

THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU
CANADIEN

Vol. 103

2025

No. 3

THE PUBLIC LIMITS OF PRIVATE JUSTICE: AN ACCOUNT OF THE DOCTRINE OF PUBLIC POLICY IN CONTRACT

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The common law doctrine of public policy remains poorly defined. It has been invoked to produce outcomes distinct from what conventional doctrine would require, but no consensus exists as to the purposes it serves, the factors justifying its intervention, or even the manner of its operation. This paper argues that the best understanding of public policy identifies it as delineating the justifiable boundary between spheres of public and private justice.

This paper accounts for the capacity of public policy to override the demands of private justice without detracting from its essentially private character. Using Rawls' understanding of the institutional framework justifiable in a liberal democracy and distinguishing between the principles of justice appropriately applicable to political and private relationships, this account theorizes public policy as a barrier preventing private derogation from the basic political structure of liberal democracy. Focusing on contract, this paper proposes that public policy operates in circumstances in which the parties to a particular contract have sought judicial enforcement of private obligations, which, if enforced, would substantively alter the allocation of civic entitlements underpinning liberal democratic society.

This paper also offers a complementary account of the precise effect a declaration of repugnance has on contractual relationships, suggesting

¹ Associate Professor, University of New Brunswick Faculty of Law. I am appreciative of the assistance provided by my research assistants, Susan Ivimey, Jacob Stoddard, and Nathaniel Box in the finalization of this paper. I am also appreciative of the helpful comments offered by participants in the Obligations X Conference and the anonymous reviewers. Mistakes, as always, are my own.

that courts should be understood as declining to enforce otherwise valid contracts, rather than declaring parties never to have been bound. On this account, public policy simply permits a court to decline requests that would otherwise set the liberal democratic state against itself.

La doctrine de common law relative à l'ordre public demeure mal définie. Bien qu'elle ait été invoquée afin de produire des résultats distincts de ce qu'exigerait la doctrine conventionnelle, aucun consensus n'existe quant à ses objectifs, quant aux facteurs justifiant son intervention, ni même quant à son fonctionnement. L'auteur fait valoir que la meilleure définition de l'ordre public qui soit pose ce concept comme la ligne de démarcation justifiable entre la sphère de la justice publique et celle de la justice privée.

L'auteur prend acte de la primauté de l'ordre public sur les revendications relevant de la justice privée, sans atteinte aucune à son caractère essentiellement privé. Appliquant la conception rawlsienne du cadre institutionnel justifiable dans une démocratie libérale et opérant une distinction entre les principes de justice légitimement applicables aux relations politiques et privées, l'auteur étale l'ordre public comme un obstacle empêchant les dérogations privées à la structure politique à la base des démocraties libérales. S'intéressent principalement au droit contractuel, l'auteur propose que les règles de l'ordre public opèrent dans des circonstances où les parties à un tel contrat sollicitent l'exécution judiciaire d'obligations privées qui, si elles étaient

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appliquées, modifieraient substantiellement l'exercice des droits civiques à la base d'une société démocratique et libérale.

L'auteur présente aussi, à titre complémentaire, les effets précis d'une déclaration d'incompatibilité sur les relations contractuelles, et avance qu'il devrait être entendu que les tribunaux refusent d'appliquer des contrats valides, plutôt que de déclarer invalides les relations contractuelles entre les parties. Dans cette optique, l'ordre public permet simplement aux tribunaux de refuser des requêtes qui feraient que l'État démocratique libéral se porterait atteinte à lui-même.

Introduction

The doctrine of public policy in contract is an outstanding corner of the law, in that it inspires confusion and disagreement amongst judges and legal scholars not only as to *when* it should be triggered but also as to the *effect* it has on the underlying contract. The first of these points of dispute is the far better canvassed of the two and need not be recounted in much detail here. There is an abundance of skepticism as to the reliability of the doctrine: it is thought neither to produce coherent outcomes nor to produce outcomes for coherent purposes. “[P]ublic policy is always an unsafe and treacherous ground for legal decision,”² Lord Davey once noted. Lord Watson had earlier expressed skepticism as to whether the doctrine was even an entirely legal one, asserting that “[a] series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal.”³

The second, and far less well-considered, point of dispute is what it means for a contract to be determined to contravene public policy. Beyond the obvious practical effect of such a determination—that the plaintiff in the matter in issue is unsuccessful in their effort to obtain a remedy for their loss flowing from the defendant’s non-delivery of the expected performance—the legal mechanism by which this outcome is reached is seldom well articulated. Indeed, judges and scholars employ a multiplicity of language to describe such an outcome, ranging from “void” to “set aside” to “unenforceable” to “invalid”, usually without explaining how a contravention of public policy could have these effects on a contract. For centuries, it seems, judges and scholars have been satisfied to draw on the vague and dubious authority of a few Latin maxims to justify treating

² *Janson v Driefontein Consolidated Mines Ltd*, [1902] AC 484 at 500 (HL).

³ *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co*, [1894] AC 535 at 553 (HL).

contracts as somehow evaporating in the face of a contravention of public policy.

In the account below, I attempt to provide some clarity in both of these areas of uncertainty. Taking the less-often considered point first, I argue that the *only* effect of a determination that a contract is contrary to public policy is that it cannot be enforced by court order, either for damages or specific performance. This understanding of the doctrine of public policy casts it as entirely distinct from and external to the law of contract, acting only as a limit on the availability of recourse to coercive enforcement rather than as a substantive limit on the power of persons to create binding legal transactions. On this account, despite its unenforceability, a contract determined to be contrary to public policy nonetheless *continues* as a contract, with all of the legal consequences for its parties that one would expect. This understanding of the mechanism by which public policy operates may also extend to account for the existence and operation of public policy in other areas of private law, such as the estate context.⁴

In relation to the uncertainty as to what, precisely, can justify a court declining to enforce a contract, I seek to offer a coherent (though, admittedly, perhaps not easily justiciable) understanding of the basis upon which heads of public policy have been, and ought to be, identified. The accounts I offer in response to these two nodes of uncertainty are linked by Rawls' core insight as to the appropriate relationship between conflicting conceptions of public and private (or local) justice.⁵

In their 2007 article “The Doctrine of Public Policy in Canadian Contract Law”, Kain and Yoshida argue that the “lack of any coherent theory of public policy has traditionally made the doctrine inaccessible.”⁶ That paper, which continues to find favour among the judiciary,⁷ concludes with a brief canvassing of the possibility that “the categories of public policy reflect the

⁴ It should be noted that courts may refrain from giving effect in the estate context to a testator's attempts at private ordering for reasons very different than those advanced herein as justification for doing so in the contractual context.

⁵ See generally John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Belknap Press, 2001) [Rawls].

⁶ Brandon Kain and Douglas T Yoshida, “The Doctrine of Public Policy in Canadian Contract Law” (2007) *Annual Rev of Civ Litigation* 1 at 4 [Kain & Yoshida].

⁷ See e.g. *Métis National Council Secretariat Inc v Dumont*, 2008 MBCA 142, at paras 10–11; *Tercon Contractors Ltd v British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4 at para 116 [Tercon]; *Niedermayer v Charlton*, 2014 BCCA 165 at para 76; *Uber Technologies Inc v Heller*, 2020 SCC 16 at paras 109 – 110 [Uber]; *Pearce v 4 Pillars Consulting Group Inc*, 2021 BCCA 198 at para 217 (citing Uber) [Pearce].

preconditions of a just society”,⁸ and expressly references the work of Rawls as influencing what such a “just society” might be considered to be. On their account, the values reflected by (some of) the heads of public policy are associated with the protection of the state, the judiciary, and the free, dignified, and equal individual, all of which they consider to be essential aspects of a liberal democracy.⁹ As will be seen below, I differ from Kain and Yoshida on several points, such as my understanding of the public justice functions of some of the heads of public policy. Additionally, the account I offer seeks to resolve uncertainties not only as to when public policy may be invoked but also concerning the effect of doing so, which Kain and Yoshida seem not to have addressed.

That said, it should be acknowledged here that Kain and Yoshida were the first, to my knowledge, to suggest that the doctrine of public policy might be explained through the lens of Rawls’ account of the justifiable division of labour between a public conception of justice pertaining to the basic structure of society and a private conception of justice appropriate to the institution of private ordering in operation within such a social structure.

My account seeks to expand this insight in several directions. The first section below provides a brief overview of the doctrine of public policy in contract (and the reader would be well advised to refer to Kain and Yoshida, or their precursors Knight¹⁰ or Winfield,¹¹ for a more comprehensive outline of this field and its origins). The second section details my account of the effect of a determination that a contract contravenes public policy and seeks to reconcile the legal treatment of the parties after such a determination with the pertinent language commonly used by judges and legal scholars. The third section offers my account of the applicability of Rawls’ concept of a division of labour between differing conceptions of justice to the doctrine of public policy in contract and aims to justify that framework as an explanatory lens for this legal phenomenon. The fourth and final section attempts to explain several of the more difficult heads of public policy as doctrinal manifestations of this division of labour in order to support an understanding of the doctrine of public policy as one of a number of common law doctrines, the purpose of which is not to serve the demands of private justice but to act as a limit, grounded in a conception of public justice, on the capacity of the private law doctrines of the common law to serve those demands.

⁸ Kain & Yoshida, *supra* note 6 at 43.

⁹ *Ibid* at 44.

¹⁰ WSM Knight, “Public Policy in English Law” (1922) *Law Q Rev* 207 [Knight].

¹¹ Percy H Winfield, “Public Policy in the English Common Law” (1928) *42:1 Harvard L Rev* 76.

1. Public Policy and Contract

At the outset, it is important to note the distinction drawn here between the closely aligned doctrines of illegality and public policy. In my view, the doctrine of illegality offers no compelling or challenging mysteries either in its mode of operation or justification. Illegal contracts, whether falling foul of statute or the common law itself, are by their nature offensive to the notion of a system of law.¹² There can be no question as to the relative authority of private ordering when set against the express or implied will of a competent legislature. This is, of course, the same principle that permits a competent legislature to impose by statute a contract-like relationship governing a particular private relationship (such as, for example, when labour disputes are resolved through so-called “back to work” legislation) or to impose by statute certain default terms in each and every contractual relationship of a particular type (as the various *Sale of Goods Acts* have done throughout Canada for over a century). As such, this paper leaves illegality entirely to the side and focuses squarely upon the doctrine of public policy, which specifically permits courts to decline enforcement of contracts that are *not* illegal in any way.

One of the challenges posed by the doctrine of public policy is, perhaps, that its label is not nearly so onomatopoeic as its doctrinal cousins, statutory illegality and common law illegality. As Knight put it just over a century ago,

The expression ‘public policy’ is not one of very old standing in English common law. It is rather the modern equivalent for other and much older terms or phrases, now, save for something like a revival in recent years, rarely used in their original connexion. It is accordingly impossible satisfactorily to understand the modern expression without first taking a glance at its early antecedents.¹³

Knight identified the earliest of those terms and phrases used to describe contracts that would today be considered contrary to public policy as being *encounter common ley*,¹⁴ another as being *encounter le necessity del commonwealth*,¹⁵ and yet another as *encounter de ley de Dieu*.¹⁶ These

¹² As an anonymous reviewer has noted, this understanding of illegality might conflict with the expressed views of the Supreme Court of Canada (in, for example, *Transport North American Express Inc v New Solutions Financial Corp*, 2004 SCC 7) in which, according to the reviewer, the application of that doctrine “seems to depend on the type of illegality” in issue. This seems to be a pragmatic approach to the question rather than a principled one.

¹³ Knight, *supra* note 10 at 207.

¹⁴ *Dyer’s Case* (1414) 2 Hen 5 f 5, pl 26.

¹⁵ (1586) *Anon*, Moore No 379.

¹⁶ *Prat v Phanner*, (1586) Moore No 683.

earliest manifestations of the doctrine of public policy seem to have reflected most of the characteristic hallmarks of the modern doctrine. For example, the consequence of a determination that a contract fell into one of these categories meant then, as now, that it could not be enforced—as cited by Knight, “*a covenant ou condition encounter ley est void.*”¹⁷ The early modern authorities, as Knight noted, indicated that even the nascent doctrine of public policy seemed to play a restrictive role in the adjudication of private disputes, albeit for somewhat amorphous reasons.

There is no question of statute or written law. The doctrine, concealed under widest generalization, operates, in fact, because of some gap in that law, though only where the dominant general consideration is the good of the community—the supreme law—with, it may be, some special consideration for the rights or interests of individuals other than those immediately concerned in the matter the subject of the suit.¹⁸

The modern era of the doctrine of public policy, according to Knight, opened with the decisions of Rolfe B and the House of Lords in *Cooke v Turner*¹⁹ and *Egerton v Brownlow*,²⁰ respectively, each of which endorsed an understanding of public policy as a means by which attempts at private ordering could be constrained by more general societal interests. As Rolfe B put it, “[t]he conditions said to be void, as trenching on the liberty of the law, are those which restrain a party from doing some act which it is supposed the state has or may have an interest to have done.”²¹ The House of Lords, in the latter case, were largely of the view that, as Lord Lyndhurst put it, “a condition against the public good, or public policy, as it is usually called, is illegal and void.”²²

¹⁷ *Bragge v Stanner*, (1621) Palm 172.

¹⁸ Knight, *supra* note 10 at 208.

¹⁹ (1846), 15 M & W 727, 153 ER 1044 [*Cooke*].

²⁰ (1853), 4 HLC 1, 10 ER 359 [*Egerton*].

²¹ *Cooke*, *supra* note 19 at 735–736.

²² *Egerton*, *supra* note 20 at 160. See also comments by Lord Brougham [*Egerton*] (“[t]hus far, touching the tendency of the condition to produce and facilitate attempts at obtaining the dignity by corrupt means – attempts, it is admitted, unlikely to be made at the present day, and if made, still more unlikely to succeed. But there are other means of a far less guilty cast, and which are not to be rejected from our consideration; for they are neither so unlikely to be employed, nor are they without great injury to the public weal” at 177); Lord Truro [*Egerton*] (“I shall, therefore, assume that a disposition of property by will, equally with a disposition in any other form, which has a tendency injurious to the public interest or good, the law will not uphold, and the law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition; and if the law is to be practically applied, it cannot be administered with reference to the character of the individuals to whom the question may relate” at 196–197); and Lord St Leonards [*Egerton*] (“I ask you to consider, if there should be, as there probably would be, a considerable number of landed proprietors, each attempting to raise a dignity attached

The factual contexts in which private ordering has been held to implicate the public good, common weal, or public policy so as to justify a court in declining to give it effect are varied and have tended to resist classificatory efforts. That said, Kain and Yoshida considered it plausible that the so-called “heads” of public policy could, in the contractual context, usefully be grouped into five broad categories: 1) contracts injurious to the state; 2) contracts injurious to the justice system; 3) contracts involving immorality; 4) contracts affecting marriage; and 5) contracts in restraint of trade.²³ For the purposes of this paper, I limit my discussion to three heads of public policy as a more or less representative sample of the above list: contracts injurious to the domestic affairs of the state, contracts interfering with the administration of justice, and contracts relating to marriage and immorality. A brief outline of each of these heads is set out below.

A) Contracts Injurious to the Domestic Affairs of the State

The primary sort of contractual relationship captured by this head of public policy is one that inhibits or otherwise fetters public actors in the proper exercise of their discretion. The class “public actor” has been determined by the Supreme Court of Canada in *Montreal Park & Island Railway v Chateauguay & Northern Railway*,²⁴ for the purpose of this head of public policy, to include private entities, such as railway companies, that have been delegated some public power or authority. As Justice Davies put it, those to whom Parliament has delegated public powers presumably hold such powers for the public good.²⁵ If such delegated public powers were permitted to be fettered in their exercise by private ordering, according to Justice Davies, “the most serious consequences might result and the chief object of Parliament in [delegating those powers] might be defeated.”²⁶ In reaching this conclusion, Justice Davies relied on the decision of the House of Lords in *Oswald v Ayr Harbour Trustees*,²⁷ in which Lord Blackburn concluded that

to his own private estate, embarrassing and entangling the Crown, and embarrassing and perhaps leading into mischief the Crown’s advisers, how the Crown would deal with the circumstances, and how the law would stand with respect to that which would become a public mischief. Your Lordships ought to strike at this disposition, upon the ground, and upon the ground alone, that it is necessary to do so for the sake of public policy” at 246). Lord Cranworth LC did not consider a matter of public policy to arise on the facts in issue and did not address the question.

²³ Kain & Yoshida, *supra* note 6 at 17.

²⁴ 1904 CanLII 46 (SCC), 35 SCR 48.

²⁵ *Ibid* at 56.

²⁶ *Ibid*. Justice Killam, agreeing with Justice Davies in result, reached a similar conclusion on the basis of American jurisprudence at 62.

²⁷ [1883] UKHL 873.

I think that where the legislature confers powers on anybody to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void. This is, I think, the principle on which this House acted in *Staffordshire Canal v Birmingham Canal*, and on which the late Master of the Rolls acted in *Mulliner v Midland Railway Co.*²⁸

This class has also been determined to include such actors as town clerks,²⁹ police officers,³⁰ police magistrates,³¹ judges,³² and municipal councillors,³³ and of course includes such other public officers as legislators.³⁴ At the heart of this head of public policy seems to be a concern that, if enforceable, contracts fettering the discretion of public actors, or even potentially posing a private inducement to them to exercise or refrain from exercising their discretion in a particular fashion, would tend to undermine the public purposes in service of which the actor in question has been empowered to act. As Lord Truro noted in *Egerton v Brownlow*, “the law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition; and if the law is to be practically applied, it cannot be administered with reference to the character of the individuals to whom the question may relate.”³⁵ As such, contracts inducing the granting of a public office³⁶ or its vacancy³⁷ are also repugnant to this head of public policy, not so much because they treat a public office as something to be bought and sold, but because they tend to influence the exercise of discretion in reaching a determination to grant or resign it.

²⁸ *Ibid* at 634 – 635.

²⁹ *Hughes v Statham* (1825), 4 B&C 187, 107 ER 1029.

³⁰ *Hobbs v Attorney General of Canada*, 1914 CarswellAlta 38, 7 WWR 256.

³¹ *Central Bank of Canada v Ellis* (1893), 20 OAR 364 (CA).

³² *Flarty v Odium* (1790), 100 ER 801.

³³ *Finney v McKellar (Township)*, 1982 CanLII 1918 (ONCA), 133 DLR (3d) 351.

³⁴ *Egerton*, *supra* note 20 at 161 (per Lord Lyndhurst), 177–179 (per Lord Brougham), and 201–204 (per Lord Truro).

³⁵ *Ibid* at 196–197.

³⁶ *Blachford v Preston* (1799), 8 TR 89, 101 ER 1282.

³⁷ *Ryan v Willoughby*, 1990 CanLII 11 (SCC), [1990] 2 SCR 1421.

B) Contracts that Interfere with the Administration of Justice

Contracts that can be characterized as interfering with the due course of justice,³⁸ such as an agreement to conceal a criminal offence or to otherwise stifle criminal prosecution,³⁹ an agreement not to testify at a criminal trial⁴⁰ or to refrain from disclosing information for use in a trial,⁴¹ to conduct a trial so as to portray someone in a particular light,⁴² or to procure⁴³ or refrain from procuring evidence for use in a trial,⁴⁴ have been determined to be contrary to public policy.

This head of public policy has also been the basis upon which contracts ousting the jurisdiction of the court have been held contrary to public policy. Although this prohibition has historically been broad enough to capture even those agreements referring any controversies between the parties to arbitration,⁴⁵ the enactment of statutory arbitration enabling schemes has dramatically reduced the scope of this head of public policy's application in this area, but, in Canada, at least, there have been suggestions that it remains a basis on which to decline enforcement of arbitration agreements the practical effects of which are to present an insurmountable economic or procedural barrier to relief.⁴⁶

The last category of contracts that have historically been held to contravene this head of public policy are those that tend to interfere with the impartiality of the court, being agreements of maintenance or champerty.⁴⁷

C) Contracts Injurious to Marriage and Sexual Morality

Contracts providing for the cohabitation of unmarried persons, in restraint of marriage, to broker a marriage, to dissolve a marriage, and

³⁸ *Lound v Grimwade* [1886], 39 ChD 605 [*Lound*].

³⁹ *Johnson v Musselman*, 1917 CanLII 660 (ABCA), 28 CCC 165.

⁴⁰ *Collins v Blantern* (1767), 2 Wils KB 347, 95 ER 850.

⁴¹ *Northland Bank v Wilson* (1994), 157 AR 172.

⁴² *Lound*, *supra* note 38.

⁴³ *Pay v Kaboly*, 2006 BCSC 925.

⁴⁴ *Symington v Vancouver Breweries Ltd and Riefel et al*, 1931 CanLII 797 (BCCA), [1931] 1 WWR 410.

⁴⁵ *Thompson v Charnock* (1799), 8 TR 139, 101 ER 1310.

⁴⁶ *Uber*, *supra* note 7 at paras 112–114; *Petty v Niantic Inc*, 2023 BCCA 315 at para 81; *Williams v Amazon.com Inc*, 2023 BCCA 314. This may also be the basis upon which it has been suggested that exclusion of liability clauses might contravene public policy; see *Tercon*, *supra* note 7 at paras 82 and 116–123 per Justice Binnie (in dissent).

⁴⁷ *McIntyre Estate v Ontario (Attorney General)*, 2002 CanLII 45046 (ONCA), 218 DLR (4th) 193.

for the provision of sexual services have all been held to be contrary to public policy. As a result of changing social and public attitudes, there has been a substantial degree of fluctuation in the public policy treatment of agreements falling within these categories. Cohabitation agreements, for example, are now generally no longer held to contravene public policy,⁴⁸ while contracts in restraint of marriage will be enforceable so long as they merely disincentivize marriage rather than outright prohibit it.⁴⁹ Similarly, while a contract to broker marriage was historically held to contravene public policy on the basis that it introduces “the consideration of a money payment into that which should be free from any such taint”,⁵⁰ changing societal contexts have largely rendered this subhead of public policy defunct.

Agreements committing one of the parties to end a marriage and marry another remain contrary to public policy,⁵¹ although contracts providing for a post-divorce settlement in the form of a prenuptial agreement, which was historically contrary to public policy, are now generally enforceable.⁵² Similarly, although contracts for the provision of sexual services,⁵³ as well as contracts the known effect of which is to support the provision of such services,⁵⁴ have historically been unenforceable as contrary to public policy, changing social contexts are, once again, raising the possibility that the scope of this subhead could be dramatically altered in the near future.⁵⁵

2. Public Policy and the Mechanisms of Contract Law

In order to clarify what, in my view, public policy does and does not do in the context of contract law, I must first engage in a brief survey of the various ways in which an apparently validly made contract can be recognized as incapable of supporting a successful action for damages. First, at law, a contract can be void *ab initio* as a result of a failure of consideration,⁵⁶ which flows from a conclusion that (at least) one of the parties to the agreement promised to give something having no legal value, such that there is no valid transaction to enforce. A contract can also be avoided at

⁴⁸ *Chrispin v Topham*, 1986 CanLII 3568 (SKQB), 28 DLR (4th) 754.

⁴⁹ *Caron v Caron*, 1987 CanLII 59 (SCC), [1987] 1 SCR 892 at para 13.

⁵⁰ *Herman v Charlesworth*, [1905] 2 KB 123 (CA) at 130.

⁵¹ *Wilson v Carnley*, [1908] 1 KB 729 (CA).

⁵² *Granantino v Radmacher*, [2010] UKSC 42, [2010] 3 WLR 1367.

⁵³ *Pearce v Brooks* (1865), LR 1 Ex 213.

⁵⁴ *Ibid.*

⁵⁵ Consider, for example, the decision in *Sheehan v Samuelson*, 2023 NSSM 27 [*Sheehan*], in which an agreement to pay money in exchange for sexual services was successfully enforced.

⁵⁶ *Cole v Pope*, 1898 CanLII 33 (SCC), 29 SCR 291.

law as a result of having been procured by duress,⁵⁷ which undermines the transaction's requisite voluntariness, or as a result of a material change in the factual context within which the transaction was entered into either as a result of a mutual mistaken apprehension prior to contracting⁵⁸ or as a result of a supervening change impacting the relative value of the consideration exchanged that frustrates the bargain.⁵⁹ Whether void *ab initio* or avoided, such a contract is treated, upon adjudication, as never having existed (for most purposes). As such, when a contract is held to fall into one of these categories, the reason an action based upon it will be unsuccessful is because, legally, no such agreement exists at the time of adjudication and judgment.

In equity, agreements that would be binding at law can be rescinded either because they have been procured through the exercise of undue influence⁶⁰ or because they are unconscionable transactions.⁶¹ Although neither of these doctrines directly impacts the legal nature of the agreement in issue, the inevitable consequence of a determination that an agreement legally entrenches the parties in an inequitable relationship is that said legal relationship is equitably rescinded, such that the underlying contract, valid at law, is nonetheless incapable of enforcement.⁶²

Unsurprisingly, the doctrine of public policy is an outlier among the legal and equitable doctrines that can identify a contract as void *ab initio*, avoidable, or inequitable. The ways in which the doctrines of consideration, duress, mistake, and frustration function to undermine the internal logic of a legal transaction and render it a nullity all clearly relate to the core legal requirement that a contract feature an objectively discernable, voluntary agreement by the parties to an exchange of legal value that they implicitly

⁵⁷ *Findlay v Findlay*, 1951 CanLII 10 (SCC), [1952] 1 SCR 96; *Pao On v Lau Yiu Long*, [1980] AC 614 at 635 (PC).

⁵⁸ *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, [2002] 4 All ER 689 (CA).

⁵⁹ As Lord Radcliffe stated in *Davis Contractors Ltd v Fareham Urban District Council*, [1956] AC 696 at 728 (HL), "there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which *ex hypothesi* they neither expected nor foresaw."

⁶⁰ *Geffen v Goodman Estate*, 1991 CanLII 69 (SCC), [1991] 2 SCR 353; *Royal Bank of Scotland plc v Etridge (No 2)*, [2002] 2 AC 773, [2002] UKHL 44.

⁶¹ *Pearce*, *supra* note 7; *Uber*, *supra* note 7.

⁶² It is also possible for equity to prevent some particular contractual right from being exercised in circumstances in which doing so would be inequitable. This kind of transitory injunction in relation to a particular right at a particular time should always be distinguished from an unconscionable transaction, being a legal relationship that is inextricably tinged with inequity as a result of the circumstances under which it was created.

identify as equal. In other words, the rationale for declining to enforce an agreement on the basis of one of the aforementioned legal doctrines accords with the internal logic of contract law itself—if contract law justifiably enforces only those agreements characterized by the features just mentioned because only agreements of that sort are understood at law to be contracts, there is nothing mysterious about a failure to assign liability for failure to comply with the terms of an agreement that contract law does not recognize as a contract. In such circumstances, though an agreement of some sort may exist, there is no contract, so there can be no legal obligation. Similarly, the equitable doctrines that could operate to prevent enforcement of a contract do so for reasons internal to and consistent with the overarching logic of equity, indifferent to the fact that contract law would identify the agreement in question as valid and, as a result, legally binding on its parties.

The doctrine of public policy fits awkwardly into this context. While some contract theorists⁶³ have advanced accounts of public policy suggesting that it somehow operates congruently with the internal logic of contract law, this is, in my view, an unsustainable position. For public policy to be understood as an adjunct to the doctrine of consideration such that contracts contrary to public policy are void *ab initio*, for example, there must be some reason internal to the logic of contract law itself as to why the act in issue in that particular context is understood differently from any other context. Why, for example, would the act of renting someone a carriage have legal value for all purposes except when that person

⁶³ Benson suggests that some aspects of the doctrine of public policy, such as restraint of trade, operate to protect against a kind of “contractual unfairness”, specifically “to assess terms of restraint to ensure that an exchange is not a means for a party simply to limit the other’s inalienable freedom to engage in productive and market activities.” Peter Benson, *Justice in Transactions* (Cambridge: Belknap Press, 2019) at 203 [Benson]. Similarly, Margaret Jane Radin suggests in “From Baby-Selling to Boilerplate: Reflections on the Limits of the Infrastructures of the Market” (2017), 54:2 *Osgoode Hall LJ* 339 at 371 that “the background rules of the institutions of property and contract—including the limits of property and contract, and including remedies in property, tort, and contract law—must be maintained and properly enforced by government. That is, the rules of the background legal infrastructure must remain substantially within the care of the polity.” Radin’s analysis of certain rights as “market-inalienable”, which turns on the requirement of the Rule of Law that “rights affirmed and protected by the state must have remedies available to subjects in case the rights are transgressed”, seems to capture both what I would consider to be the structural requirements of public justice (such as the capacity to access impartial and authoritative adjudication of disputes) and the scourge of over-broad liability waivers (which have not yet been recognized as destructive of the public entitlements allocated by the basic structure in a well-ordered society). See also Randy Barnett, “Contract Remedies and Inalienable Rights” (1986) 4:1 *Social Philosophy & Policy* 179.

is engaged in sex work?⁶⁴ Similarly, there seems to be no grounding in the doctrine of consideration for the proposition that a promise not to disclose some particular fact has legal value only if the fact is not one of legitimate public interest.⁶⁵ Such an account does not prevent the renting of a carriage or the keeping of a secret from having legal value as a result of the internal limitations of the doctrine of consideration; no judge, in explaining the doctrine of consideration, has ever indicated that it involves a stage at which something found at some earlier stage to have legal value is interrogated against the limitations imposed by the doctrine of public policy. Rather, where it is argued that the doctrine of public policy identifies something that should not be subject to contractual exchange (because it is, for example, “market-inalienable” or an “inalienable freedom”), it is merely posited that the doctrine of consideration (or the law of contract as a whole) should not extend to a particular transaction in circumstances in which it otherwise clearly would, the parameters of which are dictated by factors external to contract law itself.⁶⁶

In *Contract Theory*,⁶⁷ Stephen Smith advanced a nuanced account of what he referred to as “substantive limitations on the enforceability

⁶⁴ Smith’s answer to this question, linked to the argument outlined in detail below, is that “a promise to do an act that will assist or facilitate an objectionable act [...] is not binding because it is wrong—objectionable—to assist another in doing an objectionable act.” The unenforceability of agreements that would have the effect of aiding or facilitating such an “objectionable act”, but in which that fact is not known to one of the parties, can be explained, according to Smith, on the assumption that “it is reasonable to believe that ‘no objectionable means are to be used’ is an implied term of most agreements.” Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 252–253 [Smith].

⁶⁵ Such a contract would, apparently, be contrary to public policy—see Hugh Beale, *Chitty on Contracts*, 34th ed, (London: Thomson Reuters, 2021) vol 1 at 18-013, citing *Brown v Brine, Executor* (1875), 1 ExD 5 (DC), and *Jennings v Brown* (1842), 9 M&W 496, 152 ER 210 [Beale].

⁶⁶ It should be clear, at this point, that this paper takes a rather narrow view as to what, precisely, the common law of contract consists of. In my view, the common law of contract is no more and no less than the doctrines comprising the objective test of contract formation (that is, those relating to offer, acceptance, and consideration) and those doctrines structurally related to them (pertaining to the voluntariness, exclusivity, and legal value of the exchange, such as duress, privity, mistake, and frustration) or required to understand the agreement reached (being doctrines of construction and implication). On this understanding, much of what would commonly be found in a casebook for a contract law course, such as the common law treatment of remedies, the doctrine of the seal, and those equitable doctrines adjacent to or directly bearing on contract law, would not be understood as being captured by “the common law of contract”. Obviously, it is also my view that the doctrine of public policy, which is grounded in and partakes of norms extrinsic to private law in general, is not part of the common law of contract.

⁶⁷ Smith, *supra* note 64.

of agreements.”⁶⁸ As Smith put it, “substantive limitations’ here refers to rules which declare certain agreements, or clauses within agreements [...], to be unenforceable on the basis of the *kind of activity or action* that is required by, or closely linked to, those agreements.”⁶⁹ While he considered there to be four potential explanations for why courts might decline to enforce agreements in this way,⁷⁰ Smith’s view was that the ‘no obligation’ justification “provides the broadest, and most convincing, explanation for the core categories of substantive limitations on enforcement.”⁷¹

The mechanism by which the ‘no obligation’ principle operates to prevent enforcement of an agreement on substantive grounds, Smith argued, is different from the other three potential justifications examined in *Contract Theory* in that “it supposes that the reason the contract is unenforceable is that no valid contract was created—just as if, say, the contract lacked consideration or a necessary formality.”⁷² It is, as such, an internal account of, *inter alia*, the law of contract in relation to agreements contrary to public policy. The core of Smith’s argument on this point is as follows:

A more promising approach, I suggest, builds on the idea [...] that, while promissory obligations are essentially individualistic, rights-based obligations not to harm others, *part* of the story for why such obligations exist is that they are intrinsically valuable elements of a close or special relationship between persons. On the basis of this view of promising, it can be argued that promises to do wrongs are not binding because the good that is normally associated with close relationships is not realized in a case in which the promise is to do an objectionable activity. In the same way that autonomy has no value when exercised in pursuit of non-valuable ends (*choosing* to murder is no more valuable than murdering in an unthinking rage), close relationships have no value when they are formed in order to pursue non-valuable ends. The relationship that is formed between persons who make an agreement to murder a third person has no value.⁷³

Obviously, the concept of an “objectionable activity” must carry a substantial load in order to extend to the entire scope of legal and non-legal conduct identified as subject to substantive limitations on contractual enforceability. Smith’s account of “objectionable”, in this context, divides such conduct into two potential categories: conduct harmful to others and conduct that “is for some other reason worthless, immoral, or degrading (hereafter

⁶⁸ *Ibid* at 245.

⁶⁹ *Ibid* (italics in original).

⁷⁰ Specifically, the punishment justification, the ‘dignity of the courts’ justification, the ‘no obligation’ justification, and the ‘wrongdoing principle’ justification. *Ibid* at 246.

⁷¹ *Ibid* at 249.

⁷² *Ibid*.

⁷³ *Ibid* at 251 (citations omitted).

‘non-valuable’).⁷⁴ This second class of conduct captures, in Smith’s view, gambling agreements, commercial surrogacy agreements, agreements relating to the provision of sexual services, agreements contrary to marriage, and some restrictive covenants,⁷⁵ and is obviously the more germane to the inquiry undertaken here. A subcategory of contracts dealing with this second class of conduct, identified by Smith as “market-expanding agreements”, address “the sale of things that, in the law’s view, should not be sold.”⁷⁶ Referring to this class of agreement, Smith argued that, while the conduct itself is, in each case, unobjectionable (referring to child bearing, the transfer of a human organ, and sexual relations), “[i]t is the ‘commodification’ of child bearing, sex, or giving organs that raises a problem.”⁷⁷ While Smith was able to formulate two potential justifications for this treatment,⁷⁸ in the end, he himself acknowledged that “these justifications are relatively weak.”⁷⁹

While offering a robust account of conduct of a sort identified as objectionable because of the harm it causes to others, Smith’s account largely breaks down in the area of what he describes as conduct that “is for some other reason worthless, immoral, or degrading.” Much of the analytic work sought to be done by this category is, with respect, dependent upon a reader sharing his own intuition as to the appropriateness of these labels as descriptors for the conduct in question, that this is a coherent class, and/or that, if it is a coherent class, that it coheres around his conclusory label of “non-valuable”. Obviously, if there were some compelling basis for thinking the conduct in issue to be “non-valuable” from a legal perspective, Smith’s account would pose a substantial challenge to the account set out herein. The best argument that Smith is able to advance, however, is the suggestion that “commodification” of some things is inherently problematic, without being able to offer a compelling reason why that should be so. At the end of Smith’s account, the rationale for treating a contract for the provision of sexual services, for example, differently from an agreement providing for the provision of any other sort of service provided with the body (such as care work or manual labour) relies entirely on an interpretation of statements such as “it is widely recognized that commodifying the body is, in general, objectionable”⁸⁰ that considers

⁷⁴ *Ibid* at 255.

⁷⁵ *Ibid* at 256.

⁷⁶ *Ibid* at 260.

⁷⁷ *Ibid*.

⁷⁸ Being the protection of individuals from “activities not conducive to a good or valuable life” and the protection of the activities’ “social value” on the argument that “certain valuable activities or things [...] become less valuable for *everyone* if they are done in exchange for money.” *Ibid* at 262.

⁷⁹ *Ibid* at 263.

⁸⁰ *Ibid* at 261.

sex work, but not nursing, or therapeutic massage, or ditch-digging, or house-painting, “a commodification of the body”.⁸¹

To return to the main argument, uncertainty around the precise mechanism by which public policy interacts with an otherwise valid and equitable contract is likely at the root of the impressive conceptual range covered by judges and scholars in describing the effect of a finding that a contract, or some portion of it, is contrary to public policy. Probably the strongest language used in this context is Waddams’ characterization of a court as “striking down” (or, less kinetically, “setting aside”) a contract contrary to public policy,⁸² a formulation that has also been employed by both Canadian and English judges.⁸³ This understanding, which seems very much focused on the court as exercising a power to control freedom of contract, aligns with Waddams’ contention that “a court must reserve the ultimate power to decide when the values favouring enforceability are outweighed by values that society holds to be more important.”⁸⁴

Furmston, having adopted Lord Justice Denning’s two-part classification of the heads of public policy in *Bennett v Bennett*,⁸⁵ described the first class as “illegal” contracts and the second class as “void” contracts. Illegal contracts, according to an earlier version of Furmston, were “so transparently reprehensible judged by any standard of morals that [they] must be dismissed [...], with the result that both parties must be excluded from access to the courts and denied all remedies”.⁸⁶ Void contracts, on

⁸¹ In fairness to Smith, he acknowledged that his account was not intended to meet the sort of argument presented here. “One possible objection to moralistic restrictions” he noted, “is, of course, that there are simply no such thing as non-valuable, non-wrongful activities. In this view, comparing the value of reading pornography with the value of, say, reading Plato is like comparing the value of eating pistachio ice cream with the value of eating strawberry ice cream. Addressing this (in my view) implausible claim is outside the scope of this book, but it is worth noting that claims of this sort often turn out, on closer inspection, to be claims about the proper scope of criminal law or claims about the practical difficulty of determining what activities are immoral or worthless or degrading. Pure ‘value sceptics’ are relatively rare.” *Ibid* at 257. Without committing to the label of ‘value sceptic’, I would merely challenge the contention that contract law is the appropriate tool with which to identify, or context within which to act upon, the kind of value difference in issue between reading pornography and reading Plato.

⁸² SM Waddams, *Law of Contracts*, 8th ed (Toronto: Thomson Reuters, 2022) at para 571 [Waddams].

⁸³ See e.g. *Steinberg v Cohen*, 1929 CanLII 419 (ONCA), [1930] 2 DLR 916; *Uber*, *supra* note 7 at paras 130–131 and 152; *Marshall v NM Financial Management Ltd*, [1997] 1 WLR 1527, [1997] EWCA Civ 1237 at para 19; *Douez v Facebook Inc*, 2017 SCC 33.

⁸⁴ Waddams, *supra* note 82 at para 386.

⁸⁵ [1952] 1 KB 249 (CA) [*Bennett*].

⁸⁶ Michael P Furmston, *Cheshire, Fifoot & Furmston’s Law of Contract*, 15th ed (Oxford: Oxford University Press, 2007) at 468.

the other hand, were and are expressly identified as void, not in the way that a contract is void *ab initio* for want of consideration, but rather in the sense that “these contracts are in practice treated by the courts as void either in whole or at least in part.”⁸⁷ As was the case with Waddams, the problem in issue in both of the classes described by Furmston seems to be akin to an attempt to contract in relation to subject matter that is *ultra vires* the power of a person, justifying a court in treating such contracts as having no force or effect.⁸⁸

Lord Justice Denning also seems to have taken a similar view,⁸⁹ but not without adding to this linguistic maelstrom. Citing the Court of Exchequer Chamber in *Price v Green*⁹⁰ and the Court of Appeal in *Evans & Co v Heathcote*,⁹¹ Lord Justice Denning suggested that contracts contrary to public policy as restraints of trade

are not ‘illegal,’ in the sense that a contract to do a prohibited or immoral act is illegal. They are not ‘unenforceable,’ in the sense that a contract within the Statute of Frauds is unenforceable for want of writing. These covenants lie somewhere in between. They are invalid and unenforceable. The law does not punish them. It simply takes no notice of them. They are void, not illegal.⁹²

It seems unhelpful to describe a contract as both “invalid” and “unenforceable,” inasmuch as these descriptors seem to indicate different judicial treatments, a vagary exacerbated by the addition of “void” as a coup de grace. That said, however, it seems clear that when Lord Justice Denning described contracts like those in restraint of trade as “void, not illegal”, he seems, unlike Furmston, to have truly meant it, having expressly described such contracts as “invalid”.⁹³

⁸⁷ *Ibid* at 470. Michael P Furmston, *Cheshire, Fifoot & Furmston’s Law of Contract*, 17th ed (Oxford: Oxford University Press, 2017) at 458.

⁸⁸ Although Furmston describes contracts in relation to “some improper element” as thereby “vitiating” (*ibid* at 457), and although, as noted, he does not consider such contracts to be void in a technical sense, Furmston does not seem to address the question of how, exactly, the vitiation of a contract contrary to public policy takes place.

⁸⁹ Though without Furmston’s clarification that a description of a contract as “void” relates only to how such a contract is treated by courts in a practical sense, rather than as a technical descriptor.

⁹⁰ (1847), 153 ER 1222, 16 M&W 346, 365.

⁹¹ [1918] 1 KB 418, 426, 431, 436.

⁹² *Bennett*, *supra* note 85 at 260.

⁹³ Presuming, of course, that Lord Justice Denning here used “invalid” and “void” to mean “technically invalid” and “technically void” rather than “practically invalid” and “practically void” in the way that Furmston did.

Each of McCamus and Swan, Adamski, and Na, for their part, variously describe contracts contrary to public policy as both “unenforceable” and “void”. McCamus seems not to dwell on the significance of the difference between the two.⁹⁴ Swan, Adamski, and Na, however, take specific note of the issue in their discussion of whether any distinction should be drawn between the effects of contracts determined to have been *ultra vires* for one (or more) of their parties and those determined to be unenforceable as contrary to public policy. “[I]f the treatment of an *ultra vires* contract differs significantly from that of an illegal contract,” Swan *et al* argued, “it would be interesting to ask why that difference should be and how it can be justified.”⁹⁵ The 34th edition of *Chitty on Contracts* is fairly consistent in referring to contracts contrary to public policy as simply “unenforceable”,⁹⁶ reflecting an admirable linguistic consistency unusual to the subject matter.

In summary, there seems to be either very little in the way of consensus as to the mechanism by which a contravention of public policy renders a contract unenforceable or quite a lot of carelessness as to the words used to describe such contracts. Many of the rationales for a court declining to enforce a contract that is contrary to public policy either implicitly or explicitly draw on the maxims of *ex turpi causa* and *in pari delicto* as sufficient justification for doing so. This was the approach taken by Lord Mansfield in the foundational case of *Holman v Johnson*,⁹⁷ where he stated that

If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.⁹⁸

While the maxims of *ex turpi causa* and *in pari delicto* seem appropriate enough as descriptions of the unfavourable treatment by courts of contracts contrary to public policy, they fall short as legal explanations of the phenomenon. Additionally, as Burrows has argued, the jurisprudence developed from these maxims (and academic commentary upon it) has been, in general, unsatisfactory.⁹⁹ The maxims certainly offer little aid

⁹⁴ John D McCamus, *Law of Contracts*, 3rd ed (Toronto: Irwin Law Inc, 2020) at 500, 507.

⁹⁵ Angela Swan, Jakub Adamski, and Annie Y Na, *Canadian Contract Law* 4th ed (Toronto: LexisNexis, 2018) at §10.47 [Swan, Adamski & Na].

⁹⁶ Beale, *supra* note 65 at Chapter 18, broadly.

⁹⁷ (1775) 1 Cowp 341, KBD, 98 ER 1120 [*Holman*].

⁹⁸ *Ibid* at 343.

⁹⁹ Andrew Burrows, *Restatement of the English Law of Contract*, (Oxford: Oxford University Press, 2016) at 221–222.

in understanding the mechanism by which a contract contrary to public policy becomes unenforceable and could easily support the contentions of Waddams, Lord Justice Denning, and Furmston. The problem is that the distinctions between these accounts matter very much—the availability of unjust enrichment as a remedy, for example, or the potential acquisition of rights by a third party, is entirely contingent upon whether a valid contract is ever created and, if so, whether it survives a judicial determination that it is contrary to public policy. The outcome should (one hopes) be very different if the contract in issue is “invalid and void,” “struck down (or set aside),” or merely “unenforceable”.

This paper, as such, proceeds upon a somewhat distinct understanding of the effect of public policy on contracts and contract law.¹⁰⁰ Rather than trying to explain public policy as limiting the validity of contracts from an internal perspective (in a manner analogous to the doctrines of consideration, duress, and frustration, for example) or as the product of the dubious authority of naked maxims, I suggest that the doctrine of public policy operates exclusively as a limit on the capacity of courts to enforce legally valid and equitable contracts in circumstances in which their enforcement (and the vindication of the private ordering they reflect) would undermine some aspect of a different and more fundamental legal order that individual legal actors have no valid private capacity to enlist a court’s aid in altering. In other words, the doctrine of public policy identifies circumstances in which the demands of private justice (i.e., the enforcement of validly made interpersonal obligations in equitable circumstances) must justifiably yield to the demands of public justice. Public policy, in my view, operates to prioritize the latter over the former and is best understood as, like the relationship of equity to the common law, operating independently of, in preference to, and for purposes distinct from the particular doctrinal field in question (here, the common law of contract). On this account, not only can parties *create* and *voluntarily perform* valid and equitable contracts that are in some way contrary to public policy, but such a contract will also *survive* a subsequent judicial determination that it does, in fact, offend public policy.

The above, in my view, explains why property conveyed pursuant to a contract contrary to public policy cannot ordinarily be recovered. If the effect of a determination that a contract was contrary to public policy was to “void” or “strike down” the contract in issue, one would think that any property conveyed pursuant to it should be recoverable as an unjust enrichment for which no juristic reason exists.¹⁰¹

¹⁰⁰ And wills, for that matter.

¹⁰¹ *Pettkus v Becker*, 1980 CanLII 22 (SCC), [1980] 2 SCR 834 at 848; *Kerr v Baranow*, 2011 SCC 10 at para 3.

This has not traditionally been the case. As former Chief Justice Laycraft noted, “[s]ince 1775, this principle¹⁰² has been repeatedly applied with the results generally being that gains or losses resulting from illegal transactions remain where they have fallen.”¹⁰³ This approach expressly denies an outcome seemingly demanded by private justice (i.e., recovery of a benefit granted pursuant to a contract contrary to public policy that has been breached) in favour of the opaque demands of a naked maxim. This position has understandably invited challenges. For example, Swan, Adamski, and Na argue that the potential unfairness of the traditional approach is sufficient justification for its abandonment in order to make restitution by unjust enrichment available to disappointed transferors,¹⁰⁴ an argument that implicitly rejects any possible distinction between an *ultra vires* contract (which would be void *ab initio*) and a contract contrary to public policy.

On my account, however, no resort to extraordinary arguments relating to judicial propriety or fairness is required to explain why a person should not be permitted to recover property transferred pursuant to a contract contrary to public policy. The ordinary rules relating to the effect of a breach of contract are sufficient to explain this phenomenon—contracts almost *always* survive their breach, and even a breach of sufficient gravity as to permit the non-breaching party to treat the contract as at an end cannot have the effect of undoing a contractual transfer of ownership that took place prior to the breach. In such circumstances, the non-breaching party is *always* limited to an action for damages, a situation unaltered by any circumstance that renders such an action impossible.¹⁰⁵ There is no reason in the law of contract (or the jurisprudence of unjust enrichment, for that matter) why a non-breaching party to a contract contrary to public policy *should* be permitted to recover what they have given because, on this account, property in it has been transferred pursuant to a valid and equitable contract. This, in my view, is a superior explanation of the traditional position because it is firmly anchored in the ordinary doctrines of contract and unjust enrichment (rather than vague maxims) and, not less significantly, explains the observed phenomenon using ordinary rather than extraordinary principles.

¹⁰² Referring to Lord Mansfield’s assertion in *Holman*, *supra* note 97 at 343, that “[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.”

¹⁰³ *McDonald v Fellows*, 1979 ABCA 224 (CanLII), 105 DLR (3d) 434, cited in Swan, Adamski & Na, *supra* note 95 at §10.59 note 2.

¹⁰⁴ Swan, Adamski & Na, *supra* note 95 at §2.24.

¹⁰⁵ One rarely hears arguments as to the unfairness of leaving a defendant in the possession of their gains in the context of an action barred by the expiry of a limitation period, for example. This is, however, undoubtedly the same impulse to “fairness” that underlies arguments in favour of the doctrine of fundamental breach and its progeny.

The account of public policy developed here explains, in my view, why a voluntarily performed contract found contrary to public policy can have the same legal effect it would if no such public policy concern existed, and why a contract contrary to public policy should have the effect of transferring ownership of its subject matter even in circumstances in which a court has declined to enforce it. It remains, however, to explain why any effort to enforce such a contract would fail. In my view, a contract contrary to public policy should not be enforceable, not because no contract has been created or because it has been struck down, but rather because enforcing such a contract would set the power of the courts (and, by extension, the power of the state) against the public justice demands of the broader liberal democratic social order and, ultimately, against the state itself.¹⁰⁶ An account of why this might be the case follows in Part III.

3. Rawls' Division of Labour

The theoretical foundation for this conception of public policy, and the relational conception of public and private justice it entails, is Rawls' theory of political or domestic justice, a rudimentary sketch of which is at this point required. At the outset, it should be noted that Rawls understood there to be three levels at which relational justice could be conceived: global justice (applicable to the relations between states and being the substance of international law), domestic justice (applicable to the proper formulation of the basic structure of society), and local justice (applicable to the operation of particular institutions and associations in the broader context established by the basic structure).¹⁰⁷ Being fundamentally distinct kinds of relations, the principles of justice applicable in each of these contexts would be, Rawls thought, both distinct from and compatible with each other. Notwithstanding the application of distinct principles of justice to the basic structure and institutions operating within it (including, I argue, the component fields of the institution of private law), Rawls was clear that the relation between domestic justice and local justice was not

¹⁰⁶ I am as surprised as anyone to find support for this contention among the best-regarded members of the 20th century British judiciary. In his reasons in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*, [1967] UKHL 1, [1968] AC 269, Lord Reid noted that "[o]ne must always bear in mind that an agreement in restraint of trade is not generally unlawful if the parties choose to abide by it: it is only unenforceable if a party chooses not to abide by it" (at 297). Benson, *supra* note 63 at 203, also seems to support the suggestion that a contract in restraint of trade is only problematic where a party seeks to enforce it over the objections of the other as a "unilateral imposition on the parties' inalienable powers". Presumably, contrary to Lord Reid's view, this understanding would cast a party's voluntary compliance with an apparent contract in restraint of trade as a gratuitous performance rather than an obligatory one (in that the performance, being forbearance from using an "inalienable power", could not form part of a valid contract).

¹⁰⁷ Benson, *supra* note 63 at 11.

a relationship of parity. In general, he wrote, “principles for the basic structure constrain (or limit), but do not determine uniquely, the suitable principles of local justice.”¹⁰⁸ As illustrated below, this suggests that where the principles of justice applicable to any particular institution operating within the context established by the basic structure would produce an outcome incompatible with or repugnant to the basic structure itself, the requirements of local justice must yield of the requirements of domestic justice. In this way, particular institutions of a society, to the extent that they are not themselves components of its basic structure, are permitted to work toward conceptions of justice appropriately tailored to their own purposes and subject matter, while being structurally incapable of undermining the components of the basic structure in their function of securing conditions of background justice across said society as a whole.

Domestic justice in a liberal democratic context, in Rawls’ understanding, is informed by what he called the principles of justice as fairness. Justice as fairness stipulates, as a starting point, three fundamental ideas: that liberal democratic society is a “fair system of social cooperation over time from one generation to the next,”¹⁰⁹ that citizens, being those engaged in social cooperation, are free and equal persons,¹¹⁰ and that a “society effectively regulated by a public conception of justice”¹¹¹ can be thought of as a “well-ordered society.”¹¹² Drawing on these fundamental ideas and working from behind a veil of ignorance, Rawls concluded that the contents of the basic structure of a well-ordered liberal democratic society would be determined on the basis of two principles of justice, formulated as follows:

- (a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
- (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).¹¹³

In Rawls’ view, the equal basic liberties guaranteed to each person in accordance with these two principles are relatively few in number, consisting of equal political liberties, freedom of thought, liberty of conscience, freedom

¹⁰⁸ *Ibid* at 12.

¹⁰⁹ Rawls, *supra* note 5 at 5.

¹¹⁰ *Ibid* at 5.

¹¹¹ *Ibid*.

¹¹² *Ibid*.

¹¹³ *Ibid* at 42.

of association, liberty and integrity (physical and psychological) of the person, and the rights and liberties covered by the rule of law.¹¹⁴ While a society that guarantees the equal basic liberties to all persons does not guarantee all of these liberties equally, Rawls emphasized that, as the foundational components of a liberal democratic society's structure, they may be "limited or denied only for the sake of one or more other basic liberties."¹¹⁵ To expand upon that point,

[a]s we have said, none of the basic liberties, such as freedom of thought and liberty of conscience, or political liberty and the guarantees of the rule of law, is absolute, as they may be limited when they conflict with each other. Nor is it required that in the finally adjusted scheme each basic liberty is equally provided for (whatever that would mean). Rather, however these basic liberties are adjusted, that final scheme is to be secured equally for all citizens.¹¹⁶

This passage reflects the core component of the argument advanced here, being that the constituent components of the basic structure can be limited or circumscribed only to the extent required to devise a coherent scheme of equal basic liberties, thereby implicitly excluding the possibility that mechanisms of private ordering could derogate from them.

Given this paper's focus on the interaction between private ordering in the form of contracts and the components of the basic structure of liberal democratic society, I begin this analysis by asserting the necessity, in a well-ordered liberal democratic context, of a system of private ordering. The primary basis for this assertion springs from Rawls' contention that the first principle of justice as fairness "includes a right to private personal property."¹¹⁷ From this position, the necessity of a system by which free and equal individuals might acquire and alienate personal property from and to each other is unavoidable. Indeed, Rawls implicitly recognized this himself, stipulating that only a free and competitive market environment could satisfy the demands of justice as fairness.¹¹⁸ This is not to say that justice as fairness requires a system of private law identical to that which exists in Anglo-Canadian common law today. One could perhaps imagine a well-ordered society in which, for example, a public no-fault insurance scheme provided compensation for interpersonal harm arising from inadvertence, replacing the entirety of the law of negligence, but my contention is that, at the very least, a well-ordered liberal democracy requires the existence of a system of private ordering suitable to the proper

¹¹⁴ *Ibid* at 112–113.

¹¹⁵ *Ibid* at 111.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid* at 138.

¹¹⁸ *Ibid*.

operation of a free and competitive market. We must, as free and equal persons, be at liberty to engage in exchanges with each other that operate to assert and preserve our interpersonal equality. A system of private ordering, comprised of a body of rules that is coherent, transparent, and public, must, as such, be one of the institutions that operate within the framework of background justice established and maintained by the basic structure in a well-ordered society. That said, because the practice of private ordering has the potential to directly impact our status as interpersonal equals, disputes arising in the context of the institution of private ordering have systemic significance beyond that local context.

It would be tempting in this context to suggest that, inasmuch as a system of private ordering is a requirement of a well-ordered society, the private law doctrines of the common law ought properly to be thought of as a component of the basic structure itself. The knock-on effects of such a contention would, if made out, be significant. There seems to be little doubt that the particular manifestation of justice towards which Rawls' basic structure is inflected, justice as fairness, is a form of distributive justice. An understanding of the private law doctrines of the common law as a component of the basic structure of a well-ordered society would require those doctrines to themselves work towards outcomes that are just in the same sense. There has, of course, been no shortage of efforts to bend private law towards distributive objectives, but there seems to be little doubt that, as constituted, the form of justice towards which the private law doctrines of the common law incline is not, in fact, distributive in nature. In this vein, it is worth noting that Rawls himself acknowledged that, even under ideal circumstances and beginning from a model starting point,

the accumulated results of many separate and seemingly fair agreements entered into by individuals and associations are likely over an extended period to undermine the background conditions required for free and fair agreements. Very considerable wealth and property may accumulate in a few hands, and these concentrations are likely to undermine fair equality of opportunity, the fair value of the political liberties, and so on.¹¹⁹

“Unless the basic structure is regulated over time,” Rawls concluded, “earlier just distributions of assets of all kinds do not ensure the justice of later distributions, however free and fair particular transactions [...] may look when viewed locally and apart from background institutions.”¹²⁰ A key feature of the ideal social process view developed by Rawls is the “division of labour between principles required to preserve background

¹¹⁹ *Ibid* at 53.

¹²⁰ *Ibid.*

justice and principles that apply directly to particular transactions between individuals and associations.”¹²¹

This understanding of the cumulative effect of “fair and free” private ordering seems to map neatly onto the private law doctrines of the common law. If these doctrines can be thought of at all as oriented towards the production of just outcomes, it could, in my view, only be a narrow kind of justice that vindicates the equality of legal actors in a purely formal sense rather than a substantive one. Unlike distributive justice, in which justice is measured on the basis of the degree to which specified divisible subject matter is apportioned in accordance with some chosen characteristic of those among whom allotment is made, the justice toward which many of the private law doctrines of the common law seem directed might be better captured by Weinrib’s description of corrective justice,¹²² which applies specifically to transactions between persons on the basis of “the notional equality with which the parties enter the transaction.”¹²³ My contention in this paper is that a Rawlsian division of labour between domestic justice and local justice, applied to the basic structure of liberal democratic society and the private law doctrines of the common law, respectively, simultaneously permits each sphere to be attuned to the particular form of justice appropriate to it while preserving the logical priority of domestic justice where potential for conflict exists.

How, then, does the division of labour between domestic justice and local justice (specifically the kind of justice towards which the private law doctrines of the common law work) manifest in substance? Benson, for his part, argues that the account advanced by Rawls “supposes that both sets of principles can work together in tandem in a way that preserves the distinctive role and relative autonomy of each [conception of justice],”¹²⁴ and proceeds to offer an account of the division of labour that harmoniously preserves “both the fundamental significance of the juridical conception [of contract law] and the regulative primacy of distributive principles.”¹²⁵ With the greatest of respect, this seems to go a step further than is necessary; Rawls’ concept of a division of labour between different principles of justice across (and, in the context of local justice, within) multiple spheres seems to clearly specify not only the regulative primacy of the principles of justice as fairness but also their logical priority. As Rawls put it,

¹²¹ *Ibid* at 54.

¹²² See e.g. Ernest J Weinrib, “Corrective Justice in a Nutshell” (2002) 52:4 UTLJ 349.

¹²³ *Ibid* at 350.

¹²⁴ Benson, *supra* note 63 at 448.

¹²⁵ *Ibid* at 449.

Justice as fairness starts with domestic justice—the justice of the basic structure. From there it works outward to the law of peoples and inward to local justice. [...]. In general, principles for the basic structure constrain (or limit), but do not determine uniquely, the suitable principles of local justice.¹²⁶

In fairness to Benson, his account of a seamless and non-conflictual relationship between the principles governing the law of contract and those governing the basic structure, mediated through their common application to the market, is ambitious and compelling. In my view, however, it unduly flattens the relationship between domestic justice and local justice, leaving no clear role for the constraint (or limitations) Rawls seems to have thought characteristic of that relationship. Furthermore, Benson's account of the relationship between local justice and domestic justice in the particular context of contract law would be seemingly difficult to replicate in the context of other institutions operating according to the different conceptions of local justice appropriate to those contexts. It is not obvious, for example, that an account of the particular understandings of justice appropriate to religious communities could be developed that, like Benson's account of justice in transactions, preserves their autonomy and coherence without being directly constrained (or limited) by the demands of public justice. The doctrine of public policy, on my understanding, is one of a number of jurisprudential mechanisms by which this relationship of constraint (or limitation) is given legal substance. In circumstances where the demands of private justice conflict with those of public justice, the doctrine of public policy operates to prevent the former from undermining the latter, not by denying the truth of the plaintiff's private justice claim (such as by describing the contract upon which the plaintiff relies as "void"), but by merely denying its compulsory enforcement through the court-mediated exercise of state power.

With the above theoretical account of public policy as a whole in mind, it remains to offer an account of how particular heads of public policy can be thought of as operating to prevent the institutional adjustment of the basic structure through private ordering. Part IV, the final section of this paper, attempts to do so.

4. Public Policy as Divider of Labour

Rawls' account of the relationship between domestic justice and the particular iterations of local justice appropriate to any particular institution operating within the conditions of background justice established and maintained by the basic structure suggests that the demands of local justice, however conceived, must yield to the demands of domestic justice in any

¹²⁶ Rawls, *supra* note 5 at 11–12.

circumstance in which the two would produce conflicting outcomes. This account recognizes that the relational concept of “justice” should and will take different forms and impose different demands in the context of different kinds of relationships. The significance of the division of labour between domestic justice and local justice outlined by Rawls is that it permits conceptions of local justice to be finely tuned to their particular contexts (so much so that they might occasionally demand outcomes diametrically opposed to those demanded by public justice), while still guaranteeing that the demands of public justice prevail in the event of any conflict, thereby prioritizing the just arrangement of the basic structure over the maintenance of just interpersonal relationships within any particular institution of society. The account outlined above has made the argument that the doctrine of public policy is one of the mechanisms by which a relationship of this sort has been operationalized within the private law doctrines of the common law, allowing contracts contrary to public policy to be *created* and *performed* and to have *legal effect* according to the ordinary rules of contract but preventing them from being *enforced* upon breach. The division of labour effected by the doctrine of public policy has, in my view, worked to prevent contracts, as instruments of private ordering governed by an understanding of justice particular to them, from coercively undermining the public justice requirements applicable to the basic structure.

This final section of this paper will illustrate how the account developed above can explain the kinds of contracts courts have declined to enforce as contrary to public policy. In light of the difficulty of accounting for all of the heads of public policy within the limited confines of a paper of this sort, I make no attempt to do so. Rather, I offer accounts of the operation of public policy as a divider of labour between conflicting conceptions of justice for three heads of public policy. The first two heads accounted for below, being the domestic political structure and the administration of justice, fit the account above intuitively. To illustrate the explanatory capacity of this account, I extend it to contracts understood to be contrary to public policy on the basis of their addressing issues of marriage and sexual morality. In doing so, I argue that each of these heads of public policy operates to protect some aspect of the basic structure of the society in question from coercive private revision by preventing the power of an organ of the state (i.e., a court) from enforcing those revisions.

This portion of the argument, therefore, requires the subject matter of each of the heads of public policy to be illustrated as components of the basic structure of a well-ordered society. I attempt to do so using highly simplified versions of Rawls’ argument from the original position, in which I suggest that representative parties, negotiating from a position of ignorance as to the particular characteristics of those they represent,

would agree that conditions of background justice require the subject matter addressed by each of the heads of public policy to be protected from coercive private ordering. In my view, there are convincing reasons to think this is the case.

A) Domestic Political Structure

The fundamental political structure of a well-ordered society is perhaps the most obvious example of the sort of public institution that ought to be immune from coercive private restructuring. As Rawls noted, in a democratic regime, political power and, ultimately, the government's monopoly on lawful violence are neither more nor less than "the power of free and equal citizens as a corporate body."¹²⁷ An essential prerequisite for the political legitimacy of such a system, Rawls argued, was that each free and equal citizen have an equal share in that political power, absent which a just political structure cannot be maintained.¹²⁸ In a representative democracy, the burdens of political legitimacy and the associated justification of the use of "corporate and coercive political power"¹²⁹ is, in a practical sense, discharged in the context of the relationship between citizen and representative. Presumably, an electorate will not tolerate representatives who have supported or facilitated the exercise of political power in illegitimate or unjustifiable ways. The introduction of competing incentives that would serve to undermine this relationship of accountability would not, as such, be tolerable in a well-ordered society, as they would tend to introduce private justifications for the exercise of political power in opposition to, or in substitution of, the need for public justifications.

With this dynamic in mind, a conclusion that private incentives pertaining to the exercise of political power ought neither to compulsorily bind nor benefit representatives to whom they are offered is not a remarkable extension—it should go without saying that the most tangible possible incentives are those that are capable of enforcement upon the authority of a court. This, then, is a possible explanation for the fact that the doctrine of public policy prevents a contract by a legislator to sell their vote (or, in other words, to fetter their discretion), or to purchase and sell political influence, or to sell a government office, or even to bind a future legislature, from being legally enforceable. Each of these classes of contract represents a particular example of an incentive to exercise political power for private purposes and would, if enforceable, tend to detach the exercise of political power from both the public justifications for it and the relationship of

¹²⁷ Rawls, *supra* note 5 at 90.

¹²⁸ *Ibid* at 90–91.

¹²⁹ *Ibid* at 93.

accountability within which those public justifications are expressed that are presupposed by it in a well-ordered society.

Representatives (and other public actors and public entities) are, on this account, free to create such contractual relationships for the simple reason that no rule of *contract law* is capable of identifying such agreements as in any way deficient—neither the doctrine of consideration nor any other aspect of the objective test of contract formation, after all, has the capacity to differentiate between two agreements to say “nay” at some particular place and time, even if one requires a legislator to do so when called upon to vote and the other requires a participant on a legislature tour to say exactly the same thing at exactly the same place.¹³⁰

It bears noting that, on this account, a contract by a citizen to sell their vote would also be effective as a contract to transfer property in the payment to the voter, but that contract would, of course, be unenforceable as contrary to public policy in the event that either party sought to enforce it. Again, this conclusion is indifferent to the fact that, in many jurisdictions, such a contract is unlawful as contrary to statute in any event—what matters is that, even in the absence of statutory prohibition, a court would justifiably decline to enforce such an agreement despite the fact that, according to the rules of contract law, a valid contract had clearly been created.

B) Administration of Justice

Uncertainty and conflict are unavoidable aspects of any social organization, including a well-ordered society. Rawls considered it inevitable that, even when one has discounted purely self-serving and irrational sources of disagreement, sources of *reasonable* disagreement would persist in relation to “the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life.”¹³¹ These obstacles to agreement in the political context, which Rawls labelled “the burdens of judgment,”¹³² include, *inter alia*, difficulties associated with the assessment and evaluation of conflicting and complex evidence, disputes as to the weight to be assigned to such evidence, diverging judgments

¹³⁰ An agreement by a representative to sell a vote might, of course, be unlawful for other reasons, such as a criminal prohibition, but there seems to be no doubt that a vote-purchaser would not be able to obtain restitution of their bribe on the argument that it represented an unjust enrichment in the representative’s hands. My account (that is, that there is, in fact, a contract between the parties, despite its unenforceability as contrary to public policy) offers an explanation for the vote-purchaser’s disappointment that is grounded in the ordinary doctrines of contract and unjust enrichment.

¹³¹ Rawls, *supra* note 5 at 35.

¹³² *Ibid* at 35.

and interpretations of the significance of evidence, and disagreement arising from unique cumulative personal experiences.¹³³ As much as disagreement within a reasonable range arising from each of these points would be inevitable even in the context of ideal political theory, as Rawls asserted, it is equally so, even under ideal circumstances, in the sphere of private interactions. Even where one discounts interpersonal disputes arising from selfishness and stupidity, the interpersonal context will be one in which scope for reasonable disagreement as to the rightfulness of any particular interpersonal relationship is possible.

In a well-organized context, in which an institution of private ordering exists, and in which the burdens of judgment are recognized as extending, logically, to private ordering disputes, I argue that some authoritative means of dispute resolution must exist in order to prevent the system of private ordering from becoming an engine of oppression through the cumulative effect of a proliferation of uncorrected interpersonal normative inequalities.¹³⁴ In my view, the necessity of rights to private personal property as a component of the basic structure of a well-ordered society, and the concomitant requirement of a system of private ordering that operates as an institution within the context established by said basic structure, are undeniable. Under such circumstances, it is my position that the representative parties to the original position would agree that the maintenance of circumstances of background justice (that is, a society of free and equal persons) requires a mechanism by which the particular kind of equality preserved by a justifiable system of private ordering may both be and be seen to be maintained. They would also agree that such a mechanism must be independent of and impartial to the parties to any particular dispute and must give effect to the coherent, transparent, and public rules of the underlying system of private ordering. Independence and impartiality are required in order to ensure that the mechanism in question is, in fact, capable of securing conditions of background justice. Adherence to the underlying system of private ordering is required to ensure that the particular form of justice appropriate to such a system is secured by giving effect to the parties' intentions in transacting, informed as they were by those publicized strictures of the system within which they transacted.

The representative parties would, in my view, also agree that this mechanism must be backed by the authority of the state to ensure that its decisions are both recognized as law and enforceable as such through the state's coercive apparatus. Finally, the representative parties would agree that those they represent must have effective recourse to this authoritative,

¹³³ *Ibid.*

¹³⁴ *Ibid* at 138.

impartial, and independent adjudicatory mechanism, as any barriers to such access would hinder that mechanism's effectiveness in securing conditions of background justice. In light of the fact of the free and equal status of those they represent, however, it need not be the case that the representative parties would agree to anything other than a reactive adjudicative mechanism, as a more proactive system would, by definition, deprive citizens of some aspect of their freedom not necessary to secure background justice. There would be, for example, no requirement for active state supervision or regulation of private ordering; such a mechanism would deprive citizens of their own freedom to accept any particular interpersonal relationship as one characterized by equality. So long as effective access to a reactive adjudicatory mechanism is, in fact, available, such that citizens may activate it at their own initiative, background justice will be secured.

This adjudicatory mechanism, which fits comfortably within the scope of what Rawls characterized as the "guarantees of the rule of law," is, in my view, an indispensable component of the basic structure of a well-ordered liberal democratic society. It is therefore sensible, on this account, to understand the head of public policy by which courts have declined to enforce contracts to oust the jurisdiction of the court and contracts to impede the operation of courts as protecting this critical component of the basic structure of society from alteration by private ordering. On this account, one could even conceive of a public policy rationale for declining to enforce an exclusion clause—for example, it might well be asked whether a capacity for private ordering that permits alienation of all possible recourse for private wrongdoing can coexist with conditions of background justice. If one were to reach the conclusion (a reasonable one, in my view) that the enforcement of such an agreement would in fact be corrosive of the conditions of background justice and the underlying status of the parties as free from and equal to each other, it seems entirely defensible for a court to decline enforcement of such an agreement.¹³⁵

C) Marriage and Sexual Morality

The final areas of public policy to be considered in this paper are the heads dealing with contracts relating to marriage and sexual morality. These areas may not seem to offer obvious parallels to those discussed above,

¹³⁵ Interestingly, this scenario would see the agreement as contrary to public policy and, as a result, unenforceable *only* by a defendant seeking to take advantage of an exclusion clause. From the perspective of the plaintiff, however, the agreement would be entirely enforceable, a circumstance that aligns with the traditional treatment of contracts contrary to public policy, which has previously been explained (unsatisfactorily, in my view) by recourse to the Latin maxims discussed above. The Supreme Court of Canada has also gestured in this direction in *Tercon*, *supra* note 7 at paras 118–119 per Justice Binnie (in dissent).

but they are, in fact, some of the areas in which Rawls is most clearly expressed. “[T]he family”, Rawls argued, “is part of the basic structure, the reason being that one of its essential roles is to establish the orderly production and reproduction of society and of its culture from one generation to the next.”¹³⁶ That said, as Rawls noted, “no particular form of the family (monogamous, heterosexual, or otherwise) is so far required by a political conception of justice so long as it is arranged to fulfill these tasks effectively and does not run afoul of other political values.”¹³⁷

This, then, raises the possibility that the demands of public justice in relation to the family can be satisfied in a number of ways—what matters is not the particular form of regulation imposed upon the family as a component of the basic structure, but whether those regulations produce a family environment capable of ensuring conditions of background justice over time. Taking the central role of the family, in this context, to be, as Rawls suggested, the “arrangement in a reasonable and effective way of the raising and caring for children, ensuring their moral development and education into the wider culture”,¹³⁸ it is not so great a leap to identify the possibility that some efforts at private ordering might, in some contexts, threaten the capacity of some forms of family to discharge this basic role. As such, in a society wherein the raising and caring for of children is sought to be advanced by the imposition of structural preferences in favour of reproduction in the context of a permanent monogamous legal relationship, any coercive private ordering tending to promote or facilitate either reproduction outside of such a relationship or the dissolution of such relationships might be considered to undermine the capacity of the family thus structured to preserve conditions of background justice.

On this understanding of the function of the family in the basic structure of a well-ordered society, the rationale for declining to enforce contracts identified as promoting sexual immorality (that is, contracts for sexual services, contracts facilitating the provision of sexual services, and cohabitation agreements) can be readily discerned—in an age predating effective pharmaceutical contraception, such contracts might well result in the birth of children outside of the selected familial structure. Such children would not have the benefit of the compulsory supports (primarily economic) available almost exclusively within that structure, a circumstance corrosive of the conditions of background justice sought to be preserved by the basic structure. Similarly, particular contracts relating to marriage (that is, contracts in restraint of marriage, promises to marry while already married, contracts to broker marriage, and contracts to

¹³⁶ Rawls, *supra* note 5 at 162.

¹³⁷ *Ibid* at 163.

¹³⁸ *Ibid.*

provide for a future separation and dissolution of a marriage) are each, in their own way, corrosive of the chosen familial structure, inasmuch as they either prevent marriages or incentivize their dissolution, neither of which is conducive to this kind of familial structure playing the societal role required of it.

This account of the heads of public policy dealing with marriage and sexual immorality also provides an illustration of how courts should address the changing contours of public policy in the context of changing societal structures. In many ways, the central role in the family played by a permanent monogamous legal relationship has been rendered obsolete by the enactment of legislation mandating the continued provision of economic support for children by their parents upon the dissolution of their marriage (and, indeed, in contexts in which no such relationship was ever created). If, as Rawls supposed, the core role played in society by the family is “raising and caring for children”, there seems to be little need in today’s complex legislative and regulatory environment to ensure that private ordering neither coercively undermines the institution of marriage nor facilitates sexual immorality simply because that role in the basic structure is not now dependent on the institution of marriage. There seems to be little necessity, therefore, to decline enforcement of contracts under these heads of public policy—contemporary society has chosen a different structural solution to the problem of providing for and raising children.¹³⁹

Conclusion

The enduring challenge posed by the doctrine of public policy, the so-called “unruly horse” of the common law, has been uncertainty as to what circumstances justify its invocation to decline enforcement of a validly made and equitable agreement. At least part of this uncertainty has undoubtedly been the product of the widespread, and little-acknowledged, confusion over what effect a contravention of public policy has on a contract. This paper has attempted to offer an approach that both justifies the scope of subject matter captured by the doctrine of public policy and explains the observed effect of a judicial determination that a contract does, in fact, contravene public policy. At the core of both of these accounts is the argument that public policy is not, in fact, a doctrine of contract law, inasmuch as it does not partake of the inherent logic of the common law of contract, but rather operates as an external limitation on the capacity of legal actors to coercively undermine the components of what Rawls called society’s basic structure. There is no obvious reason, however, why

¹³⁹ And, in fact, small movements have been made in this direction; consider, for example, the decision in *Sheehan*, *supra* note 55.

an external limit on the capacity to *coercively* enforce the private justice demands created by the common law of contract should have any direct impact on the capacity of private actors to *voluntarily* create and perform such agreements. As I have argued, a conclusion that a contract contrary to public policy is, while unenforceable, nonetheless perfectly capable of transferring property provides, in my view, a far more compelling explanation of the fact that the doctrine of unjust enrichment will not aid one who has delivered property under such a contract than threadbare Latin maxims can. On this account, the doctrine of public policy is no more and no less than one of several common law doctrines that operate to limit the enforceable demands of private justice to safeguard the structural requirements of public justice.