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## JUDGING EQUITY

T. Leigh Anenson analyzes the scope of judicial authority and discretion to recognize the equitable doctrine of unclean hands as a bar to actions seeking damages in the United States. Bringing an American perspective to the contentious conversation about law–equity fusion in other countries of the common law, Anenson provides a historical, doctrinal, and theoretical account of the defense, analyzes cases in the federal courts and across the fifty states, and places the issue of integration within a broader debate over the fusion of law and equity. Her analysis includes descriptive and normative accounts of the equitable maxim of unclean hands. This groundbreaking work, which clarifies conflicting case law and advances the idea of a principled fusion of law and equity, should be read by anyone interested in equity – its cultivation, preservation, and celebration.

T. LEIGH ANENSON is Professor of Business Law at the Robert H. Smith School of Business, University of Maryland, and Associate Director of the Center for the Study of Business Ethics, Regulation, and Crime. She is an internationally recognized scholar working in American equity law and related areas of remedies, private law, and jurisprudence. Her pioneering research has been building a foundation for equitable defenses in modern litigation.

# Judging Equity

THE FUSION OF UNCLEAN HANDS IN U.S. LAW

**T. LEIGH ANENSON**

Robert H. Smith School of Business, University of Maryland



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*To my parents, for their love and kindness*

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## Preface

This book proceeds from the conviction that American equity is a subject of law worthy of study. At a time when changes in the law are typically assumed to be made by legislatures, vast amounts of law continue to be created by judges. Equity is one such area of judge-made law. Its historically powerful role for the courts in fashioning reforms must never be forgotten. Too little attention has been given to equitable principles and practices in the United States. Equitable defenses, in particular, have largely gone unnoticed. This book is directed at one essential defense – unclean hands.

*Judging Equity: The Fusion of Unclean Hands in U.S. Law* discusses how the clean hands doctrine came alive and whether courts were warranted in bringing it to life. It focuses on the defense's widening scope and influence by tracing its expansion into legal remedies, including damages. It provides the background necessary to understand the defense, summarizes leading cases, and considers questions of what is and should be its definitive qualities. It seeks to explain the persistence and evolution of the problem of fusion, which concerns the viability and desirability of engaging equitable doctrines in legal cases or vice versa. Around the world, disputes and discussions about fusion are ongoing.

This book uses the experience of unclean hands to offer insight into the issue of fusion and suggests lessons it might offer for the future. Along with an examination of the defense itself, there is a more general discussion of equity, especially as it touches on the relations of equity and law. Doubtless some of the challenges inherent in combining exposition and analysis, critique and simplification, remain.

I have been working on this book officially since 2016 and unofficially almost my entire academic life. As a litigator, I was involved in several cases in which equitable defenses impacted the outcome. Yet I searched in vain for commentary on these equitable doctrines and their underlying philosophy. These controversies not only piqued my curiosity about the subject, but also instilled in me a firm belief that



understanding equity is still crucially important. To this end, I am writing the book I wanted to have when I was an attorney.

*Judging Equity: The Fusion of Unclean Hands in U.S. Law* is meant for lawyers, judges, academics, and other members of the legal community. It should also engage anyone attracted to the workings of the law and the achievement of justice. In academia, especially, it should be of interest to scholars outside the United States working within systems that share our English inheritance of a common law legal system. Within the United States, it is my hope it will at least encourage others to dig into the topic of equity and further explore the territory that I have mapped out.

## Acknowledgments

The author is indebted to many friends and colleagues, too many to mention, and a host of anonymous reviewers for their valuable comments and suggestions. I am also eternally grateful to the mentors on my academic journey, Larry DiMatteo and George Siedel, for their encouragement and guidance. This book stands on additional shoulders as well, including those of the many other scholars and researchers, both here and abroad, who have taught me so much.

This book would not have been written without the generous support of the Department of Business Law and Taxation, Monash University, including the advice and assistance of Paul Von Nessen, Rick Krever, and Abe Herzberg. Peter Mellor was exceedingly helpful as well. Portions of this book were written during my visiting scholarships and fellowships at the University of Cambridge, the University of Sydney, and the Australian National University. My appreciation to those universities and law faculties for their interest and critical take on the book's arguments. This book additionally benefited from the research assistance of Evan Llewellyn, Matthew Touton, and Faith Harrington.

Research for *Judging Equity: The Fusion of Unclean Hands in U.S. Law* developed through the preparation of a series of law review and journal articles on equitable defenses. Throughout the book, I draw substantially from this work. I express my appreciation to the editors and reviewers of “Announcing the ‘Clean Hands’ Doctrine,” Vol. 51, *U.C. Davis Law Review* 1827–1890 (2018); “Equitable Defenses in the Age of Statutes,” Vol. 37, *University of Texas Review of Litigation* 529–579 (2018); “Statutory Interpretation, Judicial Discretion, and Equitable Defenses,” Vol. 79, *University of Pittsburgh Law Review* 1–59 (2017); “Limiting Legal Remedies: An Analysis of Unclean Hands,” Vol. 99, *Kentucky Law Journal* 63–118 (2010); “Beyond Chafee: A Process-Based Theory of Unclean Hands,” Vol. 47, *American Business Law Journal* 509–574 (2010); “Treating Equity like Law: A Post-Merger Justification of Unclean Hands,” Vol. 45, *American Business Law Journal* 455–509 (2008).

Wilson Huhn inspired my interest in jurisprudence during law school. To him, I am thankful. I would also like to thank my partners at Reminger Co., L.P.A., who had the audacity to give me authority and otherwise involve me in several cases comprising equitable principles and doctrines. My fellow warriors include Mario Ciano, Bill Farrall, Nick Satullo, and Larry Sutter.

Last, but certainly not least, I enthusiastically acknowledge Matt Gallaway and his staff at Cambridge University Press for their superb editorial assistance. Their meticulous reading of the manuscript, copious comments, and corrections through many revisions strengthened it immensely.