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# A NORMATIVE THEORY OF THE CLEAN HANDS DEFENSE

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What is the clean hands defense (CHD) normatively about? Courts designate court integrity as the CHD's primary norm. Yet, while the CHD may at times further court integrity, it is not fully aligned with court integrity. In addition to occasionally instrumentally furthering certain goods (e.g., court legitimacy, judge integrity, deterrence), the CHD embodies two judicially undetected norms: retribution and *tu quoque* ("you too!"). *Tu quoque* captures the moral intuition that wrongdoers are in no position to blame, condemn, or make claims on others who are guilty of similar or related wrongdoing. The CHD shares the structure of the *tu quoque*: both are doctrines of standing that deflate the illocutionary force (and not the truth-value) of normative speech acts directed against wrongdoers by those guilty of similar or connected wrongdoing. The CHD also exhibits retributive logic: it sanctions plaintiffs by reason of their wrongdoing and manifests the retributive principle that "punishment must fit the crime."

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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."<sup>1</sup> 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.

A normative theory of the CHD is especially desirable considering that in the law, denying the right to be heard is an anomalous response to wrongdoing. The law generally does not deny access to established legal

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1. See, e.g., *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944); DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION* 68 (2d ed. 1993).

recourse to a victim of legally recognized wrongdoing even if the victim's past is marred with moral, legal, or ethical blemishes. The fate of legal claims is determined and assessed based mostly on their substantive and procedural merits, not on the morality, ethics, or legality of the plaintiff's past actions, where such actions neither impinge on evidentiary issues (such as witness credibility) nor are among the operative or material facts on which the legal merits of the claim turn. In dealing with or in responding to wrongdoing, the law mostly imposes liability (such as in torts), obligations (such as in contract law), or punishment (such as in criminal law). Why, therefore, in cases of unclean hands do plaintiffs' wrongful actions, which are not material to the merits of their legal action, ground the loss of access to legal remedy? How does past wrongdoing by the plaintiff—if connected or similar to the substance of her claim—justify her losing her claim regardless of the claim's legal merits?

Following a doctrinal introduction of the CHD (Section II), the article turns to a critical assessment of the practically unanimous answer the vast majority of U.S. judicial authorities have given to the questions presented above (Section III). As is demonstrated below, courts are overwhelmingly of the opinion that the CHD is primarily a doctrine of court integrity. This article develops and explores this position, arguing that it is at best only partially correct.

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).

The article argues next, in direct contradiction to what many courts explicitly stipulate, that the CHD is a punitive doctrine with retributive properties (Section V). The article's final section on the norms relevant to the CHD considers a handful of public-policy considerations in favor of the CHD (Section VI). Tying these various threads together, the article offers an account of the CHD's normative structure and of the various norms and values comprising what the CHD is normatively for as well as a recap of what these norms and values have going for them from a moral point of view (Section VII).

The article closes with an explanation of how the norms that comprise what the CHD is normatively for give reasons for the CHD as well as perhaps forming a *prima facie* justification for the defense (Section VIII).

The article mostly refers to the "clean hands defense," yet it is worth noting that the same doctrine is often referred to as the "unclean hands defense." For reasons of consistency I use primarily the former formulation.

## 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.”<sup>2</sup> Any willful conduct that is iniquitous, unfair, dishonest, fraudulent, unconscionable, or performed in bad faith may constitute “unclean hands” under the CHD.<sup>3</sup> Conduct in violation of the CHD need not therefore be illegal.<sup>4</sup> 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.<sup>5</sup>

A component of the CHD common to most of its manifestations is that the plaintiff’s iniquitous or wrongful conduct—grounding the rejection of his or her complaint or petition—must somehow connect or relate to the conduct, interaction, or transaction underlying the plaintiff’s cause of action.<sup>6</sup> While “equity does not demand that its suitors shall have led blameless lives . . . it does require that they shall have acted fairly and without fraud or deceit *as to the controversy in issue.*”<sup>7</sup>

There are different views as to what constitutes “connectedness” or “relatedness” between a plaintiff’s iniquity or wrongful conduct and the subject matter of her suit, petition, or complaint.<sup>8</sup> While some courts require that the wrongdoing directly relate to the right or legal question that is in dispute, other courts mandate only that the wrongdoing was committed as part of the interaction or transaction that underlies the suit.<sup>9</sup> What is clear is that where a plaintiff’s wrongdoing is collateral to the subject matter of

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

3. See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945); N.Y. Football Giants, Inc. v. L.A. Chargers Football Club, Inc., 291 F.2d 471, 473 (5th Cir. 1961); DOBBS, *supra* note 1, at 68; 27A AM. JUR. 2D *Equity* §100 (1996).

4. Precision, *supra* note 3, at 815; DOBBS, *supra* note 1, at 68.

5. 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 in a court of law, he will be held remedied 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).

6. Garber v. Crews, 324 U.S. 200 (1945); Loughran v. Loughran, 292 U.S. 216, 229 (1934) (J. Brandeis); Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933); Fladeboe v. Am. Isuzu Motors, Inc., 150 Cal. App. 4th 42, 57 (4th Dist. 2007), *modified*, (Apr. 24, 2007); Mas v. Coca-Cola Co., 163 F.2d 505, 508 (4th Cir. 1947); Hoehm v. Crews, 144 F.2d 665, 672 (10th Cir. 1944); Ohio Oil Co. v. Sharp, 135 F.2d 303, 307 (10th Cir. Okla. 1943); Salzman v. Bachrach, 996 P.2d 1263, 1265 (Colo. 2000); Nakahara v. NS 1991 Am. Trust, 718 A.2d 518, 522 (Del. Ch. 1998); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §2946 (2d ed. 2010); 27A AM. JUR., *supra* note 3, §104; DOBBS, *supra* note 1, at 68–70. KENNETH H. YORK, JOHN A. BAUMAN & DOUG RENDLEMAN, CASES AND MATERIALS ON REMEDIES 209 (5<sup>th</sup> ed. 1992).

7. Precision, *supra* note 3, at 814 (emphasis added).

8. DOBBS, *supra* note 1, at 70.

9. JAMES M. FISCHER, UNDERSTANDING REMEDIES 463–464 (2006).

her suit, her wrongful conduct is not sufficiently connected or related to the litigation so as to give rise to a defense of unclean hands.<sup>10</sup>

Before delving into the philosophical analysis, here is a couple of illustrating examples. As a way of preventing debtors seizing his assets, Plaintiff Osborne, the owner of a paving business, contracted with defendant Nottley's husband (later deceased) to hold, in exchange for certain consideration, title of a parcel of land, a mobile home, and stock in the paving business all owned by Osborne.<sup>11</sup> The parties agreed that once Osborne's "problems" or "issues" with his creditors were resolved, Nottley would return title to Osborne. Not surprisingly perhaps, once Osborne settled his affairs, Nottley refused to transfer the assets back to Osborne. Osborne ejected the defendant from the properties, and litigation ensued. Plaintiff Osborne sought equitable relief in the form of a declaration of ownership. 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."<sup>12</sup>

A second example is that of *Nakahara v. The NS 1991 American Trust*, in which, sued for fraud, plaintiff-trustees sought advancement of indemnification from the trust for their litigation costs.<sup>13</sup> The defendant denied that the plaintiffs were entitled to the advance. Although the Delaware Court of Chancery determined that the law allowed for the sought-after advances, the plaintiffs' motion was denied on the grounds of their unclean hands. Prior to reaching the Chancery Court, the matter of advancement was brought before a foreign jurisdiction that ruled, on ground of *forum non conveniens*, that the matter was better adjudicated in Delaware. Their anticipation of further litigation in Delaware notwithstanding, the plaintiffs unilaterally advanced themselves large sums of money from the trust. Moreover, the plaintiffs timed their terminating of an agreement with the defendant to assure effectively that the defendant would not learn of the advance until

10. RENDLEMAN ET AL., *supra* note 6, at 209. On cases of fraudulent transfer, which count for a fair share of the case law on the CHD, DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 966–967 (3rd ed. 2002), nicely illustrates the two approaches: A, who is being hounded by creditors, colludes with B to defraud A's creditors by transferring A's assets to B, who agrees to transfer the assets back to A later. However, when the time comes for B to return the goods, she refuses. A then petitions the court to compel B to return the assets (under a theory of constructive trust). See, e.g., *Beelman v. Beelman*, 121 Ill. App. 3d 684, 688 (Ill. App. Ct. 5th Dist. 1984); *Mascenic v. Anderson*, 53 Ill. App. 3d 971, 972 (Ill. App. Ct. 1st Dist. 1977). Faced with such a scenario, courts have split on the issue of whether A's wrongdoing is sufficiently connected to the subject matter of his petition. Some courts have rejected plaintiffs such as A on the grounds of unclean hands, viewing the fraudulent intention to defraud the plaintiff's creditors as sufficiently related or connected to the remedy for which the plaintiff petitions the court. Other courts, in contrast, have refused to apply the CHD in similar cases on the grounds that the matter at issue in plaintiff A's petition is the transfer arrangement between A and B and not the parties' fraudulent reasons for the arrangement, finding said reasons not directly related to the legal issues comprising A's petition against B. For examples of case law falling on both sides of this divide, see FISCHER, *supra* note 9, at 463–464 n. 16.

11. *Osborne v. Nottley*, 206 Ore. App. 201, 201–06 (Or. Ct. App. 2006).

12. *Id.* at 205.

13. *Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770 (Del. Ch. 1998).

it was too late to reverse it. 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).<sup>14</sup>

At times, where public interest or the gravity of the violation of the plaintiffs' rights outweighed the severity or egregiousness of the plaintiffs' prior iniquitous or wrongful conduct, some courts have ruled against defendants' attempts to invoke the CHD even if the plaintiffs' hands were patently "unclean."<sup>15</sup> Therefore, even when all the elements of the CHD—plaintiff wrongdoing that is connected to the underlying transaction—are satisfied, courts maintain discretion as to whether to apply the defense where the injustice to the plaintiff significantly outweighs the severity of her own wrongdoing or where there are overriding public-policy reasons.<sup>16</sup>

Finally, the CHD is, at least traditionally, a doctrine of equity,<sup>17</sup> 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,<sup>18</sup> and some courts have in fact expanded the doctrine to claims for nonequitable remedies such as damages.<sup>19</sup>

14. *Id.* at 792–796.

15. *Byron v. Clay*, 867 F.2d 1049, 1051 (7th Cir. 1989) ("The doctrine of unclean hands, functionally rather than moralistically conceived, gives recognition to the fact that equitable decrees may have effects on third parties—persons who are not parties to a lawsuit, including taxpayers and members of the law-abiding public—and so should not be entered without consideration of those effects.") (J. Posner); *Gen. Leaseways, Inc. v. Nat'l. Truck Leasing Assoc.*, 744 F.2d 588, 597 (7th Cir. 1984) (refusing to apply the doctrine of unclean hands in an antitrust case where the application of the doctrine would have defeated the objectives of antitrust law) (J. Posner); *Republic Molding Corp. v. B.W. Photo Utilities*, 319 F.2d 347, 350 (9th Cir. Cal. 1963); *Novadel-Agene Corp. v. Penn.*, 119 F.2d 764, 766 (5th Cir. 1941); *Nakahara*, *supra* note 6, at 523; *Sheridan v. Sheridan*, 247 N.J. Super. 552 (Ch. Div. 1990); *DOBBS*, *supra* note 1, at 67.

16. At least in principle, being an equity doctrine, the CHD is discretionary. *See* *RENDELMAN*, *supra* note 6, at 209; *DOBBS*, *supra* note 1, at 67–7.

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

18. *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).

19. *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).

Sometimes the CHD is confused with a sister doctrine in law (as opposed to equity) called *in pari delicto* (“in equal fault”).<sup>20</sup> Under *in pari delicto*, the court denies a legal remedy because both parties—plaintiff and defendant—stand in equal fault in relation to the wrong or unlawful transaction complained about.<sup>21</sup> The two doctrines exhibit some common traits<sup>22</sup> yet are not identical.<sup>23</sup> A second related maxim is *ex turpi causa non oritur actio* (no cause of action can arise out of an immoral [or illegal] inducement [or consideration]),<sup>24</sup> which is manifested in the doctrine of unenforceable contract and as a defense in tort law (today less practiced in the United States than in other common-law jurisdictions).<sup>25</sup> In this article I focus on the CHD, the broadest and most widely applied of these doctrines. Yet, considering the similarities,<sup>26</sup> some of my normative analysis of the CHD also applies to *in pari delicto* and to *ex turpi causa*.

### III. COURT INTEGRITY AND THE CLEAN HANDS DEFENSE

#### A. The Prevailing Judicial Position

The most dominant goal or norm that judges ascribe to the CHD is the protection of what is best captured by the concept of “court integrity.”<sup>27</sup>

20. See BLACK, *supra* note 2, at 806.

21. *In pari delicto* applies where a plaintiff’s culpability regarding a matter at issue is equal to or surpasses the defendant’s culpability. See FISCHER, *supra* note 9, at 467–470.

22. In both the CHD and *in pari delicto*, the iniquity of the plaintiff’s conduct as it relates to the subject matter of the litigation plays a significant role in denying the plaintiff access to a remedy. See FISCHER, *supra* note 9. In addition, court integrity is thought to ground both doctrines (see *id.* at 467), and, similarly to the CHD, considerations of public interest may supersede *in pari delicto*. See *id.* at 468; 27A AM. JUR., *supra* note 3, §103.

23. In contrast to the CHD, which focuses on the plaintiff’s wrongdoing, *in pari delicto* focuses on the comparative degrees of wrongdoing and contributions to the underlying objectionable transaction of all parties. See FISCHER, *supra* note 9; 27A AM. JUR., *supra* note 3, §103. Moreover, while the CHD is a doctrine of equity, *in pari delicto* is a doctrine that applies to legal remedies, such as damages. See LAYCOCK, *supra* note 10, at 964 (2002). Also, the scope of *in pari delicto* is narrower than that of its equity counterpart because *in pari delicto* applies where the plaintiff is of substantially equal (or greater) fault in causing the harm as is the defendant (see *id.*; FISCHER, *supra* note 9, at 467), a condition not found in the CHD. Analytically, putting aside the division between doctrines of law and doctrines of equity, the scope of the CHD is wider than that of *in pari delicto*: the CHD covers all instances of *in pari delicto* as well as many others.

24. BALLENTINE’S LAW DICTIONARY 447 (3d ed. 1969).

25. See Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine Be Revived to Dent the Litigation Crisis*, 32 SAN DIEGO L. REV., 53, 62–66 (1995).

26. FISCHER, *supra* note 9, at 471.

27. See, e.g., *Olmstead v. U.S.*, 277 U.S. 438, 485 (U.S. 1928) (the CHD is applied “in order to . . . preserve the judicial process from contamination”) (J. Brandeis, dissenting); *Adams v. Manowen*, 328 Md. 463, 473 (Md. 1992) (“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.”); *Mona v. Mona Elec. Group, Inc.*, 176 Md. App. 672, 714 (Md. Ct. Spec. App. 2007) (“The equitable doctrine of unclean hands is designed to ‘prevent the court from assisting in fraud or other inequitable conduct’ . . . it protects the integrity of the court and the judicial process by denying relief to those persons ‘whose very presence before a court is the result of some fraud or iniquity.’”)

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.'"<sup>28</sup> Accordingly, a primary interest that the CHD protects is the *integrity* of the court.<sup>29</sup> In a sense, the integrity account of the CHD rests on a justification concerned with keeping the court's own hands clean.

Courts are not, however, at all explicit as to what they mean when they invoke the concept of "integrity" as a justification and an explanation of the CHD. By way of interpretation, their reasoning appears as follows: courts of justice should not abet iniquity and wrongdoing because doing so would put their nature as courts of justice and fairness in peril. Furthering, tolerating, abetting, or turning a blind eye to wrongdoing conflicts with the core normative tenets of courts of justice, even in cases where doing so would further a good greater than the loss in terms of court integrity. A variant of this position is that in cases of unclean hands, court integrity is put at risk of becoming marred by the hypocrisy of the litigant whose hands are unclean. Thus courts—as a matter of their core normative tenets—must not "dirty their hands" by hearing, entertaining, or assenting to the pleadings, complaints, and petitions of claimants whose hands are unclean. Even if an all-things-considered analysis were to justify the court's entertaining and even assenting to a claim brought by a plaintiff with unclean hands, interests of court integrity still persist and may even prevail in justifying the court in denying the claim by employing the CHD, thereby washing its hands of a claim tainted with the claimant's iniquity.

Under the integrity-based account of the CHD, the relation between the CHD and the integrity norm it supposedly embodies is structural. In applying the CHD, the court *ipso facto* refuses to reward, further, tolerate, abet, or become otherwise implicated in iniquity, wrongdoing, and even hypocrisy, which is supposedly exactly what court integrity demands in cases involving plaintiffs with unclean hands. In this respect, because in applying the CHD the court in effect refuses to abet, ignore, or tolerate iniquitous

(citations omitted); *Premier Farm Cred., PCA v. W-Cattle, LLC*, 155 P.3d 504, 519 (Colo. App., 2006) ("The [unclean hands doctrine] is intended to protect the integrity of the court, and simply means that equity refuses to lend its aid to a party who has been guilty of unconscionable conduct in the subject matter in litigation."); *Osborne, supra* note 11, at 205; FISCHER, *supra* note 9, at 462.

28. *Precision, supra* note 3, at 814–815.

29. 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").



conduct and wrongdoing, proper judicial application of the CHD is a manifestation and expression of court integrity. In a sense, the CHD makes the ideal of court integrity more fine-grained, and in that sense, the CHD is a constituent of the court-integrity ideal. Under this reading of the court-integrity interpretation of the CHD, the CHD *embodies* a norm of court integrity. Put differently, the norm of court integrity is at the core of the CHD's normative structure.<sup>30</sup>

An alternative interpretation of the integrity-based account of the CHD views the relation between the CHD and court integrity more instrumentally. Here, even if there are reasons for doubting whether the logic or normative structure of the CHD indeed embodies a norm of court integrity, still, on balance, the CHD consistently has the effect of furthering court integrity.

In the following two sections I offer reasons to doubt the dominant judicial position that the CHD is fully aligned—structurally or instrumentally—with court integrity.

## B. The Two-Edged Nature of Court Integrity

What goes unnoticed in the judicial-integrity-based account of the CHD is the rather obvious fact that the effect of applying the CHD is often to let a legally recognized injustice stand. This fact gives strong reason to doubt whether indeed the CHD always furthers or structurally embodies the integrity of courts, which are supposedly courts of justice (especially in their capacity as courts of equity). As explained above, the CHD rejects claimants not based on their claims' legal merits but due to the checkered (related/connected) moral, ethical, or legal record of the claimant. Thus the CHD may effect the rejection of otherwise meritorious petitions or claims brought by individuals who suffered an actual violation of their legal rights. While abetting, tolerating, or assisting plaintiffs who are guilty of iniquity, hypocrisy, and wrongdoing may certainly cut against the court's integrity as a court of justice, allowing a legally recognized injustice or wrong to go unchallenged and not remedied *also* cuts against the grain of the court's nature as a court of justice. This is especially true where but for her unclean hands the claimant would have been, for all practical matters, entitled to a remedy.

The position that it is the nature of the CHD to protect, further, and embody the integrity of the court is therefore not as obvious as generations of common-law judges appear to have assumed. The two conflicting

30. The term "normative structure" refers to the norms and values that a legal doctrine constitutes, embodies, or is a legal manifestation of, as well as to the logical relations between those norms and values. On the concept of "normative structure," see JULES COLEMAN, *Epilogue to RISKS AND HARMS (SPANISH TRANSLATION)*, in *RISKS AND HARMS* 25 (2010) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1631881](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1631881). For an example of an analysis of a legal doctrine's normative structure, see JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 3–40 (2001) (demonstrating that tort law embodies a norm of corrective justice).

considerations based on court integrity—not abetting wrongdoing on the one hand and remedying and halting legally recognized wrongdoing on the other—appear similarly fundamental tenets or commitments of the courts. In cases in which the former outweighs the latter, the CHD actually does more to set back court integrity than to further it.

One way to view the fact that a court may, as discussed above, forgo applying the CHD where the severity of the wrong for which a plaintiff seeks an equitable remedy outweighs the severity of the plaintiff's own past wrongdoing<sup>31</sup> is as a weighing of the two different aspects of court integrity. If the severity of the wrongful harm complained about outweighs the severity of the plaintiff's past wrongdoing, reasons from court integrity favor not applying the CHD: presumably the integrity loss in letting the injustice to the plaintiff stand is greater than the integrity loss in abetting the plaintiff's lesser wrong. The opposite is true in cases where the severity of the wrongful harm complained about does not outweigh that of the plaintiff's wrongdoing. This weighing reflects both aspects of the court's integrity as a court of justice. In cases involving plaintiffs with unclean hands, therefore, considerations of court integrity do not always favor not abetting injustice and wrongdoing (which is the logic of the CHD) over not negating or remedying it (which is a court-integrity-based reason that conflicts with the logic of the CHD).

Formulating this double-edged relation that the CHD has with the ideal of court integrity in terms of the concept of “agent-relative reasons” is illuminating.<sup>32</sup> In cases involving plaintiffs with unclean hands, courts have an agent-relative reason not to assent to or even consider claims for equitable remedies, even if meritorious. Here, even if the law is on the side of the plaintiff, integrity does not permit the court—being a court of justice—to entertain the merits of the claim. It is the agent-relative nature of the court-integrity considerations that in a sense legitimize the courts' turning their back on a meritorious claim. It is the court's nature as a court of justice that gives rise to the integrity-based reason for rejecting plaintiffs with unclean hands even if theirs is a meritorious claim, and even if an arbiter unfettered by similar integrity-based constraints were obliged to hear, entertain, and even assent to such claims. The courts' reason for applying the CHD to plaintiffs whose hands are unclean is not an agent-neutral reason for action<sup>33</sup> but rather a reason that applies uniquely to actors

31. See *supra* note 15.

32. An agent-relative reason is a reason the general form of which includes an essential reference to the person who has it. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 152–153 (1986). If integrity-based reasons for actions derive from an agent's basic tenets, beliefs, values, and commitments, then such reasons apply to only those agents who possess those very same basic tenets, beliefs, values, and commitments that give rise to those reasons. As such, assuming that the attributes (such as basic commitments) that integrity turns on are identity markers, integrity-based reasons for action are agent-relative.

33. An agent-neutral reason is a reason the general form of which does not include an essential reference to the person who has it. *Id.*

that are constrained by certain integrity considerations, such as courts of justice.

Yet, as explained above, courts—as courts of justice—have what seems an equally viable and at times overriding integrity-based agent-relative reason *not* to let the wrong the plaintiff suffered stand. This reason, which *also* derives from the court's nature as a court of justice, gives rise to an integrity-based agent-relative reason to remedy the harms the defendant's wrongdoing caused and to assent to the plaintiff's claim. This second agent-relative reason for action is also grounded in court integrity yet, unlike the former court-integrity-based reason, it cuts against the logic of the CHD. In cases involving plaintiffs with unclean hands, the court's nature as a court of justice generates, therefore, two conflicting integrity-based agent-relative reasons for action.

Building on the distinction between doing (through action) and allowing (through omission), some may object to the symmetry suggested above—in terms of court integrity—between the court *abetting* plaintiff wrongdoing and the court *allowing* the defendant's wrongdoing to stand. This line of logic views adjudicating and assenting to a claim that is tainted by the plaintiff's unclean hands as active judicial abetting of (the plaintiff's) wrongdoing and views the denial of such a claim, on grounds of unclean hands, as a judicial omission allowing (the defendant's) wrongdoing to go unchecked. The objection is predicated on the assumption that action somehow implicates one's integrity more than omission. The objection, I believe, fails for two reasons.

First, judicial application of the CHD is better understood as a judicial *act* of removing what would otherwise be the normative default: the plaintiff's right to be heard and even a prohibition on and a remedy for the defendant's wrongdoing. In applying the CHD, the court in effect changes the default legal landscape. Here the court is not merely a bystander to the defendant's ongoing or unremedied past wrongdoing, because in applying the CHD, the court (at least potentially) changes the default legal arrangement.

Second, it is erroneous to assume that agent integrity is sensitive only to what the agent does and not to what the agent allows others to do. Failing to oppose what one deeply perceives as evil and thereby allowing evil to transpire may certainly erode one's integrity. For example, the integrity of powerful nations that hold certain principles as part of their basic moral identity is significantly eroded when such powers allow genocide to happen, even if those powers have no substantial role to play in the killing or in creating the conditions that allow for the killing. Thus, even if we were to accept that judicial application of the CHD is better understood as an omission in relation to the defendant's wrongdoing, this would not entail that in so omitting, the court's integrity necessarily suffers less of a setback. And even if one does believe that judicial omission (letting injustice stand) has less effect on court integrity, it certainly does not follow that it has no effect.

A variant of the omission/commission objection relies on viewing private law courts as “tools” that private litigants use to obtain civil recourse.<sup>34</sup> Private law empowers private litigants to obtain recourse for private wrongs they suffer.<sup>35</sup> Accordingly, it is possible to view private law courts as the vehicles through which private law empowers litigants. In other words, in a sense litigants act *through* private law courts so that to an extent the court acts as an agent or extension of the litigants. Accordingly, were courts to assent to and even entertain the merits of a claim of a plaintiff with unclean hands, the iniquity of the plaintiff would rub off on the court. According to this reasoning, the CHD protects the agency of courts from becoming comingled or acting as the extension of a litigant marred with iniquity. In cases of omission—where the court allows an injustice to stand but does not allow litigants to act through the court in bringing about the injustice—the agency of the court is not similarly a vehicle for the agency of litigants, and therefore the integrity of courts is not similarly blemished.

I am doubtful about this picture of the function of private law courts. Civil law affords litigants the power (in Hohfeldian terms) to bring a suit against those who wronged them. This power of the private law plaintiff is a power to create a legal context in which the defendant is liable (in Hohfeldian terms) to the power of the court to adversely alter the defendant’s rights and entitlements in favor of remedying the plaintiff. Put a little differently, the empowering aspect of private law is in the power of private litigants to expose defendants to the power of courts. Once this is achieved, however, it becomes the duty of the court to decide whether the law mandates exercising its judicial power, which was “created” or is conditioned on the plaintiff’s power to sue.

I do not think, however, that private law goes so far as to erase partially the court’s agency in favor of the agency of the litigant. The power that private law affords private actors is the power to sue, which is the power to hold defendants liable to the power of the court to remedy the plaintiff. Private law does not, however, afford private actors the power somehow to exercise vicariously the judicial power of imposing a remedy. This, I think, takes the empowering metaphor of private law one step too far. Even if the judicial powers of private law courts are conditioned on the power of private litigants to sue, these judicial powers are not in any meaningful way subject to the agency of private litigants. In exercising its judicial powers, the judiciary is an objective arbiter applying the law and not an agent of any particular litigant.

To conclude, in contrast to the majority judicial position, it seems that it is not always true that in cases involving plaintiffs with unclean hands, reasons

34. For this objection I am grateful to one of the referees for *LEGAL THEORY*.

35. This is a position in line with John Goldberg’s and Benjamin Zipursky’s view of private law and specifically tort law. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *TEX. L. REV.* 917, 945–947 (2010); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *GEO. L.J.* 695, 733–756 (2003).

of court integrity are always aligned with the logic of the CHD. At times, hearing, entertaining, and assenting to a complaint or petition brought by a plaintiff with unclean hands does less to set back court integrity than does rejecting such a plaintiff on the grounds of unclean hands. Depending on the circumstances, a norm of court integrity may lean either in favor of or against a court applying the CHD. While the CHD may certainly capture aspects of court integrity and at times, on balance, even further court integrity, there is strong reason to doubt whether the CHD is indeed fully aligned with court integrity. It seems that the doctrinal logic and structure of the CHD neither embodies a court-integrity norm nor always has the effect of furthering court integrity.

### C. Law versus Equity

Another source of skepticism as to whether the CHD is indeed aligned, structurally or instrumentally, with a norm of court integrity is that there are reasons to doubt whether granting a remedy of equity to a litigant with unclean hands really detracts, on balance or otherwise, from the court's integrity. In applying the law—as opposed, perhaps, to equity—courts grant remedies to iniquitous plaintiffs (whose moral iniquity is related to the background subject matter of the suit) as a matter of regular practice. It is well established that law and morality are not (fully) coextensive and therefore that judges' devotion to the law may have moral costs in particular cases. The concept of a “legal right” allows for the category of a “legal right to do moral wrong,” and courts of law are mostly obliged to uphold legal rights. In fact, it seems a staple of the integrity of courts of law to uphold legal rights even in the face of allowing, abetting, or furthering immoral or unethical (yet legal) conduct. For example, if the right to free speech protects the rights of Nazis to march in a Jewish neighborhood, then judicial integrity mandates that judges uphold this right even in the face of such egregious conduct. Accepting that fidelity to the law, even when it conflicts with morality, is a staple of court integrity when sitting in matters of law, one wonders whether the attributes of court integrity are indeed so radically different when courts preside over issues of equity.

Today, long after legal institutions of equity and law were almost universally subsumed under a single judiciary,<sup>36</sup> there is reason to doubt to what extent the imperative of protecting the integrity of the court from abetting or allowing iniquity and wrongdoing—through awarding equitable remedies to claimants with unclean hands—persists. The prevailing judicial position—that integrity is the primary norm underlying the CHD and the primary value furthered by the CHD—seems to exhibit a trace of the common law's past, originating in an era when courts of law and courts of equity

36. DOBBS, *supra* note 1, at 101–102; LEAVELL ET AL., *supra* note 19, at 6–11.

were two wholly different institutions.<sup>37</sup> Over time, courts of equity shed most of their unique institutional and formal characteristics, so that now courts function largely as courts of law even when sitting in equity.<sup>38</sup> The days when equitable remedies were fully discretionary and entirely subject to judges' own ethical reasoning are over.<sup>39</sup> Today, as a practical matter, equitable remedies are more, even if not entirely, a matter of legal entitlement, right, and formal rules than of pure judicial discretion.<sup>40</sup>

Considering that the integrity of courts of law mostly obliges them to apply legal rules and to defend legal rights and entitlements—even in the face of occasional moral or ethical wrong—and considering that courts sitting in equity function much like courts of law, there is reason to think that the relation between court integrity and the equitable doctrine of the CHD has weakened or frayed with time. Therefore, if Richard Posner is correct,<sup>41</sup> and my sense is that he largely is, that today judges deciding matters of equity reason much as they do in matters of law—primarily applying standards, rules, and precedents and upholding litigants' rights and entitlements as opposed to exercising the judges' own “free-wheeling ethical discretion”<sup>42</sup>—then there is reason to think that even in matters of equity, judicial integrity is a matter of fidelity more to the legal standards and rules governing litigants' entitlement to a remedy than to the ideal of not abetting iniquitous conduct. It is probable that today a court's abetting of iniquitous conduct through the awarding of an equitable remedy may not negatively impact court integrity all that much. Thus, in such a judicial environment, the CHD—even as a doctrine of equity—seems no longer as fully aligned with protecting the courts' integrity as it perhaps once was.

#### D. The Concept of “Integrity”

Putting these doubts aside and assuming that the CHD is at least partially aligned with court integrity, I now shift the analysis away from the descriptive toward a reflection on the moral force or importance of court integrity.

37. DOBBS, *supra* note 1, at 48, 60–63.

38. *Id.* at 102–103.

39. See Shondel, *supra* note 18, at 868 (“A modern judge, English or American, state or federal, bears very little resemblance to a Becket or a Wolsey or a More, but instead administers a system of rules which bind him whether they have their origin in law or in equity and whether they are enforced by damages or by injunctions. To tell a plaintiff that although his legally protected rights have been invaded and he has no adequate remedy at law [i.e., damages] the judge has decided to withhold equitable relief as a matter of discretion just would not wash today. Even when the plaintiff is asking for the extraordinary remedy of a preliminary injunction—extraordinary because it is often a very costly remedy to the defendant, yet is ordered on the basis of only a summary inquiry into the merits of the plaintiff's suit—the request is evaluated according to definite standards, rather than committed to a free-wheeling ethical discretion.”) (citations omitted) (J. Posner).

40. *See id.*

41. *Id.*

42. *Id.*

“Integrity” is a term used to refer to a variety of concepts.<sup>43</sup> Yet, when judges evoke “integrity” or similar concepts as the primary goal or norm of the CHD, they do so with little elaboration or philosophical subtlety. What exactly is the nature of the integrity interest that the CHD supposedly embodies or furthers? What does “integrity of courts” have going for it as a normative concept? Does court integrity have the normative weight courts appear to ascribe to it? In other words, even if the CHD is partially aligned with court integrity, should we care, and if so, when?

There are various accounts of integrity in the literature.<sup>44</sup> One approach focuses on how personal identity is related to one’s fundamental commitments, conceptualizing “integrity” as an identity-preserving concept. Bernard Williams, who is the primary expounder of this view, equates integrity with fidelity to one’s fundamental or constitutive commitments and projects,<sup>45</sup> projects and commitments that give meaning, structure, and reason to one’s life. Under this view, it is through one’s integrity that one preserves and perhaps also reaffirms as well as solidifies “who one is.”

A second perspective on integrity explores how integrity is not about who a person is but rather about who a person may become. At times people’s self-image and identity may be formed—either through social (e.g., discrimination) or more private (e.g., abusive parenting or neglect) ill treatment—to incorporate negative attributes such as being inferior, silent, “invisible,” subhuman, subservient, or feeble. Resisting such oppression is often, according to this line of reasoning on integrity and identity, a matter of one’s integrity as an individual. Here integrity serves not to protect the fundamental commitments constitutive of “who one is,” for it is exactly against “who one is” that one is in a sense rebelling. In such circumstances personal integrity is better understood in relation to “who one may become.”<sup>46</sup>

A third account of integrity, based on the concept of an “integrated-self,” is attributed to Harry Frankfurt.<sup>47</sup> Here integrity is the fidelity to a set of second-order commitments, values, and desires about which first-order principles, commitments, values, and desires one should have. Integrity here is found in one’s consistent adherence to the second-order set, whatever

43. See DAMIAN COX, MARGUERITE LA CAZE & MICHAEL LEVINE, *INTEGRITY AND THE FRAGILE SELF* (2003), at 17–40; Damian Cox, Marguerite La Caze & Michael Levine, *Integrity*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2008), available at <http://plato.stanford.edu/entries/integrity>.

44. For a survey of views, see *id.*

45. BERNARD WILLIAMS, *Persons, Character and Morality*, in MORAL LUCK, 1–19, 20–39 (1981); BERNARD WILLIAMS, *Integrity*, in J.J.C SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST*, 108–117 (1973).

46. For such an approach to integrity see Susan E. Babbitt, *Personal Integrity, Politics, and Moral Imagination*, in *A QUESTION OF VALUES* 107–134 (Samantha Brennan, Tracy Isaacs & Michael Milde eds., 1997).

47. See Cox et al., *Integrity*, *supra* note 43; Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, 58 *J. PHIL.* 5–20 (1971); Harry Frankfurt, *Identification and Wholeheartedness*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 27–45 (Ferdinand Schoeman ed., 1987).

its substance and content, in forming one's first-order set, making for an integrated and coherent self.

Another perspective on integrity views it as a social virtue.<sup>48</sup> Cheshire Calhoun argues that an important aspect of integrity is standing up for what one thinks is morally right.<sup>49</sup> As such, integrity is a virtue of social responsibility and participation. Here integrity demands that people not keep their normative views to themselves or renounce them in public when it suits them but rather that people sincerely contribute to the social discourse and deliberation on the social good.

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."<sup>50</sup> 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. In other words, there are certain things that people with integrity must and must not do, regardless of the all-things-considered moral implications of such actions or omissions. Put differently, at times a person of integrity simply "cannot" and in a sense should not do some  $\phi$ , even if  $\phi$ -ing would result in a state of affairs that—all things considered—would be morally better than the state of affairs that would result from that person preserving her integrity through not  $\phi$ -ing.<sup>51</sup> For example, when Martin Luther said, "here I stand. I can do no other," he was possibly expressing the position that although challenging the Catholic Church was predicted to have dire consequences for Luther as well as for others, Luther simply could not—as a matter of his most basic beliefs and commitments—remain silent.

### E. The Moral Significance of Institutional Integrity

It is important to note that court integrity is a form of institutional integrity, not personal integrity. To the extent that integrity is of intrinsic moral value, it is most likely so as a concept relating to individuals. As reflected in the various conceptions of integrity presented above, it is personal integrity that is considered a candidate for being a virtue or of intrinsic moral value.<sup>52</sup> By implication, institutional integrity does not appear a viable candidate for counting as a virtue or for having intrinsic moral value. Generally the

48. Damian Cox, Marguerite La Caze, & Michael Levine, *Should We Strive for Integrity?*, 33 J. VALUE INQUIRY 519–530 (1999).

49. Cheshire Calhoun, *Standing for Something*, 92 J. PHIL. 235 (1995).

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

51. Of course, which actions challenge one's integrity depends on what one's unconditional normative commitments, principles, values, and beliefs happen to be.

52. Whether integrity is a virtue or in some sense morally good is a matter of contention. See Cox et al., *Integrity*, *supra* note 43, at 41–100.



integrity of objects (i.e., nonliving things) seems void of intrinsic moral value. Looking for such value, for example, in the integrity of a pencil factory, a political party, or a library seems peculiar. Courts are institutions, not persons, and as such, institutional integrity just does not seem something morality is concerned with for its own sake. These examples, of course, do not strictly prove the proposition that institutional integrity lacks intrinsic moral value. My position here is based more on stipulation—grounded in a person-affecting approach to morality—than on argument.

In any case, even within a person-affecting scheme there are at least two exceptions to my stipulation that institutional integrity is not of intrinsic moral value. Legal institutions such as courts involve, effect, and are constituted by persons. It is when people maintain significant attachments to an institution or when, in their capacity as agents of an institution, individuals are constituents of the institution that court integrity may be of intrinsic moral value. These two exceptions are explored in the next two sections.

The possibility of ascribing integrity to institutions does not challenge the hypothesis that institutional integrity is generally not of intrinsic moral value. As demonstrated below, at times it is fitting to conceptualize an institution's preservation of and fidelity to its own basic tenets, commitments, and values in terms of integrity. Yet, it is not at all clear why the preservation of and fidelity to institutional tenets, internal logic, coherence, commitments, and core values is a virtue or of intrinsic *moral* value when divorced from effecting or otherwise involving an individual person in a morally significant way.

Where the integrity of objects—such as institutions—is of intrinsic value, such value is mostly best characterized as aesthetic. Integrity is often understood in relation to keeping things intact, harmonious, uncorrupted, and, in a sense, true and consistent with their internal form or logic. For example, the integrity of a collection may refer to the collection's completeness or uniformity; the integrity of a strategy may refer to its flawlessness; the integrity of a forest may refer to the forest's pristineness; the integrity of a piece of music may refer to its harmony (or disharmony in the case of an atonal piece); the integrity of a newspaper may refer to its accurate reporting. In all these examples, integrity may have intrinsic value yet it does not draw said value from morality. Following this line of logic, it is possible that court integrity is of aesthetic value and as such may function as a reason for the CHD. Yet in most cases, the force or weight of such a reason seems negligible when compared to the reasons for remedying the legally recognized wrongs suffered by plaintiffs who happen to have unclean hands.

The proposition that the intrinsic value of the integrity of objects is a matter of aesthetics and not morality does not rule out the integrity of an object having moral significance through its *effects*. For example, compromising the integrity of a work of art—such as adding color to the black-and-white movie *Casablanca*—would not only decrease the aesthetic value inherent in the film but might also cause severe distress to cinema lovers. To give a

second example, erosion in the integrity of a newspaper committed to truthful reporting may have an adverse impact on society and by extension on the well-being of the individuals that comprise that society. Where erosions in institutional integrity have morally significant effects, which, as I explain below, they do in the case of court integrity,<sup>53</sup> protecting such integrity is of *instrumental* or *functional* moral value. Thus, but for the two instances discussed below, the moral value of court integrity is most likely extrinsic, not warranting protecting or solidifying court integrity for its own sake.

#### F. The Integrity of Judges

One exception accounting for the intrinsic moral value of court integrity is its relation to the integrity of judges. After all, it is flesh-and-blood judges who comprise the judiciary and decide the fate of lawsuits. While we may have no moral reason to care about the integrity of courts per se, protecting court integrity because of its implications for the integrity of judges *as judges* is quite another matter. If, indeed, hearing, entertaining, and assenting to the claims of plaintiffs with unclean hands abets iniquity or wrongdoing, then any judge who does so compromises her integrity as a judge. Protecting court integrity may have value, therefore, as an aspect of protecting individual judges' professional integrity.

Protecting court integrity in cases of unclean hands ipso facto protects the professional integrity of the judges comprising the court. In other words, court integrity in the clean hands context is at times a category or aspect of judge integrity. Accepting that the professional integrity of judges is of intrinsic moral value as a category of personal integrity, perhaps court integrity transitively also enjoys such a status to the extent that it is an aspect of judge integrity.<sup>54</sup>

Assuming one were to accept that judge integrity is intrinsically morally valuable, that court integrity is at times an aspect of judge integrity, and by extension, that court integrity has intrinsic moral value, does it really matter all that much? Put differently, what is the normative weight or significance of judge integrity in this context? Do the interests of several individual judges in their own professional integrity as judges pack sufficient normative force to justify a legal doctrine that has the effect of rejecting countless meritorious claims and of allowing a similar number (assuming the law is moral) of injustices to stand? Taking an all-things-considered approach, the significance of court integrity—as an aspect of individual judges' professional integrity—seems low. Yet, as explained above, personal integrity often functions to defy—in the case of particular individuals—what are contradictory

53. See *infra* Section III.H.

54. This line of reasoning requires accepting that the "abetting" of iniquity presumably involved in a court's assenting to the claims of plaintiffs with unclean hands is indeed deleterious to judges' integrity, a position challenged by the arguments given in Sections III.B. and III.C.

and even overriding reasons for action. In this respect, the CHD functions to allow judges the legal space to draw an imaginary line in the sand and—when they “can do no other”—refuse to sacrifice their integrity when faced with the prospect of allowing or abetting wrongdoing.

While I doubt whether judges indeed have such strong integrity-driven recoil in most equity cases involving plaintiffs with unclean hands, at times they certainly may. And assuming that such integrity-driven reactive emotions are good indicators of genuine integrity conflicts, perhaps at times assenting to and even entertaining the claims of plaintiffs with unclean hands indeed compromises the integrity of judges. Thus occasionally the role the CHD plays in protecting court integrity may have the unique and morally significant role of allowing judges to protect their own integrity. This line of reasoning does not necessarily point to an intrinsic moral value in all the instances in which the CHD protects court integrity, but it does point to such a value in some such cases.

### G. The Integrity of the Courts, the Legal Community, and the Citizenry

Another line of reasoning for recognizing that court integrity has intrinsic moral value depends on accepting that how well social groups or institutions fare at times determines, ipso facto, aspects of the well-being of individuals constitutively attached to those groups or institutions. This occurs where attachments to a group or institution partially constitute individuals' identities. In such circumstances, how well the group or institution fares is often, ipso facto, an aspect of how well those constitutively attached individuals fare. Considering that the well-being of individuals has intrinsic moral value, the same is true for certain aspects of the well-being of the groups or institutions to which they are formatively or constitutively attached.<sup>55</sup>

Such a constitutive relation may exist between citizens and the legal systems to which they are subject, especially in democracies in which the legal system plays a significant role in forming national identity and the idea of citizenship (as is the case in the United States). Indeed, where an otherwise just legal system performs a great injustice, there is often a sense in which such a moral failure ipso facto taints the community, the nation, and the citizenry at large. Such mass tainting through association mainly occurs, to the extent that it does, in cases of grave injustice and moral failings of the judiciary. Clear-cut examples are the legal regime of slavery and the Supreme Court's ruling on the constitutionality of the internment of

55. I develop a theory of this notion of ipso facto harm as a matter of constituting attachments elsewhere. See Ori J. Herstein, *Historic Injustice, Group Membership and Harm to Individuals: Defending Claims for Historic Justice from the Non-Identity Problem*, 25 HARV. BLACKLETTER L.J. 229 (2009).

American citizens of Japanese descent during World War II.<sup>56</sup> Yet, fortunately, in liberal democracies such cases of grave judicial moral failing are relatively rare. Most communal or institutional infractions, failings, sins, and wrongs do not taint all their members, devotees, or citizens.<sup>57</sup> More modest failings may, however, be constitutively detrimental to legal practitioners, such as lawyers, judges, law professors, and students, as well as any other individuals whose sense of self is strongly tied to and intertwined with the legal profession, community, and institutions.

Assuming that ipso facto constitutive harm—be it to members of the citizenry at large or to members of the legal community—at times indeed arises in cases of unclean hands, the question then becomes: What is the weight or severity of this harm? My sense is that at least in certain cases—where the institutional attachment is strong and/or the institutional failing severe—it is possible that the harm involved is more than negligible, mustering some normative force behind the CHD in its capacity as a protector of court integrity. However, similarly to the judge-integrity analysis offered above, the line of reasoning presented here at best recognizes intrinsic moral value in only some instances of furthering court integrity.

#### H. The Functional Moral Significance of Court Integrity

If morally favorable or detrimental, the consequences, results, and effects of erosions in the integrity of courts may infuse the CHD, which presumably furthers court integrity, with instrumental moral value. An example of a possible detriment of erosions in court integrity is the corruption of judges' sense of justice or discipline in pursuing justice. Upholding court integrity may have the favorable effect of cementing and furthering the integrity and professionalism of judges. Protecting the pride and sense of vocation of members of the judiciary through protecting the integrity of the courts is another possible favorable effect of preserving court integrity. Yet, considering that preferring what is legally valid to what is morally right is not an uncommon occurrence in judicial practice, I doubt whether an equity system lacking a CHD would indeed actually suffer such setbacks. Considering that applying the legal over the moral in matters of law does not appear to have the detrimental effects considered above, there is no reason to think that such detriments would arise in cases of equity. The worry seems, in other words, exaggerated.

More significant, I think, is the fact that erosion in court integrity may influence the public's perception of the integrity, decency, and fairness of the courts, which in turn might have detrimental implications for courts' legitimacy. In other words, the fact that people's trust in and respect for the courts is connected to the integrity of the court (and the court's actual

56. *Karamatsu v. U.S.*, 323 U.S. 214 (1944).

57. Herstein, *supra* note 55, at 243–244.

integrity undoubtedly plays a role in forming the public's perception of the court's integrity) may invest court integrity with (instrumental) moral value. Under such circumstances it is conceivable that the loss of integrity, which is presumably involved in courts entertaining and assenting to the claims of plaintiffs with unclean hands, may erode the public's favorable image of and trust in the courts, resulting in a negative impact on courts' legitimacy.

This is likely what Justice Brandeis was getting at in associating the CHD with maintaining "respect for law"<sup>58</sup> and the promotion of "confidence in the administration of justice."<sup>59</sup> It is primarily under such circumstances that the instrumental benefits the CHD offers in terms of court integrity may have more than negligible normative force. Whether and to what degree entertaining and assenting to the claims of plaintiffs with unclean hands are detrimental to the public's perception of court integrity and, by extension, to the legitimacy of the courts are empirical questions I do not have the tools to answer. Nevertheless, considering that most private law disputes attract little to no public attention, the implications the CHD has for the public's trust in the judiciary is probably quite low. This may not be so in high-profile civil litigations as well as in disputes of public law involving equitable remedies that touch on widely contested matters. In cases such as these, the benefits the CHD offers in terms of preserving court integrity—as a means of preserving court legitimacy—appear rather weighty.

### I. Conclusion: Court Integrity and the Clean Hands Defense

The outcome of my assessment of the majority judicial position—that the CHD is primarily a doctrine of court integrity—is mixed. As shown above, the effects that the merging of law and equity have presumably had on the judicial craft and reasoning in equity cases raise doubts as to whether granting equitable remedies to plaintiffs with unclean hands indeed detracts from courts' integrity. Putting this speculation aside, there is reason to doubt the premise that the ideal of court integrity is fully aligned with the CHD both structurally—the CHD probably does not embody a norm of court integrity—and in its effects—on balance the CHD does not always further court integrity. Yet it still seems plausible that in many cases the CHD does further court integrity.

As for the prescriptive aspects of the court-integrity account, I conclude above that but for two types of exceptions in which the court-integrity benefits of the CHD are at times morally significant—where court integrity is an aspect of judge integrity or is constitutive of institutionally attached individuals' well-being—court integrity appears lacking in intrinsic moral value. I next move to the integrity-related instrumental aspects of the CHD. The protections that the CHD offers court integrity really matter primarily in

58. *Olmstead*, *supra* note 27, at 484.

59. *Id.*

circumstances where the court's integrity loss, which is presumably inherent in judicial assent to the claims of plaintiffs with unclean hands, has the effect of eroding the public's trust in the courts.

Having fleshed out and developed the judicial account of the CHD as a doctrine of court integrity and having made an earnest attempt to present it in a favorable light, I conclude that although it is the long-standing position of the vast majority of legal authorities, the integrity-based approach is at best only partially correct. Most significantly, although court integrity possibly plays some role in the CHD and perhaps even offers it significant normative support in certain cases, there are reasons to doubt that the CHD is *fully* aligned—structurally or instrumentally—with court integrity. Developing an alternative or supplementary account of the normativity of the CHD is the aspiration of the remainder of this article.

#### 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.<sup>60</sup> 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].<sup>61</sup> 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.

Analyzing the sanction of the CHD in terms of pragmatics proves illuminating. Statements are often not just locutions, that is, do not express only certain content, but are often also illocutions, that is, statements often also *do* things.<sup>62</sup> What a statement, or more broadly, what a speech act does or creates, that is, a statement's illocutionary component, constitutes its "force."<sup>63</sup> For example, the statement "I will call the police" may have the

60. DOBBS, *supra* note 1, at 44.

61. BLACK, *supra* note 2.

62. On "locutions" and "illocutionary," see J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

63. *Id.* at 100–101.

illocutionary force of a threat, prediction, or assertion. Similarly, expressions of normative assessment often do not only reflect (accurately or not) normative states of affairs but also blame, judge, condemn, demand, and so on, and thereby *create* and *constitute* normative facts.

Legal complaints filed in court are, of course, locutions, yet they also have an illocutionary component. A legal complaint properly filed in court is not only a document containing and expressing propositions about the law; such documents also create new legal facts: initiating litigation, making a legal claim against the defendants, and introducing a matter the court must address, hear, and entertain.

In the terms of pragmatics, the sanction of the CHD is the deflating of the illocutionary force of legal complaints. The application of the CHD effects the rejection of a legal complaint on the grounds that the plaintiff who brought the complaint is deemed lacking the requisite legal standing to make such a complaint. While the plaintiff's claim may itself be legally valid and meritorious, the CHD deems that based on the rules of equity, this plaintiff cannot bring that claim before the court. Normally, the court would have been obliged to hear and entertain the plaintiff's complaint, but for reasons of unclean hands, the plaintiff is in effect found to lack the normative power to bring a complaint that the court is obliged to hear. Because it is this person's complaint, the complaint simply lacks illocutionary (legal) force in the form of constituting a set of legal claims the court is obliged to hear and entertain.

Put differently, it is the plaintiff's lack of standing that deflates the illocutionary force her complaint would normally have had. Were another party—innocent of any related wrongdoing—to bring exactly the same complaint and follow exactly the same rules of procedure, all other things being equal, the complaint would have been successful not only in the truth-value of its locutions but also in illocutionary terms: it would have successfully created and constituted a (new) legal fact in the form of a legal claim that defendants are required to answer for and courts are obliged to hear and entertain on its merits.

The CHD is, therefore, a doctrine of standing. The grounds on which the CHD determines (the lack of) standing—a plaintiff's connected/related wrongdoing—are, however, unique, reflecting the unusual norms the CHD embodies.

## B. *Tu Quoque* and *In Delicto*

*Tu quoque* ("you too!") stands for a normative phenomenon that is as loosely defined as it is widespread. Other expressions that capture this phenomenon are "the pot calling the kettle black"; "look who's talking!"; "who are *you* to say that?!"; and "how wilt thou say to thy brother, let me pull out

the mote out of thine eye; and, behold, a beam is in thine own eye?"<sup>64</sup> These sayings are properly invoked in a variety of circumstances against those who claim, demand, condemn, criticize, judge, or blame others for wrongdoing while they themselves are guilty of similar or related wrongdoing. For example, if I regularly fail to return my friends' phone calls it seems that—for *tu quoque* reasons—I am in no position to judge, criticize, chastise, blame, or make demands on others for failing to do the same.

It is important to notice that the *tu quoque* maxim does not negate the truth-value of a statement's normative or evaluative locution. I may, for example, be correct in stating that friends should return each other's phone calls and that in not returning mine, my friend acted wrongly. Yet, considering that I myself fail in returning my friend's calls, according to the *tu quoque* I am in no position to blame, judge, condemn, or make claims on my friend for similarly not returning my calls. I may, of course, succeed in expressing or vocalizing the semantics of blame, judgment, condemnation, or claim, but such statements would not constitute blame, judgment, condemnation, or claim.

What the *tu quoque* maxim challenges is not the truth-value of the normative content of a statement but the statement's normative illocutionary force.<sup>65</sup> One should not confuse the *tu quoque* maxim, as it is explained here, with "*ad hominem tu quoque*," which is the baseless yet often used rhetorical ploy of criticizing the validity of a normative position by way of accusing those arguing the position with *tu quoque*. The *tu quoque* undermines one's capacity normatively to criticize, blame, judge, condemn, claim, and so on, not one's capacity to express normative truths that *may* ground criticism, judgment, blaming, and condemnation.<sup>66</sup> In the circumstances of the *tu quoque*, the guilty judge/condemner/blamer/claimant may, therefore, express valid normative statements of blame, judgment, condemnation, or claim. Yet, because the party expressing such normative statements is himself guilty of similar or related wrongdoing, said statements lack normative traction; they are expressions of the semantics of blame, judgment, condemnation, and claim that fail to blame, judge, condemn, or claim.

While similar, one should not confuse the *tu quoque* with a related maxim that I call "*in delicto*" ("at fault").<sup>67</sup> *In delicto* is reflected in statements such as

64. MATTHEW 7:4 (King James ed.) (Sermon on the Mount).

65. G.A. Cohen, *Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?* 58 ROYAL INST. PHIL. SUPP. 113, 120 (2006).

66. *Id.* at 121. For a related view, see Saul Smilansky, *The Paradox of Moral Complaint*, 18 UTILITAS 284, 289 (2006). Smilansky considers divorcing the wrongness of an action from the issue of whether the victim of the action can or cannot *morally* complain about that action. The motivation for doing so is to accommodate the intuition that, at least in some cases, a victim of a wrong who is also guilty of a similar wrong may not complain about the wrong she suffers even though we genuinely believe she was treated wrongly. Yet Smilansky questions this approach because he finds it equally if not more troubling to part with the principle that "[i]f it is morally impermissible to treat *E* in a certain way, then *E* has grounds for complaint if anyone treats *E* in that way," which he calls "the principle of the transfer of complaint."

67. Cohen, *supra* note 65, at 123.



“you made me do it”; “you’re involved yourself”; “you started it”; and “it was your idea.” *In delicto* is subject to the same logic—in terms of pragmatics—as is the *tu quoque*. An important difference between *tu quoque* and *in delicto* is the relation between the wrongdoing that is the subject of blame, judgment, condemnation, or claim and the wrongdoing of the person expressing the blame, judgment, condemnation, or claim. In cases of *tu quoque* a party A—who previously performed a certain wrongful action  $\phi$ —blames, judges, or condemns B for similar, connected, or related wrongdoings. The *in delicto* maxim involves cases wherein A blames, judges, or condemns B for a specific wrong that A himself is also involved with or responsible for.

In the *in delicto* scenario, A’s prior wrongdoing is part and parcel of  $\phi$ , the *very same wrongful conduct* for which he now blames, judges, and condemns B. In cases of *tu quoque*, A’s prior wrong is distinguishable from B’s wrong, even though the parties’ wrongs are similar in kind or were performed within the same transaction, factual background, or set of circumstances. For example, under *in delicto* a superior cannot condemn her subordinate for performing a wrong the superior ordered the subordinate to carry out, even if the subordinate should not have complied. Under *tu quoque*, a superior cannot condemn a subordinate for performing a wrong if the superior herself committed or was culpably involved in wrongs that are either similar or were performed as part of the same overarching transaction or within the same set of circumstances as was the subordinate’s wrongdoing. The *in delicto* maxim is reflected in the legal doctrine of *in pari delicto* discussed above.<sup>68</sup>

### C. The Clean Hands Defense, *Tu Quoque*, and *In Delicto*

By now it is clear where the argument is headed: the *tu quoque* maxim and the CHD have largely the same logic. Both deflate the illocutionary force of normative (moral, ethical, or legal) speech acts (such as statements of condemnation or formal legal complaints) on the grounds of the speaker’s or claimant’s guilty wrongdoing, where the wrongdoing is connected or similar to the wrongdoing for which the claimant or speaker is claiming, blaming, judging, or condemning others. Moreover, the CHD and the *tu quoque* are both doctrines of standing: the guilt of the speaker or claimant does not affect the truth-value or accuracy of her normative statement or claim but denies her standing actually to make the claim, blame, judgment, or condemnation that the statement purports to embody.<sup>69</sup> If someone else, not guilty of related or similar wrongdoing, were to make exactly the same statement, all other things being equal, her statement or complaint

68. See *supra* notes 20–26 and accompanying text.

69. On the *tu quoque* as a norm of standing, see, e.g., Cohen, *supra* note 65, at 119–121; R. Jay Wallace, *Hypocrisy, Moral Address, and the Equal Standing of Persons*, 38 PHIL. & PUB. AFF., 307, 317 (2010).

would have successfully embodied a claim, judgment, condemnation, or legal complaint.

The CHD probably also covers scenarios of *in delicto*. As a matter of legal interpretation, performing the same wrong, as is the requirement for *in delicto*, may certainly fall under the CHD's categories of a "connected" or "related" wrongdoing. As such, the scope of the CHD is wider than that of the *tu quoque* in that it also incorporates cases of *in delicto*. Therefore, instances of *tu quoque* and *in delicto* arising in matters of equity fall under the purview of the CHD, while instances of *in delicto* arising in matters of law fall under the purview of *in pari delicto*.

The CHD largely shares a normative structure with the *tu quoque* and *in delicto* (but for the caveat that the CHD accommodates both maxims). For reasons of simplicity and considering that it is the broader, more central norm, I will focus mostly on the *tu quoque*. Cases of *tu quoque* turn on the identity, similarity, or connectedness of the plaintiff's and the defendant's wrongs. Similarly, the operative relation in the CHD is connectedness. In addition, the *tu quoque* and the CHD are both norms of standing that deflate the moral or ethical (in the case of *tu quoque*) or the legal (in the case of the CHD) illocutionary force of claims expressed or brought by wrongdoers, regardless of the truth-value or legal merits of the claims' locutions.

#### D. The Morality of the *Tu Quoque*

Switching gears from the descriptive to the prescriptive, one wonders whether the *tu quoque* is morally valid. The norm of *tu quoque* has a strong presence in natural normative parlance and is thought to capture something of moral significance, which lends some plausibility to the idea that the *tu quoque* is morally valid. Yet merely pointing out that the normative landscape contains the *tu quoque* hardly settles the matter. After all, the *tu quoque* has an effect that is prima facie problematic: silencing people's otherwise potentially valid normative illocutions. Analyzing the place *tu quoque* captures in the logic of morality is beyond the purview of this essay. Yet the idea that morality contains such a norm does not seem improbable and is certainly intuitive. When, for example, the deranged dictator of Libya, Muammar Gaddafi, threatens rebel forces and their civilian supporters with imminent massacre, his subsequent condemnation of NATO's military intervention in the Libyan conflict rings hollow. Somehow the condemnation or blame fails as condemnation or blame when uttered by Gaddafi, even if in principle the content expressed were morally valid.

While the *tu quoque* is a fairly neglected normative phenomenon in the philosophical literature, some accounts, primarily in the contexts of the concepts of "blame" and "complaint," have recently emerged.

Gerald Dworkin offers a functional grounding of the *tu quoque*.<sup>70</sup> According to Dworkin, the point of expressions of moral judgment such as blaming, judging, criticizing, or disapproving is to effect some change in the behaviors or character of the agents toward whom the statements are directed. Given that people tend to seek the respect of those whom they respect, criticism delivered by those guilty of *tu quoque* is less likely to achieve the desired transformation in the recipient's character. When a party who is himself subject to *tu quoque* expresses moral criticism, in a sense he "shoots himself in the foot," because were the recipient of the criticism to accept the criticism, she would thereby presumably lose respect for the person expressing the criticism (due to his own susceptibility to his own criticism) and therefore be less likely to alter her conduct according to that criticism.

Thomas Scanlon explains that blaming wrongdoers incorporates a condemnation for willingly behaving in a way that makes the wrongdoer into "someone towards whom [the condemner] cannot have the intentions and expectations that constitute normal moral relations,"<sup>71</sup> such as trust and reliance. Some such normal expectations are relational, mutual, or reciprocal. In cases of *tu quoque* or hypocrisy, Scanlon explains that the condemner's own past wrongdoing has already impaired the parties' moral relationship. There is something false, therefore, in the former wrongdoer's condemnation of the subsequent wrongdoer.<sup>72</sup> The condemner rails against the wrongdoer for undermining their moral relation yet she herself has already undermined the factual basis for her condemnation—that such a moral relation existed for the wrongdoer to undermine—by her own past wrongdoing. In this, Scanlon does not claim that the circumstances of the *tu quoque* are in any way right or wrong, only that the *tu quoque* captures a practical failure in the hypocrite's condemnation: the wrongdoer-complainant, -blamer, or -condemner has nothing to condemn, blame, or complain about.

Saul Smilansky, in his discussion of the concept of "moral complaint," suggests thinking of the moral basis of the *tu quoque* in terms of what he calls the "legislative nature of morality and moral actions,"<sup>73</sup> which stands for the idea that one's morally significant actions are in a sense instances of self-reflexive moral legislation by which one makes it (or "legislates" it to be) morally permissible to act toward him or her in a manner similar to how he or she acts toward others; a position rooted in Kantian moral philosophy. As such, Smilansky appears to ascribe the *tu quoque* with moral content: denying the wrongdoer-complainant her moral complaint is just. Notice that for both Scanlon and Smilansky, the viability of the illocutionary component of statements of blame and condemnation is parasitic on the

70. Gerald Dworkin, *Morally Speaking*, in REASONING PRACTICALLY 182, 184–186 (Edna Ullmann-Margalit ed., 2000).

71. THOMAS M. SCANLON, MORAL DIMENSIONS (2008), at 175–176.

72. *Id.* at 175–179.

73. Saul Smilansky, *Some Thoughts on Terrorism, Moral Complaint, and the Self-Reflexive and Relational Nature of Morality*, 34 PHILOSOPHIA 65, 66 (2006).

truth-value of the statements' locutions: the reason the illocution fails is that the locution is somehow false.

Yet another recent contribution to the philosophical reflection on the morality of the loss of standing in circumstances of the *tu quoque* is that of Jay Wallace.<sup>74</sup> Wallace understands the *tu quoque* to derive from the fact that the hypocrite-blamer-wrongdoer exposes himself to condemnation, rejection, and resentment for his hypocritical blaming of others, which grounds the rejection of his standing to blame, condemn, or resent. Blaming, condemning, or resenting incorporates a reactive emotion to wrongdoing; in blaming, condemning, and resenting the wrongdoing of others, one demonstrates that one values the moral value the wrongdoers violated. Wallace believes that blaming, condemning, or resenting others for violating certain moral values gives rise to a practical commitment to subject one's own attitudes and behavior to similar scrutiny. A condemner-wrongdoer who neither repents, corrects, nor comes to terms with her own wrongdoing violates this practical commitment and thereby undermines her standing to persist with the blaming, condemning, and resenting that give rise to those commitments of self-scrutiny.

According to Wallace, what is objectionable about the circumstances of the *tu quoque* is that one—who is aware of and values the value she herself has violated—holds her own interests and the interests of the victims of others in higher regard than she holds the interests of those who victimize others and the interests of her own victims. Doing so violates what Wallace holds as fundamental to morality: the equal moral worth of all individuals. Denying others equal moral regard or respect in this way lays open the hypocrite to the resentment of others and to the rejection of her own standing to blame, condemn, or resent others. Here it is the wrongness of hypocrisy and not a pragmatic failure in illocution that allows ignoring the hypocrite's hypocritical allegations.

Finally, it is possible to view moral desert as the moral grounds of the *tu quoque*. This view is perhaps not far from Wallace's. The idea is that the *hypocrisy* of bringing the claim or of blaming makes the hypocrite deserving of losing the standing to blame or to bring such a claim. Notice that this retributive grounding of the *tu quoque* differs from the retributive account given below of the CHD (Section V). Here the retribution is for one's hypocrisy, while in the latter account the retribution is for the hypocrite's past (similar or connected) wrongdoing.

It is important to note, however, that at least in some cases there are strong reasons for allowing hypocrites standing, the *tu quoque* notwithstanding. As Smilansky points out, "one surely wishes that the Nazis [had] practiced less what they preached."<sup>75</sup> Moreover, at times social change requires a degree

74. Wallace, *supra* note 69, at 323–331.

75. For a brief account of more problems with ascribing hypocrisy with overriding moral weight, see Saul Smilansky, *On Practicing What We Preach*, 31 AM. PHIL. Q. 73, 78–79 (1994).

of hypocritical locutions, as was the case with slave-owning abolitionists. There are no doubt further such arguments.

In any case, at least some of the views presented above ascribe moral value to the *tu quoque*. Under Dworkin's account, the *tu quoque* has morally desirable effects, injecting the *tu quoque* with extrinsic moral value. Smilansky, on the other hand, views the *tu quoque* as a manifestation of a fundamental tenet of Kantian moral philosophy. Wallace also ascribes moral value to *tu quoque* as a morally just product of a violation of agents' equal moral worth. Finally, an account based on moral desert is also plausible. There is, therefore, at least some reason to think that the legal norm of the *tu quoque* embodied in the CHD has a counterpart in the form of a moral norm of *tu quoque*.

## V. THE CLEAN HANDS DEFENSE: PUNISHMENT AND RETRIBUTION

### A. The Clean Hands Defense as a Doctrine of Retribution

In laying out the rules of the CHD, numerous courts have explicitly said that this doctrine is not designed or applied in order to punish.<sup>76</sup> Very few courts appear to take the contrary position.<sup>77</sup> In direct contrast to what most courts claim, there is at least some reason to think that the CHD is a punitive doctrine.

In fact, I think it is obvious. A mark of punishment is that sanction, suffering, or deprivation is imposed for an (actual or supposed) wrong. In other words, punishment is meted out by reason of or on the grounds of wrongdoing.<sup>78</sup> Moreover, punishment is usually directed at an actual or apparent wrongdoer for her actual or apparent wrongdoing.<sup>79</sup> 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).<sup>80</sup> That the CHD is applied for reason of wrongdoing

76. See, e.g., *Johnson*, *supra* note 1, at 403 ("The abstention which equity exercises, as it should here, under the short-hand phrase of the 'clean hands doctrine' is not due to any desire to punish a litigant for his uncleanliness") (J. Frankfurter, dissenting); *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933) ("They apply the maxim, not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice."); *W. L.A. Inst. for Cancer Res. v. Mayer*, 366 F.2d 220, 227 (9th Cir. 1966); *Thompson v. Orcutt*, 257 Conn. 301, 310 (Conn. 2001); *Adams v. Manown*, 328 Md. 463, 482 (Md. 1992); *Mona v. Mona Elec. Group, Inc.*, 176 Md. App. 672, 714 (Md. Ct. Spec. App. 2007); *Hicks v. Gilbert*, 135 Md. App. 394, 400 (Md. Ct. Spec. App. 2000).

77. See, e.g., *Busch v. Baker*, 79 Fla. 113, 119 (Fla. 1920).

78. John Gardner, *Introduction*, in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY xxv (2008).

79. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (2008), at 4–5.

80. 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.

and not merely conditioned on it is made clear from the CHD's doctrinal and practical preoccupation with plaintiff iniquity and from the fact that the judicial labor of deciding whether to apply the CHD almost entirely turns on determining whether the plaintiff's hands are unclean. As such, the doctrine of the CHD exhibits the marks of a practice of punishment: it is a wrongdoing that grounds any and all implementations of the defense, which means that the CHD is conditioned on and applied for wrongdoing.

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,"<sup>81</sup> 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.

I suspect that in arguing that the CHD is not a punitive doctrine, courts are conflating description and justification, as if concerned that recognizing the punitive aspects inherent in the doctrine of the CHD would somehow negate the CHD's presumed underlying goal as a protector of court integrity. But justifying the CHD on the grounds of court integrity does not mandate denying the doctrine's punitive nature. The justifications for grounding any and all implementations of the CHD in the plaintiff's wrongdoing may derive from a variety of values. For example, it is certainly possible (although, as argued above, unlikely) that the CHD is a punitive doctrine that is justified primarily on grounds of court integrity.<sup>82</sup> And a justification grounded primarily in court integrity does not necessarily negate the fact that the doctrinal logic or structure of the CHD is punitive.

Once we have accepted that the CHD has the structure of a punitive doctrine, the question of its retributive underpinnings arises. Norms of retribution are inherent in practices of punishment:<sup>83</sup> punishment is conditioned on there being an (actual or apparent) wrong to sanction, and the sanctioning with punishment is for or by reason of that wrong.<sup>84</sup> This is the essence of retributive justice: sanctioning a wrongdoer for her wrongdoing. As just explained, there is reason to think that the best interpretation of the CHD is as a doctrine grounded in this punitive logic. Thus the CHD embodies a retributive norm.

81. *Johnson*, *supra* note 1.

82. I use "justified primarily" as opposed to "justified solely" because if norms of retribution have some moral weight and are inherent in practices of punishment, then retribution is a norm that necessarily plays *some* role in the justification of any punitive rule. For more on this line of logic, *see infra* Section VIII.

83. *See supra* note 78.

84. In the paradigmatic case of punishment, punishing X is not merely conditioned on X's wrongdoing but is also meted out for that wrongdoing.

## B. Retributive Reasons for the Clean Hands Defense

Moving once again from the descriptive to the justificatory, assuming that we accept that the CHD exhibits the logic or structure of a retributive norm—punishing a wrongdoer for or by reason of her wrongdoing—the question that arises is whether the (legal) sanction of the CHD is (morally) justifiable, at least partially, on retributive grounds.

There is a variety of theories of retributivism accounting for why and when punishing wrongdoing is just. One version of retributivism justifies punishment simply on the grounds that wrongdoing makes wrongdoers deserving of a sanction.<sup>85</sup> A second prominent retributive approach views punishment as rectification, standing for the position that punishment is justified because it annuls, erases, or confiscates ill-gotten or unfair advantages from the wrongdoer.<sup>86</sup> “Communicative retributivism” is another modern strand of retributivism which justifies punishment as an expression and denouncement of wrongdoing.<sup>87</sup>

Regrettably, it is beyond the scope of this article to give anything other than a cursory demonstration of how each of these types of retributive theories accounts for and assesses the retributive norm embodied in the doctrine of the CHD. Yet, assuming retribution is just, on the face of things it does appear that one could reasonably argue that, considering that plaintiffs with unclean hands are by definition wrongdoers: (a) they deserve the sanction of the CHD; (b) they gained an ill-gotten gain or advantage through their previous wrongdoing that is annulled or confiscated through denying them a remedy for a wrong related to the wrong that they inflicted on others; and (c) in cases of unclean hands, condemnation of wrongdoing is well communicated to the wrongdoer and others through denying the wrongdoers access to a remedy for a related wrong they suffered.

Moreover, in retributive reasoning, punishment is just when it is fitting and proportionate in relation to the wrong committed.<sup>88</sup> Whether a particular sanction is retributively warranted depends on whether it is deserved, effectively communicates condemnation, or successfully annuls an ill-gotten

85. See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001), at 20–21; David Wood, *Punishment: Nonconsequentialism*, 5 PHIL. COMPASS 470, 471 (2010); Michael S. Moore, *Justifying Retributivism*, 27 ISR. L. REV., 15, 15–21 (1993).

86. See, e.g., GEORGE SHER, DESERT 69–90 (1987); DUFF, *supra* note 85, at 21–23; Michael Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726 (1983); John Finnis, *The Restoration of Retribution*, 32 ANALYSIS 131 (1972).

87. ANTHONY DUFF, TRIALS AND PUNISHMENT (1986), at 233–267; DUFF, *supra* note 85, at 27–30; Jean Hampton, *An Expressive Theory of Retribution*, in RETRIBUTION AND ITS CRITIQUES 1–27 (Wesley Cragg ed., 1992). For a recently developed justification of legal punishment called “confrontational retributivism” that is based on a communicative conception of retribution, see Dan Markel, *What Might Retributive Justice Be?*, in RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY (Mark D. White ed., forthcoming).

88. On the retributive requirement that the punishment fit or be proportionate to the wrong/crime, see, e.g., Hampton, *supra* note 87, at 13; Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 180 (Ferdinand Schoeman ed., 1987); Davis, *supra* note 86, at 727.

advantage. But if taken more loosely, the retributive requirement for a fitting or appropriate punishment is nicely captured in the age-old retributive maxim of *lex talionis*: that punishment should be in kind and no more,<sup>89</sup> or that “the punishment must fit the crime.” When taken literally, this is, of course, an ideal not easily realized in the law. Accordingly, the days of “an eye for an eye” are fortunately long gone. Nevertheless, one of the retributive virtues of the CHD is that unlike many doctrines of legal punishment, it achieves a very neat fit in type between transgression and sanction: it is fitting to deny a plaintiff a remedy for a wrong related to the wrong she inflicted on others.<sup>90</sup>

This correlation in type between infraction and sanction is rare in the law, which generally employs only fines and prison terms as sanctions for numerous radically different types of wrongdoing. Denying the plaintiff-wrongdoer relief assures that he receives—under *lex talionis*—what he deserves for his prior wrongdoing: to suffer a wrong related to his own. The CHD punishes in that it denies the plaintiff-wrongdoer the right to petition for legal relief that would otherwise remedy or annul the harm that the petitioner in a sense has coming to him. Of course, it is the defendant and not the court that is the direct source of the fitting and deserved punishment/wrong. Yet the CHD has the effect of denying the right to legal relief or nullification of that wrong. The CHD’s role in assuring this elegant fit in type between transgression and sanction gives further support to the position defended in the previous section that the CHD embodies a retributive norm.

The CHD also captures the retributive tenet of proportionality that “the punishment must fit the crime and *no more*” in the fact that when the wrong the plaintiff has suffered (grounding her suit) outweighed in its severity her past wrongdoing (constituting her unclean hands), courts have, at times, chosen not to apply the CHD.<sup>91</sup> This reflects the fact that when the severity of the sanction nonnegligibly outweighs the severity of the “crime,” the sanction is not retributively just and should not be imposed. This proportionality measure is imperfect, and it is certainly possible that while the CHD achieves a fit in type between sanction and wrong, it does not always achieve perfect alignment in terms of the severity in the harms caused by the sanction and the wrong. To this I assert that an overly stringent proportionality requirement between the effects of the crime and those of the sanction runs the risk of proving the improbable: that most legal punishment also fails to count as retributive. After all, the suffering and loss that a prison term or fine causes greatly varies from one defendant to another, even when their wrongdoing and their punishment are identical.<sup>92</sup>

89. BLACK, *supra* note 2, at 932.

90. This is not to say that the sanction the CHD imposes necessarily exhausts the punishment the plaintiff-wrongdoer deserves.

91. *Supra* note 15.

92. *See, e.g.*, Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009).



Notice that the CHD potentially sanctions both plaintiff and defendant; although the CHD assures that the defendant—a presumed wrongdoer deserving of sanction in her own right—wins the case, were that defendant to bring a suit against the plaintiff for his wrongdoing (which constituted his unclean hands) she (the former defendant) would most likely also lose on grounds of unclean hands. This is a function of the fact that the CHD is generally available only where the plaintiff's wrongdoing is somehow mixed with the defendant's relevant wrongdoing<sup>93</sup> or is directed against the defendant.<sup>94</sup>

The concept of redemption provides another reason to associate the CHD with retribution. Courts have refused to apply the CHD against certain plaintiffs guilty of wrongdoing on the grounds that those plaintiffs ceased their wrongdoing or otherwise redeemed themselves.<sup>95</sup> Redemption does not transform the guilty into innocents, yet it does make the redeemed party no longer deserving of punishment for the wrongdoing of which he is guilty. Retributive norms comfortably accommodate the phenomenon of redemption because they turn on the desert of the guilty and can account for the category of a guilty wrongdoer who is nonetheless redeemed and therefore not deserving of punishment. As suggested above, the doctrine of the CHD appears to incorporate a similar logic.

The CHD is, however, an imperfect punitive doctrine. It usually succeeds in punishing only those litigants who would have otherwise been successful in obtaining the sought-after remedy. Litigants with “losing” or meritless claims (irrespective of their unclean hands) whose claims end up rejected on grounds of unclean hands would have lost their claim regardless.<sup>96</sup> Thus, although the CHD has retributive logic, it is not always retributively successful. Another possible proportionality problem with viewing the CHD as a retributive doctrine derives from the fact that the CHD may allow for rejecting the claim of a litigant already otherwise punished for her past wrongdoing.<sup>97</sup> I think this worry is overblown. One reason, beyond the point that occasional imperfection in retribution is not, in and of itself, a strong argument in this context, is to realize that the CHD generally applies to conduct that is not otherwise legally penalized. Legal punishment—be it criminal or in the form of punitive damages—does not come near to covering the realm of moral, ethical, and even legal wrongdoing that the CHD covers. Moreover, supplementing legal punishment with the sanction of the CHD does not necessarily result in disproportionate penalizing, just

93. See *supra* note 6.

94. See DOBBS, *supra* note 1, at 70–71.

95. See, e.g., *Stewart v. Jackson*, 635 N.E.2d 186, 189–190 (Ind. Ct. App. 1994) (“Indiana has recognized the ability to purge oneself of wrongdoing, which effectively restores the right to equitable relief. . . . Because the Stewarts no longer [illegally] operate any businesses from their home, they have purged themselves of unclean hands.”) (citations omitted); *Estate of Blanco*, 86 Cal. App. 3d 826, 833 (1978).

96. In fact, the CHD may actually benefit such litigants in saving them litigation costs.

97. For this objection I am grateful to one of the referees for LEGAL THEORY.

as differences between sentences for two similar crimes do not necessarily lead to such a conclusion.

## VI. PUBLIC POLICY

A complete account of what the CHD is normatively for must look beyond the norms and values embodied in the structure of the doctrine of the CHD and also capture the doctrine's salient or significant normative implications and effects. Above, when exploring the CHD in terms of court integrity, I offer some speculations about the morally valuable effects that preserving court integrity through the CHD may have on court legitimacy. Another way the CHD may have favorable effects on court legitimacy is as a product of imposing the *tu quoque* and giving wrongdoers their "just deserts," maxims people tend to associate with fairness and justice.

A further possibly favorable effect occasionally associated with the CHD is the deterrence of wrongdoing.<sup>98</sup> Presumably potential plaintiffs wishing to preserve their access to equitable remedies would shy away from conduct that might dirty their hands. The most likely scenario involves deterring retaliatory wrongdoing: concerned with preserving their cause of action, would-be plaintiffs would presumably turn immediately to the courts and await their ruling, foregoing resorting to self-help or retaliation that involves wrongdoing.

Justifying the CHD on the grounds of deterrence requires that people actually know of and be motivated by the CHD and its sanction. I dare say that the CHD and its detrimental implications for iniquitous plaintiffs are not common knowledge and rarely guide conduct. Therefore the justificatory scope and strength of the deterrence justification are probably limited primarily to parties whose actions are subject to the advice of counsel, for example, large corporations or parties already engaged in litigation.

The CHD may still, however, have wide-reaching effects on people's conduct not through deterrence but rather more vicariously. While not all actors know of the CHD or even of its implications, some clearly do. Those who are aware of the CHD are often sophisticated actors (such as lawyers, government bodies, corporations, legal aid agencies, legal Internet sites) possessing the power to influence and regulate the conduct of others. The practices, procedures, and standards followed and instituted by members of this smaller, more sophisticated group—who *are* directly aware of and are deterred by the CHD—may affect and mold the practices of many others, causing them to adhere to the goals of the CHD without their awareness.

An additional public-interest consideration in favor of the CHD is the protection it offers to the efficiency and reliability of the judicial process. The concerns here are primarily evidentiary. In some jurisdictions the CHD

98. FISCHER, *supra* note 9, at 462–463. See, e.g., *Farino v. Farino*, 450 N.Y.S.2d 593, 594 (N.Y. App. Div. 2d Dep't. 1982).

also applies to litigants who dirtied their hands in an attempt to subvert the equitable judicial process to which they are a party.<sup>99</sup> Such is the case of, for example, a litigant who lies or misrepresents facts to the court. In order to deter such guile and to preserve the reliability of the judicial process, untruthful litigants are often ejected from the litigation on the grounds of their unclean hands.<sup>100</sup>

These evidentiary considerations strongly apply to courts presiding over issues of equity. Such courts do not always have the luxury of hearing testimony and at times must rely on affidavits alone, especially when called to rule on provisional equitable relief.<sup>101</sup> When lacking the adversary safeguards built into the evidentiary process, courts sitting in equity are at times more vulnerable to deceit and more dependent on the litigants' honesty and reliability. These concerns are increased where proceedings are held *ex parte*, as they sometimes are.<sup>102</sup> Understandably wary of relying on facts offered by plaintiffs who have demonstrated a propensity toward subverting the judicial process, courts are wise to turn to the protections of the CHD.

## VII. THE NORMATIVITY OF THE CLEAN HANDS DEFENSE, OR WHAT THE CLEAN HANDS DEFENSE IS FOR

### A. Method

Giving a normative theory to the CHD entails accounting for its “normative universe” or for what it is normatively for or about. Capturing the doctrine’s normative structure is the first step. The term “normative structure” refers to the norms and values that the standards and rules of a legal doctrine constitute, embody, or are legal manifestations of, as well as to the logical relations between those norms and values.<sup>103</sup> Yet a theory of a legal doctrine’s normative structure does not, in and of itself, offer an exhaustive account of the doctrine’s normative universe or of what the doctrine is normatively for. An account of the normatively significant or salient effects of the CHD is also required. Moreover, given an account of the various norms and values relevant to the CHD—that is, of its normative universe—the question then becomes: What do those norms and values have going for them from a moral point of view?

99. One such example is the Israeli legal system. *See, e.g.*, *Nibit Systems, Inc. v. State of Israel—Ministry of Commerce and Industry*, HCJ 579/89 1; *Balles v. Dist. Attorney of Tel Aviv*, HCJ 742/86 1.

100. *Id.*

101. DOBBS, *supra* note 1, at 184.

102. For example, where there are exigent circumstances, a litigant may pursue a temporary restraining order without providing the defendant with prior notice. *FED. R. CIV. P.* 65(b) (2010).

103. *See supra* note 30.

## B. The Normative Structure of the Clean Hands Defense

We first consider above the role of court integrity, concluding that unlike what most courts appear to believe, court integrity is not a value fully aligned with or embodied in the CHD. In fact, there is some reason to think that the CHD actually sets back elements of court integrity to an extent. Therefore, although the CHD may often further court integrity (on balance), the norms the CHD comprises do not count a norm of court integrity among their ranks. The *tu quoque*, on the other hand, is a norm that the CHD does embody. As shown above, the normative structure of the CHD is of a legal manifestation of the *tu quoque*, embodying a normative construct according to which blaming, claiming, or complaining that involves hypocrisy fails on illocutionary grounds. Retribution, too, is a norm that is part of the CHD's normative structure, which is a doctrine centered on sanctioning wrongdoers for or by reason of their wrongdoing. As essential parts of its normative structure, both retribution and the *tu quoque* are inherently manifested in any proper application of the CHD. They are, in other words, part of what the CHD is.

Whether a norm turning on considerations of public interest is also part of the CHD's normative structure is more of a puzzle. As explained above, where there are reasons of public interest against applying the CHD that outweigh the severity or egregiousness of the plaintiff's prior wrongful conduct, courts may and on occasion have ruled against applying the CHD, even where a plaintiff's hands are undoubtedly unclean.<sup>104</sup> Whether this rule is part of the CHD's doctrine or external to it is a matter of interpretation. I tend not to view this public-interest rule as part of the CHD but more as a general principle of equitable reasoning. It seems to me that a counterfactual legal system containing a doctrine with all the elements of the CHD, but for the rule that public interest may override the defense, would still have a CHD doctrine. Thus the public-interest rule is not essential to the logic or normative structure of the CHD but appears more like an external standard that cuts against the logic of the CHD. In any case, had this public-interest rule been part of the doctrine of the CHD, the normative structure of the CHD would have comprised a public-interest side-constraint on the CHD's public-policy goals and on its norms of retribution and *tu quoque*.

## C. What Norms and Values the Clean Hands Defense Is for and What They Have "Going for Them"

A theory of what a legal doctrine is normatively for must account for all the doctrine's salient and significant normative aspects, effects, and implications. One must draw a line between a doctrine's salient and significant normative results, implications, or effects and those more removed or

104. *Supra* note 15.

negligible. This line is, of course, as fuzzy—turning on concepts such as “salient,” “significant,” and “immediate”—as it is dynamic—dependent on changes in the law and the factual circumstances. As such, some of the functional aspects of a doctrine’s normativity are potentially in flux.

Throughout the article I am identifying the CHD’s salient normative virtues. To recap: they include furthering court integrity as it relates to judge integrity, court legitimacy, and the well-being of individual citizens and members of the legal community attached to the court system, as well as embodying the legal norms of the *tu quoque* and retribution found in the CHD, to the extent that they, too, contribute to the public’s positive image of the court and its legitimacy. The CHD’s contribution to the efficiency and reliability of the judicial process is another important positive aspect of the CHD’s normativity, as is the occasional deterrence of wrongdoing.

How may we account for the normative value of the legal norms of *tu quoque* and retribution found in the CHD in relation to the presumed moral norms of *tu quoque* and retribution? Assuming the norms of *tu quoque* and retribution are moral and that they indeed prescribe denying standing to plaintiffs with unclean hands, it follows that their legal counterparts—the legal norms of *tu quoque* and retribution embodied in the CHD—derive certain moral value from carrying out the prescriptions of the moral norms of *tu quoque* and retribution.

All these positive normative implications of the CHD comprise its normative universe and the answer to the question: What is the CHD normatively for?

### VIII. THOUGHTS ON TYING TOGETHER THE THREADS OF JUSTIFICATION

For each potential norm or value considered throughout the article as a candidate for counting as a salient normative aspect of the CHD, I am offering both a structural as well as a brief moral assessment. Upon identifying what the CHD has going for it from a moral point of view—namely manifesting the *tu quoque* and retribution, various public-policy benefits, and favorable effects on individuals’ well-being—one wonders how all these factor into a justification of the CHD.

Accounting for a legal doctrine’s normative universe or what it is normatively for or about is a descriptive or interpretive endeavor, yet it cannot help also having a justificatory component. In giving a normative account of something, we are, by the very nature of the practice, engaged in a justificatory project.<sup>105</sup> This is because norms and values are reasons for actions, and therefore, even if given for purposes of description, they cannot but also be justificatory. Thus, to the extent that the norms and values (and

105. John Gardner, *What Is Tort Law For? 1, The Place of Corrective Justice*, 30 *LAW & PHIL.* 1, 3 (2011).

their interrelations) of the CHD are of moral weight, and as argued above, at least some obviously are, they necessarily play some role in the CHD's justification.

Yet accounting for the prescriptive aspects of the descriptive account of the CHD's normativity—as I do in identifying what the doctrine's norms and values “have going for them”—does not deliver a full account of the CHD's justification. A justificatory project (resulting in a neutral, positive, or negative prescription) of a legal doctrine is also a function of considerations that go beyond what the doctrine is normatively for. Normative descriptions of what a legal doctrine is for or about yield at best reasons for and against the doctrine and perhaps, in conjunction, also a *prima facie* justification for the doctrine, but certainly not an all-things-considered justification (to the extent that an all-things-considered justification is possible).

One thing that justification, even only a *prima facie* one, would obviously require is figuring out the moral weight of each of the various moral virtues I am associating with the CHD throughout the analysis. The game of justification requires not only identifying the relevant players—that is, the doctrine's morally significant structural aspects and effects—but also determining the allocation of the justificatory labor among them. It is possible, for example, that the moral weight or significance of the moral norms of *tu quoque* or retribution is relatively low and that the main force behind a justification for the legal norms of *tu quoque* and retribution that the CHD embodies derives from the doctrine's role in furthering values other than *tu quoque* or retribution, such as deterrence, judicial efficiency, or court legitimacy. Contradictions between the justificatory threads are also not beyond the realm of possibility.

Further, moral considerations not part of the CHD's normative universe may certainly also play roles in the doctrine's justification. For one, there are often cost and benefit implications. For example, perhaps the positive effects of the CHD are more efficiently achievable through a different doctrine of law, so while the CHD may have much going for it, there may still be a better alternative. Moreover, considering the administrative and other costs of imposing and adjudicating legal rules, perhaps there are other, more pressing values that the legal system should direct its limited resources toward, the virtues of the CHD notwithstanding. Yet another concern may derive from the legal system's interest in its overall simplicity, coherence, and efficacy. Perhaps, for example, while favorable when considered on its own, the CHD may not fit well within the broader context of legal doctrines, standards, and rules. As the law changes, for instance, certain doctrines may lose their relevancy, position, or usefulness within the broader legal system.

To the extent that they are possible, all-things-considered justifications are, in other words, a tall order. For the purposes of giving a normative theory of the CHD, it will suffice to identify the normative universe of the CHD, the norms and values it comprises, what those norms and values have

morally going for them, and the fact that they appear to amount to a prima facie justification of the CHD.

## IX. CONCLUSION

I set out to develop a normative theory of the clean hands defense. I first argued that the standard judicial account of the normative nature of the CHD is wrong. This does not entail that courts are always mistaken in associating the CHD with the furthering of court integrity, but there are strong reasons to believe that the CHD neither fully embodies nor is fully aligned with a norm of court integrity. The better view of the CHD's normative nature is to see it as a doctrine of standing and as a legal manifestation of the norms of *tu quoque* and retribution. Occasionally court integrity does play a role in the CHD's normativity, yet it is a functional and not a structural role.

Turning to the prescriptive and to reflecting on justification, there are several moral virtues in the CHD. These include the occasional furthering of judge integrity, the well-being of individuals attached to the court system, court legitimacy, deterrence, and the reliability of the judicial process. In addition, assuming that the norms embodied in the CHD—the *tu quoque* and retribution—are of moral value, furthering such norms through the law adds additional justificatory force to the CHD. Taken together these various moral virtues the CHD has going for it amount to a prima facie justification for the defense.