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A NORMATIVE THEORY OF THE CLEAN HANDS DEFENSE

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[...]

I. INTRODUCTION

Given its natural-law “feel” and its moralistic tenor, it is surprising that the clean hands defense (CHD) has attracted so little jurisprudential reflection.

The formulation of the clean hands maxim is well-known: “He who comes into equity must come with clean hands.”1 Yet this language offers little insight into the normativity of the CHD. What is the CHD normatively for or about? More specifically, what values and which norms does the CHD embody or saliently further? What is the moral force of these values and norms? Is the CHD justified? These are the questions this article addresses.

[...]

Upon pointing out the descriptive as well as the prescriptive merits and limitations of the court-integrity account, the article turns to what are two largely undetected key norms I believe the CHD embodies the tu quoque (“you too!” or “you also”) and retribution. The norm of tu quoque captures the widely held conviction that those guilty of wrongdoing are in no position to condemn, judge, criticize, blame, or make claims on others for performing similar or related wrongs. Demonstrating that the CHD and the tu quoque share the same logic and structure, the article argues that the CHD is a legal manifestation of the tu quoque. Accordingly, the CHD is best characterized as a doctrine of standing (Section IV).

[...]

II. THE DOCTRINE OF THE CLEAN HANDS DEFENSE

The CHD manifests the principle that “one cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle, such as good faith.”2 Any willful conduct that is iniquitous, unfair, dishonest, fraudulent, unconscionable, or performed in bad faith may constitute “unclean hands” under the CHD.3 Conduct in violation of the
CHD need not therefore be illegal. A party seeking to obtain an equitable remedy may be denied on the grounds of unclean hands if her conduct violated principles of law, ethics, equity, or morality, even though the claimant would have been entitled to the remedy absent her prior wrongdoing.

[...]

The Oregon Court of Appeals barred relief on the ground of unclean hands, ruling that “[a] conveyance designed ‘for the purpose of placing property beyond the reach of creditors’ constitutes inequitable conduct sufficient to bar relief under the unclean hands doctrine.”

[...]

The Delaware Court ruled that the plaintiffs’ disregard of the ongoing litigation and the violation of the agreement both constituted unclean hands: the plaintiffs’ conduct was ethically dubious as well as closely connected to their motion (the plaintiffs’ prior unethical conduct was designed to obtain exactly the same advances that were the subject of the motion).

[...]

Finally, the CHD is, at least traditionally, a doctrine of equity, applying to parties seeking equitable relief such as injunctions, declarative remedies, and constructive trusts. Under the CHD, even if a plaintiff’s rights in law were violated, she is ineligible for an equitable remedy due to her unclean hands. Some scholars have argued for expanding the CHD beyond equity to legal remedies, and some courts have in fact expanded the doctrine to claims for nonequitable remedies such as damages.

[...]

This position holds that the integrity of the judiciary is compromised when courts assent to, entertain, or even hear petitions and pleadings predicated on or implicated by the claimant’s own wrongdoing. As the Supreme Court put it, the court should not “be ‘the abettor of iniquity.’” Accordingly, a primary interest that the CHD protects is the integrity of the court. In a sense, the integrity account of the CHD rests on a justification concerned with keeping the court’s own hands clean.

[...]

Yet another view of integrity, and the one probably most in line with viewing the CHD as the protector of court integrity, is what is appropriately called the “clean hands conception of integrity.” In this view, integrity in a sense protects a person’s unconditional normative commitments, demarcating the line beyond which a person will not cooperate with what she perceives as evil and will not allow such evil to be furthered through her agency.

[...]
IV. “WHO ARE YOU TO COMPLAIN?” THE CLEAN HANDS DEFENSE AND THE TU QUOQUE

A. The Clean Hands Defense as a Doctrine of Standing

The sanction the CHD imposes is well characterized as a loss of standing to claim a remedy or as a loss of the right to be heard. As Dan Dobbs puts it, the CHD denies a plaintiff’s right of entry. A plaintiff found wanting under the CHD loses her suit/claim/complaint regardless of its merits. It is a doctrine concerned not with the substantive rules determinative of the merits of a complaint but with the conditions for whether those rules are applicable and available to assess those merits. The CHD denies a plaintiff entry, regardless of the substantive or procedural merits of her claim, because that plaintiff is deemed unworthy of having her complaint heard and entertained on its merits. As the famous maxim of the CHD proclaims: “he who comes into equity must come with clean hands” [my emphasis], or in other words, the protections of equity are not available to plaintiffs whose hands are unclean. As such, the CHD is in effect a threshold doctrine or a doctrine of standing setting the conditions for the applicability and availability of the substantive rules that govern the subject matter of legal claims.

V. THE CLEAN HANDS DEFENSE: PUNISHMENT AND RETRIBUTION

The structure of the CHD’s doctrine is centered on plaintiff iniquity (a wrongdoing) as the reason for rejecting the plaintiff’s claim or for depriving the plaintiff of the right to be heard (a sanction); and it is the wrongdoer herself (the party with unclean hands) who is sanctioned for her wrongdoing (the connected iniquitous conduct).

That the CHD is meted out for wrongdoing is further reflected in the traditional formulation of the clean hands maxim: “he who comes into equity must come with clean hands,” suggesting that those whose hands are unclean in a sense deserve to lose access to equitable relief due to their unclean hands, that is, their wrongdoing is a reason for the sanction. Moreover, the choice of “unclean hands” as the doctrinal focal point, as opposed to, for example, “conduct potentially deleterious to the integrity of the court,” further suggests that there is a component of moral reaction and disdain for wrongdoing built into the CHD.

2BLACK’S LAW DICTIONARY 268 (8th ed. 2004).

See Deweese v. Reinhard, 165 U.S. 386, 390 (1897) (“if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them, he will be held remediless in a court of equity.”); Miller v. Beneficial Mgmt. Corp., 855 F. Supp. 691, 712–713 (D.N.J. 1994) (“Whenever a party who seeks to set the judicial machinery in motion and obtain some equitable remedy has violated conscience or good faith, or other equitable principle in his prior conduct with reference to the subject in issue, the doors of equity will be shut against him [or her] notwithstanding the defendant’s conduct has been such that in the absence of the circumstances supporting the maxim, equity might have awarded relief.”) (citations omitted).

Id. at 205.

Id. at 792–796.

LAYCOCK, supra note 10, at 964; DOBBS, supra note 1, at 68.

Shondel v. McDermott, 775 F.2d 859, 868 (7th Cir. 1985) (J. Posner); William J. Lawrence, III, Note, Application of the Clean Hands Doctrine in Damage Actions, 57 NOTRE DAME L. REV. 673, 678–681 (1982); Zechariah Chafee, Jr., Coming into Equity with Clean Hands, 47 MICH. L. REV. 1065, 1093 (1949).

Byron v. Clay, 867 F.2d 1049, 1052 (7th Cir. 1989) (“But with the merger of law and equity, it is difficult to see why equitable defenses should be limited to equitable suits any more; and of course many are not so limited, and perhaps unclean hands should be one of these.”) (citations omitted); Mona v. Mona Elec. Group, Inc. 176 Md. App. 672, 713 (Md. App. 2007) (“Traditionally, the clean hands doctrine only applied in equity. It has been expanded, however, to cases at law, as well.”); Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists, 227 Cal. App. 2d 675, 696 (Cal. App. 1st Dist. 1964); FISCHER, supra note 9, at 471 (“The cases are few, but the movement is toward recognizing unclean hands as an available defense to legal claims.”); ROBERT N. LEAVELL, JEAN C. LOVE & GRANT S. NELSON, EQUITABLE REMEDIES, RESTITUTION AND DAMAGES 722 (4th ed. 1986).

Precision, supra note 3, at 814–815.

DOBBS, supra note 1, at 68, 880; RENDLEMAN, supra note 6, at 209 (“In applying the unclean hands doctrine, courts act for their own protection, and not as a matter of ‘defense’ to the defendant.”); FISCHER, supra note 9 at 462. See, e.g., Ne. Women’s Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1354 (3d Cir. Pa. 1989) (“The equitable doctrine of unclean hands is not ‘a matter of defense to the defendant.’ Rather, in applying it ‘courts are concerned primarily with their own integrity,’ and with avoiding becoming ‘the abettor of iniquity.’”) (citations omitted); Nakahara, supra note 6, at 522 (“The unclean hands doctrine is aimed at providing courts of equity with a shield from the potentially entangling misdeeds of the litigants in any given case. The Court invokes the doctrine when faced with a litigant whose acts threaten to tarnish the Court’s good name”).

Id. at 246–252; WILLIAMS, Integrity, supra note 45.

DOBBS, supra note 1, at 44.

BLACK, supra note 2.

I am unaware of cases recognizing vicarious or collective unclean hands under the CHD. By “collective unclean hands,” I am referring to a concept similar to “collective punishment”: a case wherein the hands of all members of a set are deemed unclean due to the iniquity of just one of them.

Johnson, supra note 1.

Referring Principles:

I.1.5 - No advantage in case of own unlawful acts