean hands to bar legal remedies.[15] The book aims to end the arbitrariness and judicial extremes on the subject of unclean hands in an effort to unify this fragmented area of law.

Identifying the reasons behind the rules adopting or rejecting the clean hands doctrine at law, this research clarifies the meaning of the law–equity merger in federal and state civil procedure. It suggests that the unification did not prevent courts from adopting the defense in lawsuits seeking legal remedies on a case-by-case basis. It further directs courts to be sensitive to whether the application of the defense is consistent with its purposes and does not otherwise defeat the purposes of the asserted claim. Along with advocating substantive fusion on a principled basis, this book provides an alternative way of fusing the unclean hands defense as a matter of procedure. It further derives a decision-making framework for distinguishing substance from procedure going forward.

It additionally engages the debate over law–equity integration. During the centuries following the merger of law and equity, there has been a vigorous discussion about the relationship between these two traditions in the United States and the rest of the common law world.[16] These so-called fusion wars advance diverse views about the role of law and equity in the current legal framework.[17] Battlegrounds have been drawn on an array of subjects like property, remedies, choice of law, fiduciaries, and unjust enrichment.[18] This book includes the equitable doctrine of clean hands in that conversation.

The value of equity is up for fuller explication in American law. Equitable defenses are fundamental conceptions of equity jurisprudence.[19] Yet seldom are they the focus of study in the modern law school curriculum.[20] Attorneys who began

[15] *See, e.g.*, Unilogic, Inc. v. Burroughs Corp., 12 Cal. Rptr. 741, 745 (Cal. Ct. App. 1992) (commenting on the lack of relevant authorities and precedents in considering the availability of unclean hands to bar a legal claim).

[16] Beverley McLachlin, *Introduction* (Chief Justice, Canadian Supreme Court) ("[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."), *in* Equity in Commercial Law, *supra* note 14, at vii, vii; Tiong Min Yeo, *Choice of Law for Equity* ("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."), *in* Equity in Commercial Law, *supra* note 14, at 147, 150.

[17] McLachlin, *supra* note 16, at vii (using the phrase "fusion wars" to refer to the discussion of the relationship of law and equity).

[18] *Id.* at vii; Mason, *supra* note 14, at 65 (explaining that in Australia, Canada, and New Zealand, the question of whether damages are appropriate for breach of an exclusively fiduciary duty has been a catalyst for discussion about the fusion of law and equity).

[19] *See* 1 Dan B. Dobbs, Dobbs Law of Remedies: Damages-Equity-Restitution § 2.10, 247–48 (2d ed. 1993) (discussing unclean hands, laches, and estoppel as a basis for refusing injunctive relief).

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

their legal education prior to the 1970s may recall that equitable defenses like unclean hands are typically used to prevent opportunism.[21] They may also remember that these maxims rest on sound moral principles such as prohibiting litigants from taking advantage of their own wrong and protecting the judicial system.[22] They may even recollect that doctrines like clean hands usually operate *ex post* rather than *ex ante* to allow judges discretion and flexibility in adjusting case outcomes.[23]

With a focus on the fusion of law and equity, this inquiry will analyze ancient equity in the modern context and "the abstention courts exercise under the shorthand phrase 'unclean hands.'"[24] Tracing the integration of unclean hands into damages actions provides an important opportunity to explore the defense itself as

of a Course in Equity, 8 J. Legal Educ. 422, 422 (1955) (criticizing a trend of law schools that do not offer a separate course in equity), *with* 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). *See also* Doug Rendleman, *Remedies: A Guide for the Perplexed*, 57 St. Louis U. L.J. 567, 572 (2013) [hereinafter Rendleman, *Remedies*] (noting that Virginia and Delaware continue to test equity on the bar exam).

[21] There are a variety of equitable defenses utilized in an almost infinite range of contexts. As such, any attempt to capture their essence is necessarily incomplete. Some simplification is useful, however, and the idea of opportunism probably best captures the spirit of the defenses discussed in this book. For opportunism as a general theory of equity, *see* Henry E. Smith, *Why Fiduciary Law Is Equitable*, *in* Philosophical Foundations of Fiduciary Law 261 (Andrew S. Gold & Paul B. Miller eds., 2014) ("This chapter will argue that a functional theory of equity – of equity as a decision-making mode aimed at countering opportunism – captures the character of fiduciary law."). For remedies as correcting for party opportunism, *see* Mark P. Gergen, John M. Golden, & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 Colum. L. Rev. 203, 237 (2012) ("A major theme in equity has been the need to correct for party opportunism and injunctions partake of this overarching purpose.") For equitable defenses aimed at the prevention of opportunism, *see* T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 Am. Bus. L.J. 1, 62–63 (2005) [hereinafter Anenson, *Role of Equity*] (discussing how equitable defenses prevent double standards and duplicity); Anenson & Mayer, *supra* note 8 (advocating the use of unclean hands to prevent company executives' unfair advantage-taking in their employment contracts). For another explanation of equitable defenses, *see* Sheelagh McCracken, *Marshalling: A Case Study in Complexity*, at 96–111, *in* Private Property and Remedies (Russell Weaver & Francois Lichere eds., 2015) (theorizing equitable defenses in commercial law as mechanisms of financial risk allocation).

[22] *See* discussion *infra* Chapter 2 (explaining rationales of unclean hands); T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 Rev. Litig. 377, 388 (2008) [hereinafter Anenson, *Triumph of Equity*] (explaining rationale for estoppel as doing unto others as you would have them do unto you).

[23] *See* Anenson, *Treating Equity Like Law*, *supra* note 10, at 508 (discussing the role of equitable defenses as a significant safety valve); *The Cleansing Power of Equity*, 11 Research@Smith 4, 5 (Fall 2010) https://www.rhsmith.umd.edu/news/researchsmith-fall-2010 (remarking that equitable defenses operate *ex post* rather than *ex ante*) (reviewing Anenson & Mayer, *supra* note 8); *see also* Henry Smith, *The Equitable Dimension of Contract*, 45 Suffolk U. L. Rev. 897, 907 (2012) (explaining *ex post* operation of equitable estoppel and unclean hands).

[24] Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944) (Frankfurter, J., and Roberts, J., dissenting).

well as the forgotten relationship between law and equity.[25] Therefore, this book advances the practice of equity and its seminal principles. It likewise influences theory by reducing the size of the substantial gap in our understanding of modern American equity.[26]

Investigating the muddle of opinions integrating equitable defenses into legal relief is difficult and time consuming. But doing so provides greater understanding of this outwardly chaotic and contested case law. It must be emphasized that equity has not been earmarked for separate study in the United States.[27] During the previous century, it failed to benefit from the laborious process of systemization undertaken in other areas of judge-made law.[28] Because much less preliminary work has been done on equitable doctrines than those of the common law, the task of restating its principles and precedents is even greater.

Clarifying the meaning of the merger enhances predictability by reducing mistakes in decisions and making them more understandable. These outcomes should enhance judicial legitimacy. Moreover, deriving a clear method of incorporating unclean hands into the law allows courts to focus attention on the equally arduous task of applying the defense. It should also enable better observation and comparison in developing principles of judicial discretion.[29] Further, it highlights the need for across-the-board research on unclean hands, and equitable defenses generally,

[25] Unclean hands originated in private law, and many of the Supreme Court decisions analyze the defense in that context. The equitable remedial rights doctrine in federal courts, which required federal courts to redress state-created rights with remedies determined by uniform federal equity jurisdiction, was neither preserved by the merger of law and equity nor saved by the *Erie* doctrine of the Rules of Decision Act. 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, 1317 (2000) (citing Note, *Equitable Remedial Rights Doctrine: Past and Present*, 67 Harv. L. Rev. 836, 836 (1954)).

[26] *See, e.g.*, T. Leigh Anenson & Gideon Mark, *Inequitable Conduct in Retrospective: Understanding Unclean Hands in Patent Remedies*, 62 Am. U. L. Rev. 1441, 1525 (2013) ("Equity is not lost, for it continues in a steady stream of precedents, but it has ceased being understood."); John R. Kroger, *Supreme Court Equity, 1789–1835, and the History of American Judging*, 34 Hous. L. Rev. 1425, 1427 (1998) (noting the lack of literature on Supreme Court equity jurisprudence and emphasizing that an appreciation of these equity decisions is indispensable to an understanding of the history of American judging).

[27] T. Leigh Anenson, *Announcing the "Clean Hands" Doctrine*, 51 U.C. Davis L. Rev. 1827, 1830 (2018).

[28] In the early twentieth century, the legal community began to develop and clarify other subjects in the private law sphere through *Restatements of the Law*. *See* discussion *infra* Chapter 2, Section 2.6 (identifying which subject areas of the *Restatements* address the clean hands doctrine). The aim of the American Law Institute was to simplify the law to the rules and principles that are to guide the conduct of clients and litigants. *See, e.g.*, Harlan F. Stone, *Some Aspects of the Problem of Law Simplification*, 23 Colum. L. Rev. 319, 334–35 (1923).

[29] *See* Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. Miami L. Rev. 947, 950 (2010) (advising that discretion began receiving scholarly attention only since the late 1960s); Daniel A. Farber, *Taking Costs into Account: Mapping the Boundaries of Judicial and Agency Discretion*, 40 Harv. Envtl. L. Rev. 87, 134 (2016) ("Discretion occupies an oddly neglected place in Anglo-American legal thought.") (quoting

which is virtually nonexistent,[30] and may renew calls for a *Restatement of Remedies* (or Equity).[31] Finally, analyzing the relationship between equity and the law through the lens of unclean hands fosters scholarship in the law of obligations, remedies, and the federal courts.[32] Taken as a whole, this book seeks to enrich our larger social understanding of what medieval equity means in the modern era.

1.2 SUMMARY OF CHAPTERS

The following chapters explain and defend the recognition of the unclean hands defense in damages actions in the United States. After an initial outline of the defense, the book begins by offering a doctrinal account of the scope of authority and discretion to recognize equitable defenses that prevent recovery of legal relief for breaches of judge-made and statutory rights before turning to more theoretical matters.

Judge William A. Fletcher, *The Discretionary Constitution Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 641 (1982)); *see also* Rendleman, *Remedies*, *supra* note 20, at 578–79 ("Discretion in decision-making is a fertile field for inquiry. Careful scholars have published several well-researched and well-reasoned articles calling for discretion in equity."); *id*. at 579 n.57 (citing T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L.J. 509 (2010); Anenson & Mayer, *supra* note 8; T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63 (2011); Anenson, *Treating Equity Like Law*, *supra* note 10).

[30] *See* Anenson & Mark, *supra* note 26, at 1450–52, 1504–05, 1511–12 (endorsing a trans-substantive approach to understanding equitable remedies and defenses). My scholarship is the exception. It has studied the operation of one or more equitable defenses across state and federal statutory and common law. *See*, *e.g.*, T. Leigh Anenson, *Equitable Defenses in the Age of Statutes*, 37 REV. LITIG. 529 (2018) (evaluating the methodology of the U.S. Supreme Court in providing the scope of equitable defenses in federal legislation); T. Leigh Anenson, *Statutory Interpretation, Judicial Discretion, and Equitable Defenses*, 79 UNIV. PITT. L. REV. 1 (2017) (revealing an assumption of equitable defenses under silent statutes and analyzing issues of judicial authority and competence); Anenson & Mark, *supra* note 26 (examining the tradition of unclean hands in light of its evolution in patent law); T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633 (2007) (analyzing equitable estoppel); Anenson, *Role of Equity*, *supra* note 21, at 24–53 (explaining the function of assorted equitable defenses in unfair competition cases). Other scholars that have analyzed equitable defenses tend to focus on one subject such as contracts. *See generally* Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 253–64 (1991) (explaining the purpose of equity in the context of contract enforcement); Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201, 1202 (1990) (exploring both positive and normative perspectives to defend equitable defenses); *see also* Anenson, *Triumph of Equity*, *supra* note 22, at 382 n.14 (listing equitable estoppel literature by subject matter).

[31] *See* Laycock, *How Remedies Became a Field*, *supra* note 3, at 266 ("In the late 1980s, the American Law Institute considered a *Restatement of Remedies*, which would have ensconced the field even more firmly in the legal establishment."); *see also id*. at 172 (explaining that there is a *Restatement of Restitution* that is considered part of the law of remedies).

[32] Equitable defenses are often associated with remedies, but they are also part of private law. Yet the American legal world divides remedies and private law into different domains, where they have developed more or less independently. As such, scholars with unique outlooks and techniques of appraisal tend to study one subject or the other.

The second chapter introduces the clean hands doctrine and provides an overview of it. It travels back in time and across the globe to identify the defense's origins. It traces the development of the unclean hands defense in American decisions as well as its discussion in American literature. The chapter also describes the defense's philosophical foundations and corresponding components.

The third chapter details the development of unclean hands as a defense to legal remedies. It reviews the reception of the doctrine in common law and statutory decisions across the United States and summarizes its status under federal and state law. It also exposes the underlying rationales for and against the absorption of unclean hands to better evaluate the idea of fusion and end the disparate treatment of the defense.

The fourth chapter focuses on the question of whether judges have power to fuse the clean hands doctrine in actions seeking damages. It reconsiders the purpose of the procedural union of law and equity. The unintended effect of the unification is that judges have relied on it to either automatically include or exclude the defense in legal actions. It reconciles these opposing rationales regarding the merger by proposing a new method to resolve the incorporation question. The compromise position suggests a case-by-case approach that is consonant with the text of the merger and the intent of the legislature.

The fifth chapter addresses the issue of whether the unclean hands defense should be available to bar legal relief. It situates the specific issue of remedial coherence for the clean hands doctrine, and equitable defenses generally, within the general debate on the relationship between law and equity that is being engaged in by academics, practitioners, and judges in England, Australia, New Zealand, and Canada. This chapter provides reasons to consider the defense's universal use in law or equity cases. It shows that the labels "law" and "equity" have become obstacles to decisions instead of guides and argues for a commonsense approach to the application of unclean hands that weighs its advantages and disadvantages in a particular case. It concludes that courts should cease discriminating against the equitable defense of unclean hands solely on account of the merger and begin treating equity like law.

The sixth chapter presents a process-based theory of unclean hands. It undertakes an innovative analysis to divide the concept of unclean hands along two dimensions: substance and procedure. This is both novel and significant because the doctrine is commonly assumed to have only a substantive side. The chapter examines the accumulating legacy of court decisions that invoke the defense to defend the litigation process. It demonstrates how judges in cases of fusion are shifting emphasis from the defense's rationale of preventing litigants from benefiting from their own wrong to protecting the court and the integrity of the law. The process-based theory integrates the defense across claims by focusing on its court-protection purpose. It also unifies the disparate treatment of the defense across jurisdictions by providing a procedural paradigm of incorporation. By rethinking the clean hands doctrine from