The Unruly Horse Put Out To Pasture: The Doctrine Of Public Policy in the Modern Law Of Contract

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I: INTRODUCTION

The enforcement of a procedurally valid contract may, in certain situations, be contrary to the doctrine of public policy. The label implies a unified and easily applied doctrine, but in reality there is little to suggest this is the case. This article examines the doctrine of public policy from an academic perspective, discussing the common law context in which these issues arise, investigating the origins of the doctrine and its modern application. Therefore, the consequences of contracts being declared illegal or void on the grounds of public policy are not covered as such. These consequences are the domain of statute.[1]

Part II discusses the doctrine of public policy in the context of classical liberal theories of contract law. Four current areas of application are then examined to assess the contemporary relevance of public policy. Part III analyses whether a thread of commonality amongst the various categories can be identified. Are these categories closed and unchanging, or do they provide another avenue for judicial law making and flexibility as society's notion of what constitutes "public policy" changes? Further, there is some discussion of the place of contract law as a social institution. Finally, some tentative possibilities regarding the future of the doctrine and its place in contract law are explored.

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* BA / LLB (Hons). I would like to thank my supervisor, Dr Rick Bigwood, who first taught me Contract Law, coaxed me through Honours, and is still inspiring me today. His constructive criticism and endless patience made this paper possible.

1 Illegal Contracts Act 1970. Despite this, the courts retain a residual power to enforce illegal contracts where non-enforcement would be inequitable or unconscionable. See, for example, *Howick Parklands Building Co Ltd v Howick Parklands Ltd* [1993] 1 NZLR 749 (HC).

II: PUBLIC POLICY IN CONTEXT

A contract involves a commitment or promise to transfer alienable rights in exchange for a similar commitment or promise. The law of contract assesses which of these promises are valid and merit enforcement. This view traces its history to the United Kingdom in the nineteenth century where the free market was valued as central to the liberty of individuals. The law of contract is often seen as synonymous with the free market, and vital to maintaining it in functioning order. However, it would be misleading to suggest that the institutions of contract law and the market are the only ones valued by classical liberal thought. On the contrary, it is suggested that contract law, as an interconnected social institution, finds itself in regular conflict with other valued social institutions. It is the balance struck between them that provides the subject for this discussion.

At its core, the law of contract supports classical libertarian notions of freedom, autonomy and rights. An individual should be able to make such promises, and to take up such duties as he or she chooses. Equally, having voluntarily assumed an obligation under a contract, the State should not readily interfere with the autonomous will of the parties involved. No real discussion of contract law can take place without recognising the ideological context in which this field of law developed.[2]

Contract law is concerned only with pure procedural justice in the creation of a binding agreement, and does not concern itself with the subject-matter of the agreement. According to libertarian theory, the question of enforceability is not a case of holding contracts up to some form of external standard. It is contended that such an approach, focussing as it does on the substance of the agreement and the nature of the outcomes, is a veiled attempt at imposing external standards, such as distributive justice or allocative efficiency.[3]

Therefore, according to classical contract theory, the only reason for the state to interfere with freedom of contract is either when there is an attempt to transfer inalienable rights or when the purported agreement suffers from a procedural defect. Under libertarian theory interference with freedom of contract is tolerated only where there is some justification on the grounds of further protecting individual rights, or the framework in which those rights operate:[4]

> Libertarians favour the public policy defence in exceptional cases where a contract, such as one to commit murder, threatens harm to someone, or when a contract purports to alienate those fundamental aspects of freedom that enable people to make their own choices. They generally oppose the doctrine, however,

2 For a comprehensive discussion of the socio-historical context of the law of contract, see Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979).

3 See for example, Barnett, "A Consent Theory of Contract" 86 Colum LR 269, 286.

4 Shell, "Contracts in the Modern Supreme Court" 81 Calif LR 431, 502.

> when it is used as a judicial device to equalise bargaining power or otherwise substitute state control for individual choice in economic and social exchanges.

Thus, a doctrine that seeks to invalidate agreements entered into voluntarily between autonomous individuals runs counter to the principle of freedom of contract, because it imposes the collectivist assumptions made by the state onto the rights of individuals. Even so, the doctrine finds an accepted place within the law of contract because it is generally recognised that such limits are necessary to preserve the balance between competing social institutions with differing objectives. As Sir William Holdsworth stated:[5]

> In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.

The doctrine of public policy covers a multitude of sins, making it a complex branch of law to evaluate succinctly. This doctrine has its origins in the eighteenth century and focussed initially on contracts that were considered injurious to society:[6]

> To give a few examples, nobody would be allowed to "stipulate for iniquity", no contract would be enforced that was "contrary to the general policy of the law", or "against the public good", or *contra bonos mores*, or which had arisen *ex turpi causa*.

Chief Justice Lord Wilmot in *Collins v Blantern*[7] commented: [8]

> This is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this, that no polluted hand shall touch the pure fountain of justice ° Procul O! procul este profani.

Although a colourful passage like this makes the doctrine of public policy seem certain and easily definable, it is nonetheless difficult to know what constitutes a "polluted hand". Vague language has led to a variety of interpretations, and to a considerable amount of judicial and academic criticism of

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5 Holdsworth, *A History of English Law*, Vol. VIII, 55 (London: Sweet and Maxwell, 7th ed, 1972).

6 Burrows, Finn and Todd, *Law of Contract in New Zealand* (Wellington: Butterworths, 1997), 376.

7 (1767) 95 ER 847 (KB).

8 Ibid, 852.

the doctrine, most famously enunciated in the image of the "unruly horse".[9]

Generally, cases within the doctrine can be divided into two categories; contracts which are held to be *void* as against public policy, and those considered more reprehensible, and therefore *illegal,* on the grounds of public policy.[10] Contracts falling within the first category include those that oust the jurisdiction of the courts, prejudice marriage, or restrain trade. Those in the second category include contracts to commit a legal wrong, contracts that prejudice public safety, lead to corruption in public life, prejudice the administration of justice, defraud the revenue, or contravene sexual morality. The validity and status of these categories is examined further in Part VI.

The Contracts and Commercial Law Reform Committee made the following comments in its report on Illegal Contracts: [11]

> Illegal contracts are frequently described as being void. There is room for argument whether this is in fact so. It appears, for example, that property can pass under an illegal contract. It is possible, in other words, that the effects of illegality are "procedural" in the sense that they make contracts not void, but merely incapable of enforcement. A result of this is that the loss lies where it falls and there is not (except where a statute provides) any scope for restitution of property illegally acquired or for striking a balance between the parties.

The difference is also one of degree. Illegal contracts are thought to be a more serious threat to the public interest, however that may be defined.

A rudimentary outline of some of the areas in which the doctrine operates shows that these classes of cases are considered offensive because of perceived community standards or values. It is difficult to extrapolate what these standards are, how they are to be assessed or measured judicially, and to what extent they have, or should, influence judicial decision making. Standards, values, and morality, under the rubric of "public policy" or the "public conscience", have long informed common law judgments. Winfield distinguishes between this form of public policy, as one of the many tools available to judges, and the doctrine of public policy as an independent legal device.[12]

The former category still has significant bearing on judicial decision making today. Though common law legal systems enshrine the strict use of precedent, and an inability to circumvent legislation laid down by Parliament, judges often turn to considerations of policy in looking to extend the law into new areas. That is not the concern of this article. Rather, it is the latter category identified by Winfield, the explicit reliance on public policy to solve specific legal

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9 "It is a very unruly horse, and when once you get astride it you never know where it will carry you": *Richardson v Mellish* (1824) 130 ER 294, 303 per Burrough J (CP).

10 *Bennett v Bennett* [1952] 1 KB 249, 260-261 (CA) where Denning LJ discussed the distinction between void and illegal contracts.

11 Contracts and Commercial Law Reform Committee *Illegal Contracts,* (Wellington: The Committee, 1969) 9.

12 Winfield, "Public Policy in the English Common Law" (1928) 42 Harv L Rev 76, 77.

problems, that finds its clearest enunciation in the field of illegal and void contracts. When public policy is crystallised into a doctrine and utilised so overtly, a thorough analysis of that notion is required. Further, it is arguable whether public policy should properly be described as a doctrine at all, despite judicial and academic willingness to classify it as such. This question will be dealt with in Part VI. For the purposes of the following discussion, it will be assumed that the doctrine exists, and that by reference to its principles, contracts can be declared illegal or void.

III: THE DOCTRINE IN CONTEMPORARY LAW

To provide a practical illustration of the way in which the doctrine of public policy operates in the law of contract today, four case studies are examined; contracts that contravene sexual morality, contracts that attempt to oust the jurisdiction of the court, contracts to insure against fines and penalties, and contracts which unreasonably restrain future freedom. Under each of these heads, it is possible to look at current examples in light of historical legal approaches to similar contracts.

1. Contracts That Contravene Sexual Morality

These are contracts that the common law considers *contra bonos mores*, and fall within the category of illegal contracts. The development of the law in this area came about as a result of the influence of Christianity, "which held all forms of sexual activity other than heterosexual conduct within a monogamous marriage to be sinful."[13] Contracts under this head of public policy can be divided into two categories: those connected with prostitution, and those relating to cohabitation outside marriage.

(a) Prostitution

The criminal law has long been inconsistent in its approach to prostitution. In New Zealand the act of solicitation is criminal, as opposed to the act of sexual intercourse for reward.[14] Although prostitution is not unlawful under statute, the doctrine of public policy renders the contract for sexual services illegal. In *Hutchinson v Davis*,[15] the New Zealand Court of Appeal held that a promise to

13 Supra at note 6, at 391.

14 Other acts that fall within the ambit of the criminal law are procuring a woman to have sexual intercourse with a man for reward, keeping a brothel, and living on the earnings of prostitution. Crimes Act 1961, ss 147, 148 and 149; Summary Offences Act 1981, s 26.

15 [1940] NZLR 490.

marry in exchange for sexual relations was based on a consideration which the law regarded as immoral, and was therefore both illegal and void.

The most obvious problem with equating a promise perceived as immoral with illegality is that the standards of morality within a society change over time. A majority of society may still regard prostitution as "immoral" and undeserving of legal countenance. Yet there are moves to decriminalise and even regulate prostitution not only in New Zealand, but around the common law world.[16] This is largely in response to the collateral problems related to economic oppression, violent crime, and disease linked to the provision of sexual services in legal systems where no legal protection is afforded to sex workers. In New Zealand, the application of the doctrine of public policy to contracts for sexual services has a clear negative consequence. Despite prostitution itself being lawful, sex workers as an occupational group receive no support from the law, and are unable to invoke basic rights enjoyed by employees in other fields.

This problem was highlighted in November 1996, when a Christchurch sex worker sued a client for breach of contract. The New Zealand Prostitutes' Collective described the action as "an important test case",[17] which they hoped would provide new legal options for sex workers. The sex worker known as "Karen" claimed the client agreed to pay for intercourse using a condom, and then forced her to have unprotected sex. The charge for protected sex was $100, whereas unprotected sex cost $1000 and required a current medical certificate of sexual health. Rather than laying a rape complaint, Karen took her client to the Disputes Tribunal, claiming the balance of her fee, compensation for a medical checkup and loss of income. Referee Robert Finlay considered the question of the enforceability of the contract. Finding that the matter was a question of public policy, he referred the case to the Christchurch District Court. Karen decided not to pursue the matter, and the case was never heard.[18]

It seems anachronistic that in this case the sex worker was unable to enforce the terms of the contract because the content offended against a perceived societal morality. Two counter-arguments exist. The first is that there are some things that simply cannot be analysed in economic terms, and sexual intercourse is one of them. Commodification has its limits and certain things which we may control or own cannot be considered reducible to the market. Commodification arguments arise in relation to contracts for surrogacy, sperm donation and the sale of body organs on the basis that for example it should not be possible to sell one's body for sex any more than it should be possible to "rent" one's womb as a surrogate. However, the tide appears to be turning in favour of allowing contracts regarding surrogacy and sperm "donation".[19] Thus, there seems to be

16 For example, the legalisation of brothels in Victoria, Australia.

17 "Prostitute sues client for breach of promise" *Sunday Star Times*, 10 November 1996, A4.

18 Telephone conversation with New Zealand Prostitutes' Collective, Christchurch, 8 October 1997.

19 See, for example, the status of children conceived through artificial insemination by a donor in the Status of Children Amendment Act 1987.

no logical reason why a person who freely chooses to sell sexual services should not be entitled to the same legal protection as any other person supplying services under contract. Further, contracts for sexual services are not in the same category, as sexual intercourse is already available in the market and if anything, negative externalities would be reduced through extending contractual protection. The only way the commodification argument succeeds is if "moral harm", such as the risk of exploitation, results.

If sexual services can be interpreted within the framework of contract law, how far does this analysis extend? For example, in *Hutchinson v Davis*,[20] the Court was faced with a "contract" where a man promised to marry a woman if she became pregnant, in return for the "consideration" of sexual relations. If contract law governs sexual service contracts in the commercial arena, must these principles also be extended to the domestic realm and what are the practical effects?

If public policy was no longer taken into account in the context of prostitution contracts, the courts could have no recourse to phrases like "immoral consideration" in terms of private agreements. This in turn raises complex practical issues such as how the courts would value consideration, how damages would be assessed for breach,[21] and whether different issues would be raised under unconscionability or duress. There are no simple answers to these questions, but an analogy with other areas in which the courts make similar assessments can be drawn. For example, courts are able to place value on a loss of personal enjoyment,[22] personal contributions to a marital or de facto relationship,[23] or speculative questions regarding damages for dismissal in employment contracts.[24] Thus, there is no significant practical obstacle to the courts applying the same reasoning to contracts for sexual services. The second argument against abandoning public policy in this area is philosophical, and more closely related to the doctrine itself. That is, in refusing to enforce contracts for sexual services, the courts are doing nothing outdated, nor out of the ordinary. They are merely acting upon society's condemnation of immoral conduct. This would be true if it were the courts' role to enforce a form of legal moralism.

Legislation attempts to reflect society's mores, particularly with regard to "social" areas of the law such as criminal, family, and employment law. Public interest, social ideology and changing values are all reflected in the passage and repeal of legislation. Therefore, in applying law, judges invoke similar policy considerations. Indeed, judicial decisions of the last decade have begun to make this sort of reasoning explicit. Why, then, should decisions on contracts that

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20 Supra at note 13.

21 For example, a question raised is how to return a person to the position she would have been in if the contract had been performed.

22 *Jarvis v Swans Tours Ltd* [1973] 1 QB 233, 71 (CA).

23 *Baumgartner v Baumgartner* (1987) 164 CLR 137 (HCA), *Lankow v Rose* [1995] 1 NZLR 277 (CA).

24 *Turner v Ogilvy and Mather (NZ) Ltd* [1995] 1 ERNZ 11 (EC).

offend public policy be seen any differently? Surely judges should be able to assess the public conscience to invalidate contracts in the same way that public policy has a bearing on a decision to extend the duty of care to a new category in negligence.[25] The value of this kind of judicial law making is examined more closely in Part IV. Further, it seems possible to draw a distinction between using public policy to inform decisions made within the guidelines of precedent and statute, and the seemingly more arbitrary manner in which the doctrine of public policy asks the courts to turn their back on the parties to an agreement because of the public conscience. It is suggested that contracts for sexual services should not be struck down because of society's condemnation. On the contrary, the moral harm that potentially results from extending contractual protection to these agreements is the risk of exploitation or financial coercion. As discussed in Part IV, the real reasoning behind the courts' refusing to enforce these agreements is their negative effects, as opposed to their immoral content. This reasoning needs to be made explicit.

(b) Prenuptial Agreements

Historically contracts considered prejudicial to the institution of marriage have also been considered contrary to sexual morality. These included agreements by unmarried couples to cohabit, promises to marry another while already married, marriage brokerage contracts, agreements restraining or preventing marriage, and agreements defining rights when a functioning marriage ended.[26]

In this area, the public interest has altered significantly. Traditional views of the institution of marriage now coexist with de facto relationships, homosexual relationships, cohabitation arrangements to raise children and the acceptance of divorce. Significantly however, statutory divorce regimes have proved unsatisfactory and increasingly couples are turning to the mechanism of prenuptial agreements:[27]

> As a result, a growing number of prospective spouses choose to opt out of the statutory order by drafting prenuptial agreements. In general ° courts have refused to treat prenuptial agreements like other contracts, and have enforced them only if they meet local tests of procedural and substantive fairness.

Rather than dismiss the intervention of public policy in such contracts as anachronistic, it is necessary to examine why a modern court might treat contracts pertaining to marriage differently to standard commercial transactions. Younger suggests that there are three differences between prenuptial agreements

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25 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA).

26 Supra at note 5, at 381.

27 "Prenuptial Agreements - Pennsylvania Supreme Court Rejects Substantive Review of Prenuptial Agreements" (1991) 104 Harv L Rev 1399.

and ordinary contracts.[28] First, the subject-matter of the contract is of greater interest to the State than the content of a commercial transaction. Such agreements ordinarily deal with support rights, property distribution, and the care of children. Second, the relationship between the parties may mean the potential for inequality in bargaining power is high. Third, any such agreement provides for the future and later events may make enforcement unwise or unfair.[29]

These differences do not adequately explain why ordinary contract rules are insufficient to deal with contracts relating to marriage. A United States decision went so far as to suggest the opposite. In *Simeone v Simeone* the Pennsylvania Supreme Court held that it would no longer look into the reasonableness of premarital arrangements, and would only invalidate such arrangements on the grounds of fraud, duress, or misrepresentation. The Court held that it "could no longer justify this 'paternalistic approach' in an age where women have achieved economic independence and equal status under the law."[30]

In New Zealand, the doctrine of public policy has, as elsewhere, been overtaken by legislation. Under s 21 of the Matrimonial Property Act 1976, a husband and wife may contract out of the Act by making their own agreement regarding the status, ownership, and division of property. Nevertheless, s 21(8) confers upon the court a "remarkable discretion"[31] to declare such an agreement void where it would be "unjust" to give effect to it. Section 21(10) provides factors for the courts to use when assessing whether or not an agreement is unjust. These amount to a substantive review of the content of the agreement on the grounds of fairness. It would seem "agreements which depart too much from principles of generally equal sharing and fairness are unlikely to survive the challenge of judicial scrutiny; the licence granted by s 21 to depart from the Act can realistically be said to be only provisional."[32] Thus, the power conferred under s 21 is somewhat illusory, as prenuptial agreements will only be recognised if they comply with the terms of the statutory regime.

Where does this leave such contracts in terms of the doctrine of public policy? While changing attitudes toward marriage have been recognised and reflected in the law, statutory provisions have done little to improve the status of contracts antecedent to marriage. This may be due to the State's interest in certain rights or responsibilities within the marital relationship, such as the care of children. The State has recognised that there will often be substantial inequalities of power in a marriage, and that one party may need protection through the mechanism of a statutory regime governing property distribution. It may be that marriage as an institution is irreconcilable with contract, as contract is concerned only with procedural justice, and abstracts itself from the parties involved. Yet there seems no reason why traditional contract mechanisms

28 Younger, "Perspectives on Antenuptial Agreements" (1988) 40 Rutg LR 1059, 1061.

29 Ibid, 1061-1062.

30 581 A 2d 162 (Pa 1990), as cited supra at note 27, at 1400.

31 *Docherty v Docherty* [1983] NZLR 586, 587 (CA).

32 Harrison, "Unfair Matrimonial Property Agreements - Why Bother?" (1994) NZLJ 252.

designed to protect weaker parties in the bargaining process, or changes in circumstance, cannot equally apply to the marriage contract.[33]

Although the well-being of children is often at stake, spouses are often in the best position to make decisions about their respective futures. Historically, the law has seen agreements between spouses as too private to warrant intervention,[34] today the situation is almost the reverse. The State now looks to impose a statutory ordering over the will of the individual parties. Since the archaic notion of "prejudicing" marriage has been abandoned, there is little need for public policy considerations to cloud an area of the law that lends itself to the contractual framework. Prospective spouses should be entitled to make decisions for themselves about their future entitlements.

The clash between the law of contract as a social institution, and the institution of marriage, requires that judges undertake a balancing exercise to determine which prevails. This balancing should be made explicit. Only then does it become clear that prenuptial agreements are not refused enforcement because their content offends the Christian notion of the sanctity of marriage. On the contrary, it is because freedom of contract, like all social institutions is politically contingent, and may have to give way at times to the institution of marriage because of the potentially negative effects that would otherwise result.

2. Contracts That Restrain Future Freedom

Contracts unreasonably or unduly restraining a party's future liberty are contrary to public policy. In *Horwood v Millar's Timber and Trading Co Ltd*,[35] the Court of Appeal held that the agreement in question improperly fettered the mortgagor's liberty of action and the free disposal of his property, and was void as against public policy.[36] Holding such contracts out as forms of self-enslavement offends against the classical liberal view of freedom of contract. To preserve the very utility of contract itself, all individuals must be autonomous and free to enter into agreements. Contracts that restrain this autonomy are indirectly self-defeating and include restraint of trade agreements, and clauses providing for equitable relief in personal service contracts.

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33 Supra at note 27.

34 "It is impossible to say that where the relationship of husband and wife exists, and promises are exchanged, they must be deemed to be promises of a contractual nature" *Balfour v Balfour* [1919] 2 KB 571, 577 (CA).

35 [1917] 1 KB 305.

36 "It is part of the common law. The law does not allow such a contract to be made": ibid, 312 per Lord Cozens-Hardy MR.

(a) Restraint of Trade

The general rule is that all covenants "in restraint of trade are *prima facie* unenforceable at common law and are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public."[37] Such agreements probably represent the earliest examples of the operation of the doctrine of public policy. This is still an area where the common law applies, for example under s 8 of the Illegal Contracts Act 1970, the common law power to sever objectionable clauses was widened to allow for modification. Further, in situations where such agreements have an unduly restrictive impact on trade, the Commerce Act 1986 may operate. The avoidance of monopolies provided the initial impetus for voiding restraint of trade agreements. However, this view did not prevail as the restriction of trading activities often attracted public and private benefit:[38]

> It was clear, for instance, that the purchaser of a business was at the mercy of the vendor, if the latter were free to carry on the former trade in the same place; and that a master was equally at the mercy of servants and apprentices if they were free to exploit to their own gain the knowledge that they had acquired of the employer's personal customers or trade secrets.

A long and confusing line of authority developed, drawing distinctions between general and partial restraints, the former being presumptively void, and the latter valid and enforceable if reasonable. This arbitrary division was later abandoned in favour of a general test of reasonableness on the facts.[39]

Thus the doctrine of public policy seeks to preserve freedom of contract through refusing to enforce contracts that unduly restrain a party's future ability to trade and carry on business. There are two restraints on trade where the doctrine usually operates. The first is where a vendor selling a business is restrained from establishing a similar business in the same geographical area. The second is where the employer seeks to restrain the employee from working with a competitor under employment or personal service contracts.[40] In both cases, the goal is to preserve the functioning of the market. A lack of genuine competition can lead to market failure, which can undermine the institution of contract of which the underlying assumption is a properly functioning market. Autonomy is only meaningful where individuals have a range of options from which to choose. Contracts that restrain this autonomy are indirectly self-defeating. They remove individuals from participating in the market thereby reducing competition and the range of options available. This seems to have less to do with policy considerations in the sense of the public conscience than the practical effects of certain agreements.

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37 Guest, *Chitty on Contracts* (London: Sweet & Maxwell, 27th ed 1994) 812.

38 Supra at note 6, at 418-419.

39 *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146, 169.

40 Supra at note 6, at 421-422.

Thus, the cornerstone of the law of contract and of liberal societies is individual freedom. The effect of such contracts is negative as individual freedom is unduly restricted. The court, therefore, will not investigate the adequacy of consideration provided in return for the restraint, and consequently parties are prevented from voluntarily bargaining for such. To deny the validity of these agreements is perhaps arbitrary, given that all contracts restrain future freedom. In every contract, each party voluntarily forbears an aspect of their future freedom in making a binding promise. The question is one of how to strike the appropriate balance.

There is a further difficulty for the courts in deciding what constitutes a "reasonable" restraint as between the parties in light of the public interest. As views of the market, competition and trade practices change, the line that demarcates "reasonable" restrictions will also undoubtedly shift. The danger is that in certain economic and political climates, the subject-matter of the restraint of trade arrangement will be the reason for the courts refusal to enforce it, rather than the underlying policy rationale of preserving competition and the freedom of the market. It is suggested that the courts should only be entitled to refuse relief where enforcement would undermine the key concepts of personal liberty, and the freedom to exist and operate unhindered within the market. In this way, the freedom of contract enjoyed on a private level is restricted in the interests of preserving the freedom of contract as a whole.

(b) Self-Enslavement Through Equitable Relief

As an extension of the influence of the doctrine of public policy in this area, the courts will not enforce clauses in a contract which "specify that in the event of a breach of the contract the promisee need not rest content with a claim to monetary damages, but has the right either to an injunction ... or, assuming performance of the contract is still possible, to performance".[41] These, Smith suggests, represent "autonomy endangering agreements" which offend against public policy because they unduly restrict the parties' future freedom. The arguments raised in relation to restraint of trade clauses are applicable here, though the consequences are more severe in that an injunctive relief or specific performance clause would have the effect of compelling a person in breach of the agreement to do, or not to do, a certain act. It is interesting that the approach of the court to granting specific performance, or injunctions for breaches of contracts for personal services, appears to demonstrate a double standard.

Clearly, if contracts restricting parties' future autonomy offends against public policy, it would be inappropriate for the courts to order relief that has the same effect, as to do so would "turn contracts of service into contracts of slavery".[42] There are limited circumstances, however, where a party to a personal

41 Smith, "Future Freedom and Freedom of Contract" (1996) 59 MLR 167, 170.

42 *De Francesco v Barnum* (1890) 45 Ch D 430.

service contract may wish to compel performance by the other party, or at least prevent them from entering into a contract with anyone else.[43] Typically, these contracts relate to entertainers. In *Lumley v Wagner,*[44] an opera singer had contracted exclusively with the owner of a theatre to sing for him for a specified period. The Court enjoined her from singing for anyone else for the duration of her contract with the plaintiff. In *Warner Bros v Nelson,*[45] actress Bette Davis was attempting to breach her contract with the studio to act in a rival film. Her contract contained a clause in which she formally acknowledged that her services were unique, and therefore difficult to value, so that the plaintiff would be entitled to an injunction as a remedy for breach. The Court of Appeal recognised that such a clause was unenforceable, but held that it had evidentiary value in demonstrating the difficulty of estimating damages in this kind of case, therefore it was more appropriate to order the injunction, rather than award damages.

The courts will not order specific performance, nor grant an injunction that will have the indirect effect of specific performance. However, they are willing to enforce negative covenants. Thus, a party in breach may work for the plaintiff, or not work at all in their chosen field.[46] An example of this indirect enforcement is found in the Australian decisions surrounding the Australian Rugby League ("ARL")/Superleague dispute that arose when rumours began to circulate that News Ltd was to set up a rival competition to the national league.[47] The ARL asked all the clubs in the league to sign agreements saying they would not play for a rival organisation, and loyalty agreements were later signed. However, the Superleague organisation signed a significant number of clubs and players in breach of these agreements. Justice Burchett in the Federal Court, in finding for the ARL, made a number of orders regarding the players. Among these were orders requiring that the players concerned not play for any organisation other than the ARL. These orders were successfully stayed pending the hearing of the appeal, where his decision was reversed. However, the Industrial Court has since held that three of the ARL's player loyalty contracts remain valid.[48] These decisions show the courts were willing to require the players to play for the ARL. Arguably, the players were free to take up other forms of employment but in enforcing the player loyalty agreements, the courts allowed individuals to bind their future employment options. Decisions of this nature, concerning as they do high profile specialty contracts for personal services, represent the classic approach of the courts to negative enforcement.

In addition, there has been dicta in Australian and English cases which

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43 See generally Jones and Goodhart, *Specific Performance* (London, Butterworths, 1st ed 1986).

44 (1852) 1 De GM & G 604 (Ch).

45 [1937] 1 KB 209.

46 So long as this does not deprive the party of a livelihood. See, for example, *Palace Theatre Ltd v Clensy* (1909) 26 TLR.

47 *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447.

48 "Superleague drops the ball", *Australian Financial Review*, 6 October 1997.

suggest a shift away from the strict prohibition on decrees of specific performance. In *C H Giles & Co Ltd v Morris,*[49] Justice Megarry said "I do not think it should be assumed that as soon as any element of personal service or continuous services can be discerned in a contract the court will, without more, refuse specific performance".[50] In *Gregory v Philip Morris,*[51] the Court examined the general principle that specific performance should not be ordered, and concluded:[52]

> We would not wish to give any endorsement to the view that there may never be an order in the nature of specific performance of a contract of employment. But the making of such an order is a matter within the discretion of the court ° careful consideration must always be given to the likely consequences of the order.

Despite theoretical arguments against the enforcement of "autonomy endangering agreements", in practice the courts may be more willing to hold individuals to restrictive promises than it first appears. Public policy in this context can change over time along with other categories within the doctrine. As noted above, it is possible to contend that all contracts represent restraints on future freedom, because they are promises to act, or not to act, in a certain way relative to the other party. However, on a spectrum of enforceability, a distinction must be made between contracts that are autonomy-endangering and those that are merely autonomy-constraining. The law has always viewed the enforcement of personal service contracts to lie at the extreme end.

The limited and special nature of the cases in which the courts are prepared to uphold agreements of this type, or order relief which has a similar practical effect, suggests that the primary concern remains the preservation of individual autonomy among market participants. To achieve this primary goal, freedom of contract will sometimes be sacrificed. This represents a further area in which the institution of contract comes into conflict, albeit an internal conflict in this instance, as freedom must be curtailed for its own sake.

3. Contracts that Oust the Jurisdiction of the Courts

It is the right of all individuals within a common law legal system to submit justiciable disputes to the courts. Any contract purporting to prevent this is considered contrary to public policy. These contracts are commonly referred to as attempts to oust the jurisdiction of the courts. Historically, the contracts usually caught by this part of the doctrine were agreements by one spouse not to seek further maintenance from the other, despite a legal right to do so under some

49 [1972] 1 WLR 307 (Ch).
50 Ibid, 318.
51 (1988) 80 ALR 455 (FCA).
52 Ibid, 482.

statutory provision.[53] In this section, a historical example is considered in a modern day context; a contract that seeks to prevent one or both parties from initiating litigation.

(a) Contracting Out of the Right to Litigate: The New Zealand Bill of Rights Act 1990

Generally, parties cannot make a promise not to initiate litigation at some future time, when they would otherwise have that right.[54] Thus, in *Re Julso (deceased)*,[55] it was held that a party could not contract out of her rights under the Family Protection Act 1955. Analogous questions were considered in *Peters v Collinge*,[56] where, after expulsion from the National Party, Winston Peters took issue with a clause in the Party's nomination form, which required an undertaking that candidates would refuse nomination for any electorate other than as a National Party candidate. The High Court examined the enforceability of this provision, which if upheld, it meant that an individual could contract out of their rights under the Electoral Act 1956, and the New Zealand Bill of Rights Act 1990 ("NZBORA"). Justice Fisher said:[57]

> Mr Upton's second New Zealand Bill of Rights Act argument was that although a person might have the right to stand under s 12 against the National Party, nevertheless he or she should be free to decline that right and to contract out is simply to decline to exercise a right ° In my view there is a distinction between contemporaneously declining to exercise a right upon the occasion that it arises and contracting out in advance. I think that a power to contract out in advance would be open to abuse and contrary to the spirit of s 12 of the New Zealand Bill of Rights Act ° My conclusion is that a non-competition clause of the kind found in cl 6 of the National Party's nomination form is contrary to public policy, illegal, and therefore unenforceable.

Peters did not concern the right to litigate, and Justice Fisher therefore concluded that this was a new area in which the doctrine could operate.[58] However, he made it clear that it should not be possible to contract out of certain rights in advance of their arising. This is equally applicable to agreements not to initiate litigation, and is particularly pertinent given the comments made regarding the NZBORA. The long title of the NZBORA states its purpose as being to "affirm, protect, and promote human rights and fundamental freedoms". Justice Fisher felt that contracting out of these rights would be "contrary to the

53 See, for example, *Leighton v Leighton* [1954] NZLR 841 (SC).

54 Similarly, a party cannot enter a contract that permits litigation, but imposes a penalty for initiating. See *Novamaze Pty Ltd v Cut Price Deli Pty Ltd* (1995) 128 ALR 540.

55 [1975] 2 NZLR 536 (SC).

56 [1993] 2 NZLR 554 (HC).

57 Ibid, 565.

58 A conclusion discussed further in Part III below.

spirit" of the Act. Is it possible then to abrogate one's rights under NZBORA, or would any agreement of this kind be contrary to public policy?

This question recently came before the High Court in *Christchurch International Airport Ltd v Christchurch City Council* [59] in an appeal under the Resource Management Act 1991("RMA"). Several owners of rural land near the Christchurch Airport sought resource consents to build houses on their land. The airport company sought conditions to the granting of the consents, one of which was that the consent would only endure as long as the consent holders did not complain about the noise from the airport. The Planning Tribunal declared this condition was in breach of the right to freedom of expression in s 14 of the NZBORA. On appeal, Justice Tipping held: [60]

> I can see no reason of public policy why someone should not surrender pro tanto his/her rights under s 14 in return for what is considered to be a sufficient advantage to make it appropriate to do so.... It would be unduly paternalistic and precious to say that this is a kind of right which people should not be allowed to surrender for what they see as their own advantage.

The danger with this analysis is that if an individual can surrender their rights for the benefit of consideration under a contract, the situation fast approaches the realm of "autonomy-endangering agreements", rather than those that are merely "autonomy-constraining" as discussed above. A person could contract out of his or her right to freedom of movement, right to life, and right to justice. The doctrine of public policy must be used to override such contracts on the basis of common law reasoning, rather than a pure Bill of Rights analysis. If not, the doctrine is rendered ineffective. By stating that all rights should be alienable if a person wishes to voluntarily surrender them, Justice Tipping appears to overlook this. However, the practical effect is potentially self-defeating, because at some point enough freedoms are abrogated to ensure that there can no longer be freedom of contract.

It is submitted that recourse to the courts is a crucial aspect of the institution of contract. The doctrine of public policy refuses to enforce ouster contracts, not because the content of the contract offends our moral senses, but because the practical effect of enforcement is to undermine the utility of contract law by eroding the very assumptions upon which it is founded.

4. Contracts to Insure Against Fines and Penalties

An ancient legal maxim, *nullus commodum capere potest de injuria sua propria*, states that no one may profit from his or her wrongful conduct. Is it

59 [1997] 1 NZLR 573 (HC).
60 Ibid, 584-585.

possible to make a contract to indemnify oneself against a liability arising out of unlawful conduct? In a contemporary context, this translates into whether it is possible to insure oneself against liability for statutory offences, such as those contained in the RMA and consumer protection and employee protection statutes.[61] These Acts can be described as public policy legislation, and represent areas in which the state seeks to mitigate the effects of the free market.[62]

An indemnification agreement designed to avoid liability was held to be unlawful in *Gray v Barr*,[63] where a wife sued for the wrongful death of her husband. The defendant admitted liability, but claimed he was entitled to be indemnified by his insurance company. The Court of Appeal disagreed, holding that it would be contrary to public policy for the defendant to be indemnified against the consequences of his actions, even if they had been unintentional. The position has long been the same in New Zealand, since the Court in *Jones v Kirby*[64] held that it was contrary to public policy to indemnify a person for a debt incurred through illegal conduct.

More recently, that position was reviewed in *Geismar v Sun Alliance and London Insurance*.[65] The plaintiff had taken out policies of insurance over his house contents against theft. During a break-in, several items were stolen from his house, including items that he had imported without paying the necessary duty. The articles concerned were therefore subject to forfeiture. The Court of Appeal noted that:[66]

> [I]t would seem that a contract of insurance, which is separate and apart from the illegal act, is not rendered unenforceable, but if the contract of insurance purports to cover property which the law forbids [a person] to have, then the contract is directly connected with the illegal act and is unenforceable.

Policies of insurance themselves are not tainted with illegality. However, it would be contrary to public policy for the courts to assist the plaintiff by granting the indemnity as it would amount to assisting him to derive a profit from a deliberate breach of the law.

It is obvious that if Parliament has decided that certain conduct ought to result in a penalty, the wrongdoer ought not to be able to avoid this penalty by

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61 See the Health and Safety in Employment Act 1992, the Consumer Guarantees Act 1993, and the Fair Trading Act 1986.

62 "This can be illustrated by reference to the Commerce Act 1986 and the Fair Trading Act of the same year. Parliament, representing the people, enacted the first to promote vigorous competition in the economy but, at the same time, passed the second in order to enforce basic concepts of fairness in the conduct of commercial and other transactions": *Livingstone v Roskilly* [1992] 3 NZLR 230, 239 (HC).

63 [1970] 2 QB 626.

64 (1897) 15 NZLR 48 (HC).

65 [1977] QB 383, 394 (CA).

66 Ibid, 580.

effecting insurance cover. Despite this, one author has recently concluded that: [67]

> It appears there is no case where a court has considered the validity of a contract of insurance which deliberately and expressly sets out to insure a person against liability to pay (statutory) fines or penalties. Nor are there cases where, under a contract of insurance to insure against liability generally for certain types of acts, an insured has claimed to be indemnified for *fines* payable in consequence of those acts.

However, it would seem clear from the courts' unwillingness to allow insurance against the effects of wrongdoing that such contracts would offend against public policy. This view is reflected in the Companies Act 1993, where under s 162 a company is precluded from indemnifying or effecting insurance for its directors or employees in respect of criminal liability.[68]

This has particular relevance given the increasing number of statutory regimes that impose various fines and penalties on offending corporations or employers. For example, under the RMA any person convicted of an offence is liable to a term of imprisonment of up to two years, or a fine of up to $200,000, which increases by $10,000 a day while the offence continues. In considering the parliamentary intention behind such strict regimes, the courts have said: [69]

> Breaches of these regulations and laws must be dealt with in such a fashion as to prevent their repetition and to foster the principle of environmentally responsible corporate citizenship ° The message [corporations] receive from this sentence must be that even in this bleakest of financial times, the environment must not be a sacrificial lamb on the altar of corporate survival.

The courts have taken the view that a fine ought to be a severe deterrent, although not so excessive as to place the company in financial ruin. It would make a mockery of this goal if directors and companies were able to insure against these fines. Yet many insurers are now offering, "as a standard component of their corporate/ business/ commercial packages, cover against liability for fines and penalties which may be imposed under ... environmental, health and safety, and consumer protection legislation".[70] Jurgeleit argues that these kinds of policies are unlawful, given the comments of the High Court in *Machinery Movers*: [71]

> [B]y refusing to lessen the fine to preserve the financial viability of the company

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67 Jurgeleit, "Insurance against liability to pay statutory fines and penalties" (1996) 26 VUWLR 735, 736.

68 Ibid, 737.

69 *R v Bata Industries Ltd* (1992) 7 CELR (NS) 293 (Ont Prov Ct), as discussed in *Machinery Movers Ltd v ARC* [1994] 1 NZLR 492, 503-504 (HC).

70 Supra at note 70, at 735.

71 Ibid, 748.

> (even though it acknowledged the imperative of protecting employment opportunities) the court indicated ° that these were fines which were intended to cause pain to the offender itself. Even if an (uninsured) offender could not pay the fine without risking going out of business, that would be dealt with, not by reducing the offender's personal liability (as fines and penalties insurances would), but by ameliorating the terms of payment.

So, should parties be able effectively to gamble on their future liability? To allow these kinds of contracts enable parties to spread the expense of statutory fines or penalties over several years, through annual premiums. The problem is that these premiums essentially become a licence fee to break the law, knowing that the insurance company will pay.

Perhaps this is not necessarily ethically wrong. We allow, for example, professional indemnity insurance for solicitors, or defamation insurance for academics, without presuming that this will lead to a nonchalant attitude towards negligent conduct. The difference appears to be the distinction between what have been described as "property rules" and "liability rules".[72] A liability rule, such as damages for negligent conduct, can be considered alienable in that any person can pay those damages on behalf of the guilty party. A criminal sanction, on the other hand, is a property rule and is not considered alienable, as a guilty person cannot get someone else to suffer his or her penalty. This distinction is not always clear. Statutory fines and penalties are best seen as property rules, though in reality the guilty hand may not pay the fine.

Preventing directors from insuring against this type of liability runs the risk of making businesses risk averse.[73] This risk needs to be set against the public policy interest in deterring certain kinds of corporate irresponsibility. The argument is that in allowing contracts of indemnity, certain members of society are allowed to "buy" their way out of the legal system. Such forms of insurance will probably be expensive to acquire. Therefore it is likely that only large corporations and wealthy directors or officers will be able to afford these policies. Should the wealthy be able to purchase the right to break the law? In environmental law, for example, many commentators argue that there should be some form of "efficient breach" for polluting corporations, allowing them to buy the right to damage the environment by doing something worthwhile in another area.[74]

The nature of a contractual obligation is such that it cannot be viewed independently, as it relies on conditions and assumptions. In the context of the liberal conception of the State, an effective legal system is a necessary precondition to the functioning of the institution of contract law. To allow

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72 Calabresi and Melamed, "Property Rules, Liability Rules and Inalienability" [1972] 85 Harv L Rev 1089.

73 Supra at note 68, at 742.

74 For example, having to replant rainforests to increase the amount of carbon dioxide a company is entitled to emit.

individuals to circumvent the legal process by indemnifying themselves against liability is to defeat another institution (here, quasi-criminal justice) in conflict with freedom of contract. Once more, the search for the proper balance is illustrated. To allow individuals to contract out of the legal justice system may be self-defeating, but in some instances it appears vastly more efficient to permit contracting out. It is suggested that these contracts of indemnity are just such an example.

Further, to allow individuals to validly contract for indemnity from civil liability for the consequences of civil conduct, but not to protect themselves against this kind of quasi-criminal liability, is a problematic distinction. This is particularly true where some conduct, such as negligence, may result in both tortious and regulatory liability. It is suggested that such agreements should no longer be viewed as offending against public policy, but rather as a necessary aspect of modern commercial law.

IV: ANALYSIS AND EXPLANATION OF THE DOCTRINE

Having examined four areas in which the doctrine of public policy operates, it is possible to begin to draw some broad conclusions about the philosophical underpinnings of the doctrine, and infer something of its future. Namely, why does the doctrine focus on these categories and are they closed, or is there the possibility of expansion?

1. What Do the Categories Have in Common?

Part I noted that the doctrine of public policy covers an eclectic array of contracts. It seems difficult to believe that the doctrine could effectively operate if there were no common themes in the different classes of cases. Such commonality would need to be something more than the vague allusion to all the contracts in question being "injurious to society". For the doctrine of public policy to survive intellectually, the underlying reasoning behind the choice of contracts the courts refusal to enforce should be made explicit. The alternative is to view the doctrine as a catch-all for classes of cases whose outcomes result from a clash between contract law and other social institutions. This is discussed below.

The types of contracts affected by the doctrine can be divided into two groups. The first group of contracts have subject matter historically considered by courts to be immoral. The content of these contracts offends against public morality. The second group comprises contracts whose practical effect offends. These are promises that have some sort of negative impact on the foundations upon which contract law itself depends for its proper functioning. The former are

invalidated because they are considered intrinsically bad, while the latter are caught because of the risk of negative consequences.

(a) "Content" Contracts

A key principle that informs the classical law of contract is that the courts will not inquire into the substance of a contract if it conforms to procedural requirements. However, in recent years, equitable doctrines have had a significant effect in lessening the strict application of contract rules, allowing the courts to set aside agreements on the grounds of undue influence and unconscionability. In these cases, the courts investigate the substance of the agreement. However, even then the reasoning for setting such cases aside is still expressed as being procedural, based on the weaker party's lack of voluntariness. The doctrine of public policy seems, therefore, to be an exception to this rule, as it responds to a number of contracts purely based upon their content. These include contracts that offend against sexual morality, prejudice marriage, and wagering contracts. None of the agreements represents any procedural impropriety on a strict application of the rules of offer, acceptance, consideration, certainty and intention. Rather, it is the subject of the promise that determines whether a contractual obligation exists.

As outlined in Part II, the key problem with the courts' intervention on the basis of the content of the contract is that such intervention will always be inconstant, as it is based on changing values and standards. This is one reason why a legal system develops rules to address individual factual circumstances, rather than relying on a "philosopher-king" to decide each case on its merits. It is therefore difficult to justify the approach to this small pocket of cases in which the substance of contract is relevant to its enforcement:[75]

> Nor only may it be thought that judges would not necessarily reflect community views, but judicial views will inevitably differ upon whether a particular contract is immoral or subversive of the common good. More importantly, to tie the law to a crystallisation of judicial views of public policy and morality of any one time is to risk the law being fossilised in a form divorced from later public (and judicial) perceptions of morality and public policy.

It is submitted that this is exactly what has happened with classes of contracts invalidated because of their content. A view of morality from the nineteenth century is still being utilised to refuse relief to parties, despite other areas of the common law responding to evolving values. For example, in *Barclays Bank v O'Brien*,[76] the House of Lords looked at the situation of wives agreeing to give guarantees for their husband's business ventures, often procured

75 Supra at note 6, at 376.
76 [1994] 1 AC 180 (HL).

through undue influence. In holding that there should no longer be any special treatment of wives under the law, the Court said "now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this".[77] This sort of judicial pronouncement demonstrates the inadequacy of the doctrine of public policy, which at common law still considers "illicit cohabitation" to be immoral, and which will always be losing the race to "catch up" with current mores.

It is submitted that there remains only one reason why these "content contracts" should remain unenforceable. This has nothing to do with the doctrine of public policy as expressed judicially, but rather whether on some ideological level, there remains things that cannot properly be governed by contract law. If this is not the case, and all transactions can be accommodated within the contractual framework, the doctrine of public policy should be abandoned in respect of promises considered intrinsically bad, because the notion of being contrary to a public morality can no longer be justified. Moreover, it may be inaccurate to describe these "content" contracts as offending against a public morality. It may be more accurate to represent these contracts as examples of conflicts between a desire to promote individualism and private ordering on the one hand, and a competing wish to preserve a social institution [like marriage] on the other. The category of content contracts collapses into the category of "effects" contracts because the justification for refusing enforcement to, say, contracts for sexual services, is the potentially negative effects rather than an unverifiable moralism.

(b) "Effects" Contracts

The second group of contracts consists of those which would have significant negative effects on the institution of contract law, or on some other social institution equally valued by society, if enforced by the courts. These include contracts restraining future freedom, contracts to commit illegal acts, and contracts which oust the jurisdiction of the courts.

What then are the critical elements of freedom of contract? Most importantly, individuals in a society need to be free to enter into agreements as and when they see fit. To do this, there should be a system of property ownership defining the rights an individual has and what he or she can make promises about. This encompasses the idea of alienability and commodification. Finally, a legal system should be designed to protect these rights, and facilitate their exercise. The state must do more than provide an environment in which contracts can be made; it must also protect individuals' personal freedom from crime, and collect taxes in order to administer justice. In short, it must make the rights of individuals meaningful. This represents the liberal conception of a

77 Ibid, 198.

minimalist state.[78]

In this way, we can see a bifurcation between the social environment in which different interconnected institutions exist, for example, the legal system, government and the family, and the conflicting principles or goals within each of these institutions. Society is therefore founded on the balancing that takes place at a macro level between the different institutions, allowing for individualism at a micro level:[79]

> [A] division of labour [should be maintained] between two kinds of social rules. The basic structure comprises first the institutions that define the social background and includes as well those operations that continually adjust and compensate for inevitable tendencies away from background fairness, for example, such operations as income and inheritance taxation designed to even out the ownership of property. This structure also enforces through the legal system another set of rules that govern the transactions and agreements between individuals and associations (the law of contract and so on).... They are framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraint.

If we turn to the categories of contract that offend public policy, we can see how many of them threaten this ideological base, through representing direct conflict at a macro level between the law of contract and a competing social institution. Contracts that restrain future freedom endanger the necessary autonomy of individuals within the market. Contracts to commit a legal wrong represent an affront to the system of legal sanctions, which is vital to the maintenance of a social order necessary to the enjoyment of individual rights. Similarly, contracts that oust the jurisdiction of the courts are attempting to circumvent the judicial process.

The only way the legal system has legitimacy within the liberal state is if all individuals are subject to the rule of law, and therefore parties must be able to turn to the courts for relief.[80] In addition, there is a collective interest in the due process of law where the hearing of cases provides precedents for future disputes. These agreements represent the potential to undermine ideas that form the foundation of the social structure in the liberal state. Enforcement of such agreements eventually becomes self-defeating, or potentially destructive of the competing institutions. Critical to this theory is understanding the nature of contract law as being interconnected with the other valued institutions in society. It is not possible to look at contract law merely from an internal perspective.

It is submitted that these "effects" contracts are validly refused enforcement.

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78 See generally Nozick, *Anarchy State and Utopia* (Oxford, Blackwell, 1975).

79 Rawls, "The Basic Structure as Subject", in Goldman and Kim (eds), *Values and Morals* (Boston, Dordrecht, 1978), 54-55.

80 The exception to this is where it may be more efficient to allow individuals to utilise their own chosen method of dispute resolution, rather than litigation through the courts. This is discussed below.

Contract law presupposes a properly functioning social order, comprised of all institutions necessary to human social existence. The liberal State places different value on each of these institutions and attempts to strike a balance between institutions when they come into conflict. Whether this can properly be labelled as public policy in the legal sense is questionable. It is undoubtedly a political and ideological trade-off, but one which is vital.

2. Are These Categories Closed, or Expanding and Changing?

The current position of the doctrine of public policy in contemporary law must also be investigated. As morality and standards are not fixed and timeless, it is difficult to accept that the categories within the doctrine are unchanging. There is long-standing debate over the role of judges in this field.

The House of Lords has said that the doctrine of public policy should not be interpreted in the same strict way as precedent is applied to legal rules: [81]

> Their function ... [is] ... not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain ... what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule and would if judicially enforced, prove injurious to the community.

Certainly, the courts have been prepared to abandon outdated heads of the doctrine, such as the contention that a contract to hire a public hall for a meeting of atheists was contrary to public policy.[82] More controversially, is it possible for judges to extend the doctrine to cover new fields? In *Geismar v Sun Alliance and London Insurance* Justice Talbot said: [83]

> It is quite plain from other authorities to which I have been referred that it is of the highest importance that courts do not attempt to extend the doctrine of public policy in order to hold that contracts are unenforceable thereby, and that it is necessary to look at the accepted application of that doctrine and not go beyond that.

The "accepted application" of the doctrine in the nineteenth century cannot possibly be considered relevant now. Although this article examines difficult applications of the doctrine, it is apparent that when other areas of common law are considered, judges are more than prepared to engage in expanding the law. In public policy, this function is of paramount importance.

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81 *Thorsten Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, 553 per Lord Watson (HL).

82 *Bowman v Secular Society Ltd* [1917] AC 406 (HL).

83 Supra at note 65, at 389.

As morality changes problems arise when the law stagnates. If content based contracts were no longer scrutinised, the need for evolution and expansion in the doctrine would be less pressing. The foundations of contract law are slow to change, and a doctrine that protects just those foundations has little need to alter. It is only when the doctrine attempts to concern itself with public morality that it must be ever vigilant to shifts in society's views. Therefore, the current judicial climate should allow judges to apply the doctrine to novel situations.[84] The concerns about judicial law making in this area abate if the doctrine of public policy no longer invalidates contracts based on their "immoral" content, and if judicial reasoning is made external and explicit. If judgments acknowledge the precarious balancing exercise undertaken with regard to conflicts between institutions, the doctrine of public policy becomes less of an unruly horse.

V: CONCLUSION

The doctrine of public policy is unavoidably confined by its nineteenth century origins. It reflects not only the liberal conception of the state that emerged, but also a morality that has evolved little in the last hundred years. When the doctrine operates to refuse enforcement because the content of the contract offends against public policy, outdated conceptions of society's values must be applied to prevent individuals from voluntarily making promises with one another. When the doctrine means that agreements will not be enforced because of their potential future impact upon the social structure, or the place of the law of contract within that structure, it represents a form of indirect self-preservation.

This article has attempted to locate the doctrine of public policy within the liberal framework of the State. The doctrine is at odds with the freedom of contract, because it invalidates agreements that autonomous individuals have entered into, even though the correct procedure has been followed. If this type of restriction is condoned, it must be justifiable on a practical, ideological, or philosophical level. The illustrations provided in Part II demonstrate that the doctrine often encounters hard cases, in which it is difficult to discern whether contract law ought to operate. However, these illustrations also show that it is not possible to assess the law of contract internally. When any two key goals conflict, it will be for the courts to decide where the balance is to be struck.

This article shows that the doctrine of public policy ought to be abolished to the extent that it refuses to enforce agreements based on their subject-matter. The courts should not decide what is, and is not, moral. There is no wider negative societal impact from allowing people to make agreements about whatever they choose, as long as they remain within the laws as laid down by Parliament.

84 See, for example, *Peters v Collinge*, supra at note 57.

Further, peoples' conception of what constitutes a "moral" agreement will vary considerably. If the courts were required to enforce agreements that undermine contract law the social order would conceivably disintegrate. Opting out of the legal system, contracting out of penalties or fines, and restricting their own or others' future conduct provide some examples. To preserve the rule of law, and by implication the law of contract, some freedom to contract will necessarily have to be abrogated. When this happens the reasoning behind such decisions should be made explicit. Rather than pronouncing such agreements to be "offensive", "injurious" or "immoral", judges should make it clear that some agreements are not permitted enforcement because they jeopardise the very freedom that allows them to be made in the first place.

This is the central conclusion to be drawn from this investigation. The problem with the doctrine of public policy is that it is equated with the "public conscience". At its core, however, the doctrine is concerned with the structures in which the law operates. The doctrine of public policy still has a valid role to play, not as a unified set of rules for when contracts will be declared illegal or void, but as a label for the reasoning judges must undertake to preserve our society.

As to the future, the law of contract can adequately govern those contracts that currently run foul of the doctrine because of their content. This requires a rethink of the fundamentals of contract law, but does not require judges to do anything new. The current tools of unconscionability, undue influence, mistake, fraud, and duress are quite capable of dealing with the complicated personal nature of some human transactions. Essentially, all the law of contract represents is a formal way of making promises, so that we know which promises are enforceable. This is a procedural, not a substantive question. The doctrine of public policy should be abandoned in respect of "content" contracts so that the law takes a consistent view that contract law is not interested in substantive outcomes. Those contracts considered flawed because of their effect can still be refused relief. However, the courts should refuse *enforcement* in the public interest, rather than denying the validity of the agreement itself. To renew the doctrine of public policy in this way is to put the "unruly horse" out to pasture, and to usher in an era of increased consistency, and honesty, in judicial reasoning.