

2012

Bringing Order to Contracts Against Public Policy

David Adam Friedman
0@0.com

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Law Commons](#)

Recommended Citation

David A. Friedman, *Bringing Order to Contracts Against Public Policy*, 39 Fla. St. U. L. Rev. (2012) .
<http://ir.law.fsu.edu/lr/vol39/iss3/1>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized administrator of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

FLORIDA STATE UNIVERSITY LAW REVIEW



BRING ORDER TO CONTRACTS AGAINST PUBLIC POLICY

David Adam Friedman

VOLUME 39

SPRING 2012

NUMBER 3

Recommended citation: David Adam Friedman, *Bring Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563 (2012).

BRINGING ORDER TO CONTRACTS AGAINST PUBLIC POLICY

DAVID ADAM FRIEDMAN*

ABSTRACT

In 1821, Judge Burrough famously described the public policy defense in contract law as a “very unruly horse.” To test this proposition, this Article presents the first systematic content analysis of public policy defense case law. The sparse previous literature and commentaries on this defense, which relied on theory and leading cases, tend to accept the notion that this area of contract law proves unruly. I reveal an underlying order that emerges from the ordinary run of public policy defense cases, rather than the leading cases.

An examination of opinions written in 2009 reveals that public policy defenses that specify a violation of a statute or regulation tend to be twice as successful than those that appeal broadly to public policy. Further, the employment of the defense can be segmented to show that the “unruly” cases only comprise one-third of the sample. These findings, among others, significantly cut the magnitude of the perceived “unruly horse” problem and should reframe our approach to the public policy defense.

I. INTRODUCTION	564
II. PREVIOUS ATTEMPTS TO ANALYZE THE PUBLIC POLICY DEFENSE	568
A. <i>Formal Discussions in the Literature</i>	568
1. <i>Furmston Taxonomy</i>	569
2. <i>Law and Economics Taxonomy</i>	570
B. <i>Treatises and Commentary</i>	572
C. <i>Restatement of Contracts</i>	575
III. THE PUBLIC POLICY DEFENSE AS EMPLOYED	576
IV. CONTENT ANALYSIS OF CASE LAW	580
A. <i>Contravention of Statutory/Regulation Cases</i>	582
1. <i>Contracting Counter to Licensure</i>	583
(a) <i>Halpern v. Greene</i>	585
(b) <i>Ron Medlin Construction v. Harris</i>	587
(c) <i>Baltimore Street Builders v. Stewart</i>	589
2. <i>Criminal Agreements</i>	590
(a) <i>Kardoh v. United States</i>	591
(b) <i>Lucky Jack’s Entertainment Center v. Jopat Building Corp.</i>	593
(c) <i>Neve v. Davis</i>	594
3. <i>Agreements That Limit or Shift Liability</i>	596
(a) <i>Dubey v. Public Storage, Inc.</i>	596
(b) <i>Hubner v. Spring Valley Equestrian Center</i>	598
4. <i>Other Cases and Summary</i>	600
B. <i>Content of General Public Policy Cases</i>	601
1. <i>Agreements that Limit or Shift Liability</i>	602
(a) <i>Tatman v. Space Coast Kennel Club, Inc.</i>	603
(b) <i>Vistein v. American Registry of Radiologic Technologists</i>	603

* Assistant Professor of Law, Willamette University. B.A., J.D; Yale University. The author thanks the participants in the 2009 Spring Contracts Conference at the Boyd School of Law at the University of Nevada, Las Vegas, the 2011 Southwest Junior Scholars Workshop at the Sandra Day O’Connor College of Law at Arizona State University, and the Hofstra University Law School Faculty Workshop for offering suggestions for this Article. The author also thanks Laura Appleman, Eric Chiappinelli, Caroline Davidson, Jeffrey Dobbins, Julie Hill, Peter Lee, Mohsen Manesh, Colin Marks, Jeffrey Schwartz, and especially, Susan H. Joffe, Norman I. Silber, and Symeon Symeonides for their comments. Andrea W. Conner, David Myers, and Ariel Vee provided able research assistance.

2. General/Broad Appeal Cases Where the Defense was Successful	606
(a) Chappell v. Butterfield-Odin School District No. 836	606
(b) Cope v. Cope	607
3. General Cases Where the Defense was Unsuccessful	609
(a) McDermott v. Franklin	609
(b) United States v. Korangy Radiology Association,	610
(c) Siuda v. Tobin	611
4. Summary	612
(a) "Hybrid" Cases	612
(b) Testing the Restatement (Second) of Contracts Section 178	612
V. HOW UNRULY IS THE PUBLIC POLICY DEFENSE—AND WHAT TO DO ABOUT IT?	615
A. Separating the Categories of Public Policy Cases	615
B. Modest Prescriptions for Addressing These Categories	616
1. Taming the "Ruly" Horse Where the Defense is Tethered to a Statute or Regulation.	618
2. Taming the "Somewhat Ruly" Horse Where Case Precedent is Available.	619
3. Taming the "Unruly" Horse Where There are no Rules.	619
VI. CONCLUSION	620

I. INTRODUCTION

"When they argued this case . . . it was said there was no consideration, and if there was it was illegal. . . . If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest . . . against arguing too strongly upon public policy;—*it is a very unruly horse, and when once you get astride it you never know where it will carry you.* It may lead you from the sound law. It is never argued at all but when other points fail." ¹

Judge Burrough's enduring "unruly horse" metaphor for the public policy defense to contract² appears in contract literature,³ in contract

1. Richardson v. Mellish, (1824) 130 Eng. Rep. 294, 303; 2 Bing 229, 251-52 (Burrough J.) (emphasis added). As Percy Winfield wrote in 1928:

That [horse] has proved to be a rather obtrusive, not to say, blundering, steed in the law reports. . . . And at times the horse has looked like even less accommodating animals. Some judges appear to have thought it more like a tiger, and have refused to mount it at all, perhaps because they feared the fate of the young lady of Riga. Others have regarded it like Balaam's ass which would carry its rider nowhere. But none . . . has looked upon it as a Pegasus that might soar beyond the momentary needs of the community.

Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 91 (1928).

2. Judicial invocation of public policy stretches across the common law. See Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293 (1975); Hans A. Linde, *Courts and Torts, "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821 (1994). This Article limits the focus to contracts.

3. See, e.g., John Shand, *Unblinking the Unruly Horse: Public Policy in the Law of Contract*, 30 CAMBRIDGE L.J. 144 (1972).

treatises,⁴ and in case law.⁵ When a party asks a court to refrain from enforcing an otherwise valid bargain on the grounds that it would offend public policy, the party asks the court to do something out of the ordinary. Instead of requesting the court to apply a traditional common law defense, the court is being asked to discern public policy, or possibly pronounce public policy. This can compel a court's reliance on statutes,⁶ regulations,⁷ prior case law proclaiming public policy serving as precedent,⁸ or as troublingly described by M.P. Furmston, reliance "on reasoning not convincingly or completely adumbrated."⁹

This Article tests the "very unruly horse" metaphor to see if the description remains valid wisdom nearly two centuries later. No existing contracts literature empirically evaluates the content of the cases involving the public policy defense in a systematic manner. I attempt to partially fill that gap in the literature here. I hope to contribute to a more elegant structural understanding of the public policy defense by importing the case law as we find it, rather than by just providing a study of the "leading cases,"¹⁰ as some of the literature does. Essentially, this Article aims to provide another view of the defense—a view based on what courts are routinely *doing*, not based on what the most famous or leading cases say or what the *Restatement (Second) of Contracts* attempts to restate or prescribe.

Generally, I set out in this Article to find a simpler, more predictive way of categorizing the cases—to address, among other questions, whether some types of a challenge to enforceability on public policy grounds were more successful than others and whether certain categories were more orderly or "unruly" than others.

4. See, e.g., 15 GRACE McLANE GIESEL, CORBIN ON CONTRACTS: CONTRACTS CONTRARY TO PUBLIC POLICY § 79.3, at n.2 (Joseph M. Perillo ed., rev. ed. 2003); 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 12:2 (4th ed. 2009); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 22.1 (5th ed. 2003); E. ALLAN FARNSWORTH, CONTRACTS 326 (3d ed. 1999).

5. See, e.g., Blackburn & McCune, PLLC v. Pre-Paid Legal Svcs., Inc., No. M2009-01584-COA-R3-CV, 2010 WL 2670816 at *3 (Tenn. Ct. App. June 30, 2010); Giannecchini v. Hosp. of St. Raphael, 780 A.2d 1006, 1010-11 (Conn. Super. Ct. 2000); Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. PricewaterhouseCoopers, LLP, 989 A.2d 313, 330 (Pa. 2010); Penunuri v. Sundance Partners, Ltd., 257 P.3d 1049, 1053 (Utah Ct. App. 2011); Seigneur v. Nat'l Fitness Inst., Inc., 752 A.2d 631, 641-42 (Md. Ct. Spec. App. 2000).

6. See *infra* Part IV.A.

7. See *infra* Part IV.A.

8. See *infra* Part IV.B.1-2. Or, in some cases, to infer no justification because of the absence of supporting sources.

9. M. P. Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L.J. 267, 308 (1966).

10. As Allan Farnsworth noted, focusing on "leading cases" does not help doctrine develop, nor does it aid the advancement of scholarship. E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1462 (1987). Grant Gilmore also famously noted the consequences of this Langdellian tradition of using "leading cases" to paste together contract law. See GRANT GILMORE, *THE DEATH OF CONTRACT* 19 (Ronald K.L. Collins ed., 2d ed. 1995).

After analyzing a consistent sample of public policy contractual defense cases, I conclude that Judge Burrough's metaphorical horse is *not* uniformly "unruly"—categories of these cases can be discerned, and some categories appear more orderly than others. In this Article, I define these categories and provide some descriptions of cases within each of them. Hopefully, this redefinition and proposed new framework for the defense can simplify our understanding of the defense and at least point us in a clearer direction for its application.

To undergird my analysis, in Part II of the Article, I review some of the sparse literature and commentary on illegal contracts and the public policy defense, including the *Restatement (Second) of Contracts*. In Part III, I set out the empirical agenda that I attempt to fulfill and the methodology I employed. I then discuss the outcome of the content analysis in Part IV, the categories of public policy cases that emerge, and examples of the cases that populate them. I also empirically describe the Restatement's lack of efficacy in this area. In Part V, I briefly and modestly suggest some potential revisions to the description of and the approach to the public policy defense, in light of my core findings in Part IV.

Before delving into the details of my methodology and analysis, I highlight a few of the primary conclusions I reached. My refined sample of opinions reveals that roughly half (forty-eight percent) of the public policy contracts cases are resolved by invoking or looking to a statute or regulation. When the public policy defense invokes a statute or regulation it is almost *twice as likely* to be successful in its attack on the contract (fifty-nine percent of the time) than when the defense invokes mere case law or a broad, general appeal to public policy (thirty-one percent).¹¹ These statutory/regulatory cases appear to follow a more direct path and could be described as "ruly."¹²

The defenses that employ broader appeals to general public policy tend to be less successful. Perhaps Judge Burrough's observation in *Richardson* that the defense "is never argued at all but when other points fail,"¹³ merely reflected the lower rate of the defense's success in this category. This basic distinction between the statutory/regulatory cases and the broader, general cases could be viewed as cutting the magnitude of the "unruly horse" problem at least in half. Some order can be drawn just in noting that invocation of the defense in these circumstances is substantially more likely to fail.

However, further distinctions can be made among even these general public policy cases. For example, it seems that when the defense

11. To be precise, 1.9 times more likely.

12. I coin the term "ruly," which is not an AMERICAN HERITAGE DICTIONARY word, to contrast with the word "unruly," used in *Richardson v. Mellish*, (1824) 130 Eng. Rep. 294, 303; 2 Bing 229, 251-52 (Burrough J.).

13. *Id.*

succeeds within the “broader appeal” to “general public policy” category, courts often draw upon other case precedent that declares the public policy. These courts cite the public policy found by previous courts as they would common law—without any reference to a statute or regulation. This reliance on precedent brings a degree of order and legitimacy to the defenses that fit this category, rendering them only “somewhat ruly” in my framework. They remain “unruly” to a certain degree because the public policy findings in these cases are merely based on other judicial findings.

As I describe below, the remaining “unsuccessful” uses of the public policy defense tend to be the “unruly” portion of the cases. I contend that the unruliness of these cases should not prove completely disconcerting for those seeking order in this area, as they mostly appear to represent failed attempts to lure a court into discerning public policy where no public policy has been established through political means.

Taken together, my analysis of these sets of cases can lead to a more orderly framework for understanding them, as I illustrate in Figure 1.

Figure 1
Percent of Total Public Policy Defense Cases by
Type/Success (n = 103)

Public Policy Defense	Successful Defense	Unsuccessful Defense
Defense Rooted in Statute/Regulation	48%	
Defense Rooted in General Appeal to Public Policy	15%	33%
<i>Hybrid of Both</i> ¹⁴	7%	

“Ruly”	“Somewhat ruly”	“Unruly”	Other
---------------	------------------------	-----------------	--------------

Figure 1 depicts how often cases in the public policy arena tend to fall into the categories I have described. Under my framework, the truly “unruly” cases seem to present themselves only one-third of the time.

14. I discuss the seven percent of cases that classify as “hybrids” of both categories of defense at Part IV.B.4 *infra*.

Before detailing my findings below, I explore the baseline of scholarship and conventional wisdom about the public policy defense to offer contrast to my approach and analysis.

II. PREVIOUS ATTEMPTS TO ANALYZE THE PUBLIC POLICY DEFENSE

Scholars have paid limited attention¹⁵ to the judicial invalidation¹⁶ of contracts¹⁷ on public policy grounds. Moreover, much of this attention was granted over forty years ago.¹⁸ Although the literature touches upon the role of judicially discerned public policy, both in contract and elsewhere in private law, very few scholars have focused purely on the public policy problem in contracts. As noted in the Introduction here, no systematic empirical efforts have been made to explore the nuances of the public policy defense. Only two comprehensive¹⁹ structural taxonomies of the defense have been presented over the past fifty years, and one of these was a note in the *Harvard Law Review*.²⁰

A. Formal Discussions in the Literature

Aside from the taxonomies discussed in those two works, scholars have directed their efforts in the public policy arena to broader exam-

15. See Adam B. Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 GEO. MASON L. REV. 483, 488 (2010) (acknowledging that “commentary on this issue has been sparse” in light of the frequency with which the public policy defense seems to appear in contracts opinions).

16. Though I use terms like “public policy defense,” “invalidation,” and even “attack” on a contract, I am always referring to *enforceability* in the public policy context.

17. Note the term “contracts against public policy” presents an internal contradiction. See Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 116 n.4 (1988). Contracts, by definition, are agreements that carry legal obligations. Contracts voided on public policy grounds carry no legal obligations, therefore eviscerating their status as contracts. They are merely agreements. See RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”); see also U.C.C. § 1-201(b)(12) (2007).

18. See, e.g., Shand, *supra* note 3. Furmston’s 1966 article, *supra* note 9, and a law review note appear to be the only comprehensive formal scholarship exclusively directed to the breadth of the subject and the formulation of a framework for understanding the defense. See Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445, 1446 (2006) [hereinafter *A Law and Economics Look*]. Some other older, but notable works include Winfield, *supra* note 1 (a compelling historical study of the underpinnings of public policy); George A. Strong, *The Enforceability of Illegal Contracts*, 12 HASTINGS L.J. 347 (1961) (discussing a raft of then-recent California cases in an attempt to describe the defense in an uncertain zone of conflicting rules and exceptions); and John W. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV. 261 (1947) (discussing the remedial challenges presented by different types of cases).

19. In some instances, the public policy defense has been addressed within a narrower substantive category of cases. See, e.g., Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY’S L.J. 259 (1990).

20. See Furmston, *supra* note 20; *A Law and Economics Look*, *supra* note 18.

inations and justifications for the defense.²¹ In more recent instances, scholars have addressed the thorny problems of finding appropriate remedies²² and the role of the public policy defense in promoting efficient deterrence of undesirable behavior.²³ Others have focused their study more narrowly on a specific zone of the application of the defense, attempting to illuminate the defense with specific subject matter.²⁴ These contributions to the literature all loom large because of the sheer absence of commentary about this complex problem.

Because this Article's goal is to develop a new taxonomy and a new predictive model for these cases based on a systematic study, I focus briefly on two articles that provided broad taxonomies to offer some contrasts with the approach I developed through a consistent observation.

1. *Furmston Taxonomy*

In 1966, M.P. Furmston proposed, in perhaps the most comprehensive effort to taxonomize this defense in the scholarly literature, a scheme for understanding public policy cases in contract.²⁵ He tried to address the gap in the literature left by commentators that tended to "overgeneralize the effect of cases" and "oversimplify the subject."²⁶ Furmston divided the cases into five classes: "contracts which are legal but whose enforcement is affected by considerations of public policy,"²⁷ "contracts to do an improper act,"²⁸ "contracts for improper trafficking in inaction,"²⁹ "contracts with an improper tendency,"³⁰ and, "contracts for the supply of materials for impropriety."³¹ Even though the study is nearly a half-century old, Furmston's effort remains the most recent broad and extensive scholarly attempt to organize this defense.

21. See Walter Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679 (1935); Winfield, *supra* note 1; Shand, *supra* note 3. Shand discerned three justifications for the defense—the punitive justification, the "pure fountain" justification, and the deterrence justification. The "pure fountain" interest describes a court's unwillingness to enforce dirty agreements. Shand, *supra* note 3, at 148-57.

22. See Wade, *supra* note 18; Badawi, *supra* note 15.

23. See Kostritsky, *supra* note 17.

24. See Dan L. McNeal, *Judicially Determined Public Policy: Is "The Unruly Horse" Loose in Michigan?*, 13 T.M. COOLEY L. REV. 143 (1996) (an illustration of how the public policy defense has been applied in narrow private law areas within one state); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990) (using arbitration cases to illuminate the challenges presented by the public policy defense).

25. See generally Furmston, *supra* note 9.

26. *Id.* at 308.

27. *Id.*

28. *Id.*

29. *Id.* at 308-09.

30. *Id.* at 309.

31. *Id.*

Stating modest goals, Furmston “sought [not] to give a definitive account of illegal contracts but [only] to explore more closely certain aspects of the topic.”³² He attempted to remedy the “overgeneralization” of commentators who had addressed this subject, with a new categorization scheme accompanied by case analysis.³³ Furmston cautioned that his ultimate classifications were “still tentative” and admitted that “it may be that further analysis will reveal other classes” because his exploration only involved analysis of the “leading cases.”³⁴ In the decades that followed his publication, nobody appears to have taken Furmston’s invitation to look further in the broad way he had.

Furmston’s tentative classification, however, though a notable step forward in a dark area, could not offer a complete description of the landscape of public policy cases precisely because it was based on the “leading cases,” rather than the ordinary.³⁵ Moreover, Furmston set out to uncover *more classes* of cases when perhaps a better understanding of the defense required something other than a more detailed classification. As I describe below, the commentators and the Restatement of Contracts seemed to accomplish this end, albeit providing limited value for developing a broader theory of the defense.

The Furmston scheme was never tested to see if it would help explain or predict the case law in this uncertain area. In an area of law compared to an unruly animal, unsurprisingly, few cases can be found that truly lead. Certain public policy cases are famous, like the gestational surrogacy contracts opinions in the *Baby M* case³⁶ and *Johnson v. Calvert*.³⁷ But these cases are often better used to trigger debate about how to think about the limits of freedom of contract than to explain how courts will address public policy defense cases that present more routinely.

2. Law and Economics Taxonomy

More recently, a *Harvard Law Review* note served to support a law and economics justification for “void for public policy” doctrine—that is, the public policy defense.³⁸ The taxonomy used for that pur-

32. *Id.* at 308.

33. *Id.* Furmston comes close to apologizing for not offering more than this, but his scheme is nonetheless a major contribution and the most robust framework in the literature. *Id.*

34. *Id.*

35. *Id.*

36. *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (invalidating gestational surrogacy contracts on public policy grounds).

37. 851 P.2d 776 (Cal. 1993) (holding that gestational surrogacy cases do not violate public policy).

38. See *A Law and Economics Look*, *supra* note 18, at 1446. The note concluded that “[w]elfare-minded judges making decisions under the [void against public policy] doctrine

pose divided the cases into four distinct categories that cast the cases by the nature of the contract at issue—whether the contract was to commit an act “definitely against public policy,”³⁹ to “refrain from acts that further public policy,”⁴⁰ to “commit legal acts that themselves facilitate acts against public policy,”⁴¹ and to perform acts with uncertain public policy effects.⁴²

Although this taxonomy admirably attempted to impose order on the field through the lens of another discipline, ultimately, a portion of decisions could not be effectively predicted and categorized by this scheme. The last category, agreements to “perform acts with uncertain public policy effects,” appeared to stump the authors.

What *should* a court do when the acts to be performed will have “uncertain public policy effects”? The answer seems to elude a complete solution from a law-and-economics approach, as exemplified in the note’s struggle to find a clear solution for handling indemnity clauses.⁴³ As noted in the content analysis in Part IV, indemnity and exculpation (and limitation and shifting of damages generally) prove fertile grounds for the public policy defense.⁴⁴ Failure to satisfactorily explain this subject matter leaves a hole in this approach, even though the rest of the analysis makes a contribution.⁴⁵

Both of these categorization approaches built their foundations on exemplary cases, rather than a straightforward survey and evaluation of cases coming through the system. This leaves room for exploring the latter approach.

must consider a wide variety of factors, paying attention to, among other things, the possibility of overdeterrence, the relative cost of contractual nonenforcement versus direct punishment of the underlying activity, and the parties’ relative levels of knowledge. The problem’s complexity in turn demands that courts applying the doctrine take a systematic, explicit approach, as only then can there be any hope that they will appropriately balance the interests inherent in the decision.” *Id.* The note suggested “a tentative law and economics taxonomy for the field, discuss[ed] potential reasons to enforce contracts despite their negative externalities, and consider[ed] ramifications of potential remedies [in order] to take a first step toward solidifying that approach.” *Id.* In summary, the note identified the messiness of the contracts and public policy area and attempted to use law and economics to illuminate the problem in an attempt to organize it. *Id.*

39. *Id.* at 1449.

40. *Id.*

41. *Id.*

42. *Id.* at 1458-60.

43. *Id.*

44. In my sample, twenty-nine percent of the cases involved some flavor of addressing whether an exculpatory or indemnity clause was valid. I later categorize these as “agreements that limit or shift liability” or “damage limitation” cases. *See infra* Table 2.

45. The damage limitations cases I studied appear to be explained by whether the clause runs contrary to a statute or regulation or whether it does not. A thorough law-and-economics analysis of these cases would prove fruitful, but the predictive factor seems to be quite basic.

B. *Treatises and Commentary*

Because the academic literature is somewhat sparse, a brief scan of the treatises and commentaries can provide some insight into the way cases involving this defense have been ordered. The major treatises provide extensive categorization schemes for the application of the defense. The schemes are driven both by subject matter of the underlying contract (Corbin most extensively does this) and by the nature of the relationship between the illegal act and the contract, which Williston attempted.

Though these categories and catalogues provide excellent descriptions of the application of the defense, they do not offer a robust predictive framework for where the defense will likely be more successful and where it might be more orderly. Williston suggests that if a bargain comports with the “modern view” of the successful public policy defense (essentially the balancing/weighing test also expressed in the Restatement), the contract will be held unenforceable.⁴⁶ (Given Williston’s role in drafting the first Restatement of Contracts, one would expect this convergence of approach.)

As I note in my discussion of the *Restatement (Second) of Contracts* in Part IV.B, I found in my examination of the cases that courts rarely put the Willistonian “weighing/balancing” approach into practice. The treatises and commentary provide a solid descriptive foundation of the case law and commentary about the public policy defense, but they leave room for more and better ordering. They are worth noting because their approach seems to embody much of the established wisdom about the defense—that it is indeed “unruly,” and difficult to summarize doctrinally.

For example, the Corbin treatise’s treatment of the public policy defense is exhaustive and almost scientific in the way it catalogued every identifiable species and subspecies of the defense. It leaves the impression that the defense is dependent on the minutiae of every conceivable underlying subject matter addressed in a public policy case. Corbin also expressly and appropriately concedes the difficulty of discerning public policy.⁴⁷

46. See 5 WILLISTON & LORD, *supra* note 4, § 12:1, at 744-52.

47. 15 GIESEL, *supra* note 4, at § 79.3 (“Courts often use the two alliterative words ‘public policy’ as if they had a magic quality and were self-explanatory. . . . But judges also have the job of evaluating public policy even in the absence of such sources. The entire body of what is described as the common law is the result of innumerable court decisions based upon the judicial notions of sound social policy and human welfare. In situations in which the legislature has not spoken on an issue, or in situations in which the legislature has been unclear, or in situations in which there are, perhaps, inconsistent statements by the legislature, how does a court determine whether a contract contradicts public policy? *The difficulty of the court’s task has long been recognized.*”) (emphasis added).

In his survey of contracts found to violate public policy, Corbin detailed twenty-six different types of “contracts in restraint of competition,”⁴⁸ seven types of “contracts involving familial relationships,”⁴⁹ three types of “Sunday contracts,”⁵⁰ eighteen “bargains harmful to the administration of justice,”⁵¹ nine “bargains harmful to the public service or to the performance of [a] fiduciary duty,”⁵² nineteen “bargains to defraud or otherwise injure third persons,”⁵³ twenty-two different types of “wagering bargains,”⁵⁴ fifteen types of “usury bargains,”⁵⁵ and nine “miscellaneous bargains contrary to public policy.”⁵⁶ Corbin’s treatise reads a bit like Charles Darwin’s *The Zoology of the Voyage of H.M.S. Beagle*,⁵⁷ counting 128 different subspecies of the public policy defense in action. Though, in some sense, Corbin’s work could prove to be a helpful guide to those trying to identify if a certain defense had been employed before, it does not provide any sense of the frequency with which these cases are pled, nor does it provide us with a sense of where courts are more likely to void a contract.

Corbin contributes a concrete descriptive structure, but he also attempts to provide predictive help in one section of his treatise by noting that there may be distinctions between contracts that involve conduct that is *malum in se* versus conduct that is *malum prohibitum*.⁵⁸ Even there Corbin acknowledges that “many judges have said that the distinction between contracts relating to *malum in se* conduct and contracts relating to *malum prohibitum* conduct has been ‘exploded.’”⁵⁹

Though organized differently, the Williston treatise provides a detailed analysis of the public policy defense and offers some broad guidance about the situations where one could expect the defense to succeed—and does not go far beyond that point.⁶⁰ The treatise makes a concededly broad claim that:

48. *Id.* § 80.

49. *Id.* § 81.

50. *Id.* § 82. These contracts are a leftover from an era when the law in some states prohibited business transactions on Sunday.

51. *Id.* § 83.

52. *Id.* § 84.

53. *Id.* § 85.

54. *Id.* § 86.

55. *Id.* § 87.

56. *Id.* § 88.

57. See, e.g., 4 CHARLES DARWIN, THE WORKS OF CHARLES DARWIN, THE ZOOLOGY OF THE VOYAGE OF H. M. S. BEAGLE, PART I: FOSSIL MAMMALIA, PART II: MAMMALIA (Paul H. Barrett & R.B. Freeman eds., N.Y. Univ. Press 1987) (1839).

58. 15 GIESEL, *supra* note 4, § 79.5.

59. *Id.*

60. 5 WILLISTON & LORD, *supra* note 4, § 12:1, at 742 (“[I]n this treatise, the appropriate inquiry is limited to determining in what cases and to what extent the law denies, for reasons of public policy, to technically complete bargains, the usual characteristics of contractual obligations and legal force.”).

[A] bargain will be declared illegal or unenforceable if:

1. The consideration for a promise in it is an illegal act or forbearance;
2. It is illegal to make some promise in the bargain, even though what is promised might be legally performed;
3. Some performance promised is illegal;
4. A provision is included for a condition in violation of law; or
5. According to the modern view, embodied in the Restatement Second, "the interest in enforcement [of a promise or term] is clearly outweighed in the circumstances by a public policy against the enforcement of such terms," in which case the term will be unenforceable.⁶¹

Though this categorization scheme is more abstract, Williston (like Corbin) also provides extensive lists of examples⁶² of the "various foundations of public policy,"⁶³ and the "[l]imits of judicial recognition of public policy."⁶⁴ Like other treatises, however, it does not provide a census that reveals the frequency of the subject matter of the cases or which flavors of the defense are more successful. The treatise does enter into some discussion of the first and second Restatements of Contracts, discussing where the Restatements work well and where it does not, also using anecdotal descriptions.⁶⁵ (As I note in Part IV.B below, the role of the Restatement is minimal today.) Though mentioning the "unruly horse,"⁶⁶ Williston did not attempt to tame it within the confines of his treatise.

The hornbooks, in pursuit of the simplicity that is their purpose, also seem to accept the unruly horse metaphor. Calamari and Perillo explicitly refrained in their hornbook from claiming that they were offering a comprehensive view of the "various kinds of contracts or contract clauses that have been struck down on grounds of public policy."⁶⁷ The authors focused instead on the consequences of an agreement struck down on this basis⁶⁸—a valuable contribution, but one that leaves readers bereft of an analysis of the scenarios that lead to these consequences.

The treatises and commentaries can be bolstered by a complete discussion of the defense as actually employed today, informed by

61. *Id.* at 744-52.

62. It could be characterized as a carefully-crafted laundry list, though Williston does not appear to be as comprehensive as Corbin.

63. *Id.* § 12:2, at 687.

64. *Id.* § 12:3, at 858.

65. *Id.* § 12:4.

66. *Id.* § 12:2, at 776 (quoting *Richardson v. Mellish*, (1824) 130 Eng. Rep. 294, 303; 2 Bing 229, 252 (Burrough J.)).

67. PERILLO, *supra* note 4, § 22.1, at 843.

68. *Id.*

case law.⁶⁹ After briefly discussing the Restatement, I attempt to supplement the traditional analysis of the defense with a systematic view of what types of claims succeed more often—and where there might be other meaningful distinctions between these types of cases.

C. *Restatement of Contracts*

As noted, the *Restatement (Second) of Contracts*, section 178(1), suggests that courts should “weigh” or balance factors that are more expressly delineated in subsections (2) and (3).

§ 178. When a Term is Unenforceable on Grounds of Public Policy

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is *clearly outweighed* in the circumstances by a public policy against the enforcement of such terms.

(2) In *weighing* the interest in the enforcement of a term, account is taken of

- (a) the parties' justified expectations,
- (b) any forfeiture that would result if enforcement were denied,
- (c) any special public interest in the enforcement of the particular term.

(3) In *weighing* a public policy against enforcement of a term, account is taken of

- (a) the strength of that policy as manifested by legislation or judicial decisions,
- (b) the likelihood that a refusal to enforce the term will further that policy,
- (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
- (d) the directness of the connection between the misconduct and the term.⁷⁰

To contextualize this “weighing” approach, the Restatement lays out a specific list of the bases of public policies against enforcement, one which is more specific, detailed, and content-driven than conceptual.⁷¹ The Restatement recognizes that public policy can be raised by

69. *Id.* Calamari and Perillo focused on executory bilateral contracts, *id.* § 22.2; licensing statutes (as this Article does), *id.* § 22.3; the remoteness of the illegality, *id.* § 22.4; fiduciaries, *id.* § 22.5; divisibility, *id.* § 22.6; restitution, *id.* §§ 22.7-22.8; change in law or facts after the bargain (this Article discusses a case in this category, *infra* pp. 57-59, *Lucky Jack's Entm't Ctr. v. Jopat Bldg. Corp.*), *id.* § 22.9; and with some specificity, illegal attorney agreements, *id.* § 22.10.

70. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981) (emphasis added).

71. *See* RESTATEMENT (SECOND) OF CONTRACTS § 179.

Bases Of Public Policies Against Enforcement

A public policy against the enforcement of promises or other terms may be derived by the court from

- (a) legislation relevant to such a policy, or

legislation, "the need to protect some aspect of the public welfare, as is the case for the judicial policies against, for example . . . restraint of trade[,] . . . impairment of family relations[,] . . . [and] interference with other protected interests."⁷² These bases are all folded into the more elaborate balancing tests that cover all other situations that arise with public policy.⁷³

The Restatement framework, however, does not aid much with broader categorization or predictability. As I describe in Part IV.B, courts rarely cited Restatement section 178 in the set of cases that I examined and they rarely applied the conceptual "weighing" approach, which raises questions about its utility. In an "unruly" area, one would expect courts to seek refuge in some source of authority. The Restatement does not provide that authority in practice nor does it appear to reflect the manner in which today's courts handle cases.

To test the usefulness of the Restatement, and to test the other conventional wisdom about the defense, I describe the mechanism I devised to isolate a consistent set of relevant public policy cases in Part III. In order to discern any order out of the public policy defense, the run of cases must be examined closely, which I do in Part IV. Though efforts have been made, as I have just noted, to categorize cases conceptually in some effort to bring order to the defense, no scholar has done so by looking at the problem from the bottom up. Before analyzing the public policy defense cases, I set out first to identify them.

III. THE PUBLIC POLICY DEFENSE AS EMPLOYED

A content analysis of recent cases involving the public policy defense to a contract reveals that this public policy problem might appear to be a slightly more "ruly" horse than Judge Burrough posited. No previous scholarship has attempted systematically to sift through

(b) the need to protect some aspect of the public welfare, as is the case for the judicial policies against, for example,

- (i) restraint of trade
- (ii) impairment of family relations, and
- (iii) interference with other protected interests.

For more detail on restraint of trade, see *id.* §§ 186-88, for family relations, see *id.* §§ 189-91, and for "other protected interests," see *id.* §§ 192-96, 356. See also *id.* § 181. "Effect Of Failure To Comply With Licensing Or Similar Requirement." Related sections of the first Restatement addressed bargains to "Refrain From Committing a Wrong," *RESTATEMENT (FIRST) OF CONTRACTS* § 578 (1932), "Bargains Concerning Domestic Relations," *id.* §§ 581-89, and "Bargains Tending to Defraud or Injure Third Persons," *id.* §§ 571-79.

72. *RESTATEMENT (SECOND) OF CONTRACTS* § 179.

73. See *id.* § 178(1).

public policy cases to examine their content.⁷⁴ A number of questions remain extant, however. With what relative frequency does the public policy challenge involve the violation or contravention of an established regulation or statute as opposed to a generalized call to prevent an odious public consequence of enforcement? Do courts go through the weighing and balancing exercises suggested by the *Restatement (Second) of Contracts*, section 178?⁷⁵ How often does this defense succeed and does it succeed in certain contexts more than others? This Article sets out to answer these questions and others by evaluating and categorizing six months of cases from 2009⁷⁶ in every United States jurisdiction that could be deemed as a pure challenge⁷⁷ to a contract on public policy grounds.

The identification of cases involving the public policy defense required the casting of a wide net in order to be inclusive and then the application of a tight sorting process to purify the set of judicial opinions to ensure that they were relevant to the analysis.⁷⁸ The goal was to produce a consistent set of cases that addressed the defense *apart from separate and distinct doctrines*, as I explain. First, I searched for opinions in the “All Federal & State Cases” Westlaw database for a six-month period ranging between July 1, 2009, and December 31, 2009, in order to capture activity in courts of all levels in every jurisdiction. The search terms used within this database were “contract & ‘public policy’ & defense.” This broad query within a large base of cases returned a total of 1,089 opinions, mostly unpublished opinions. I also used the search term “illegal contract” within the same timeframe. This “illegal contract” search yielded only sixty opinions, a few of which overlapped with the primary search.

I read all of the opinions to determine if they met certain, specific criteria to qualify for analysis as a “pure” public policy defense case. For a case to qualify for analysis, the opinion had to (a) involve a contractual issue, (b) address and (c) resolve the public policy defense. With respect to (c), included is the notion that courts can *sua sponte*

74. I accepted David Snyder’s invitation to “go out and look” at the cases. David V. Snyder, *Go Out and Look: The Challenge and Promise of Empirical Scholarship in Contract Law*, 80 TUL. L. REV. 1009, 1016 (2006).

75. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”).

76. Published and unpublished within the Westlaw database. This project commenced in earnest in mid-2010, so these dates presented a logical starting point.

77. See *infra* this Part for an explanation of what I deemed to be a “pure challenge.”

78. My simplified approach was heavily, but not exclusively, influenced by the basic techniques discussed in ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* (2010) (describing methods in data gathering and evaluation) and in Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63 (2008) (discussing the empirical method of content analysis).

address illegality or public policy concerns and invalidate a contract, the justification being that parties mutually involved in illegal activity may not have the incentive to plead the defense—and that the public good must nonetheless be served.⁷⁹ I included unpublished (and even modified and overruled) opinions in my final analysis because my objective was to get a solid cross-sectional view of how the defense is really used in action. I was not concerned about the precedential value of these cases—nor was I concerned with what might have happened to these specific cases on appeal. I intended to review a consistent set of opinions from a defined period of time that would demonstrate how courts handle the defense at every level, every day, from barebones, unpublished state trial court opinions to elaborate, published federal appellate opinions.

Additionally, to further distill the set of cases, I removed opinions that litigated public policy in the context of arbitration,⁸⁰ restraint of trade,⁸¹ noncompete agreements,⁸² choice of law questions,⁸³ and employment discharge challenges.⁸⁴

79. RESTATEMENT (SECOND) OF CONTRACTS, ch. 8, topic 1, intro. note (1981) (“Even if neither party’s pleading or proof reveals the contravention [of public policy], the court may ordinarily inquire into it and decide the case on the basis of it if it finds it just to do so, subject to any relevant rules of pleading or proof by which it is bound.”).

80. For descriptions of the distinct flavor of public policy in the arbitration zone see, for example, Harvey R. Boller & Donald J. Petersen, *Applying the Public Policy-Exception to Labor Arbitration Awards*, 58 DISP. RESOL. J., Nov. 2003-Jan. 2004 at 14, 16; Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 PENN. ST. L. REV. 1227, 1230-31 (2009); Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 503 (2009), and Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY’S L.J. 259, 263 (1990). The United States Supreme Court addressed the public policy defense and enforceability in *E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 61-67 (2000). Justice Thomas also addressed the defense in the context of the Federal Arbitration Act in *AT&T Mobility v. Concepcion*, 563 U.S. 1740, 1753-56 (2011) (Thomas, J., concurring.).

81. The Restatement notes that restraint-of-trade cases are well-established in common law and statute. These cases have a life apart from plain-vanilla public policy defense cases. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 2, intro. note:

The common law’s policy against restraint of trade is one of its oldest and best established. Nevertheless . . . , that policy is severely circumscribed

. . . Although activities such as organizing a corporation or refusing to deal with another may be in restraint of trade, they are outside the scope of this Restatement if no promise is involved. . . . However, a promise to organize a corporation or to refuse to deal comes within its purview.

[Also,] the Restatement does not deal with those aspects of the subject that are largely legislative. . . . Promises in restraint of trade are governed by extensive federal and state statutes, under which the promise may not only be unenforceable, as at common law, but may give rise to both civil and criminal responsibility. The substance of that legislation is beyond the scope of this Restatement. With respect to most aspects of the restraint of trade, federal legislation has so completely occupied the field as to make the common law rules of little or no consequence except as they may give meaning to some of the more general terms of that legislation. Examples are the creation of monopoly, the

In each of these cases, I justified the exclusions on the judgment that the jurisprudence appeared to be especially dominated by the substantive subject matter, leaving less room for judicial discretion than in other public policy defense cases.⁸⁵ For example, the challenges to arbitration clauses and enforcement of arbitration decisions are strongly tied to interpretation of the Federal Arbitration Act, which effectively declared a national public policy.⁸⁶ The use of the term “public policy” extends over a range of cases involving contractual enforcement.

I attempted to isolate the cases to yield opinions where courts wrestle with pure public policy defenses that stand apart from any other doctrine.⁸⁷ Certainly, different selection criteria and categories

substantial lessening of competition by, for example, tying purchases of one product to another, or the imposition of non-ancillary restraints controlling prices or limiting production. Specific aspects of the subject may also be governed by state statutes.

82. The Restatement places these cases within the public policy bucket, but they also have a distinct flavor by profession and by jurisdiction. The noise within this bucket would overpower any insights from the “pure cases.” See RESTATEMENT (SECOND) OF CONTRACTS § 186(2) (“A promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation.”). But these cases tend to follow different policy lines in different professions, like law and medicine. See Robert Steinbuch, *Why Doctors Shouldn't Practice Law: The American Medical Association's Misdiagnosis of Physician Non-Compete Clauses*, 74 MO. L. REV. 1051, 1051 (2009). Also, the cases tend to be enforced differently in (1) different industries (see, e.g., Emily E. Duke, Mary M. Krakow & Sarah M. Gibbs, *Creating Enforceable Noncompete Agreements with Bank Officers and Other Key Employees*, 126 BANKING L.J. 248, 250 (2009)); (2) states (see, e.g., John M. Norwood, *Non-Compete Agreements in Arkansas: Can They Be Enforced?*, 2009 ARK. L. NOTES 141 (2009); Kevin R. Eberle, *Eroding Disfavor of Non-Competes and the Inevitable Disclosure Doctrine in South Carolina*, S. C. LAW., Nov. 2008 at 13, 13)); and (3) at the intersection of states and industries (see, e.g., Melissa Ilyse Rassas, Comment, *Explaining the Outlier: Oregon's New Non-Compete Agreement Law & the Broadcasting Industry*, 11 U. PA. J. BUS. L. 447, 447-48 (2009) (discussing a new Oregon law that revised the approach to noncompetes within the broadcasting industry in that state)).

83. For a comprehensive set of examples that demonstrate that these cases are often decided on issues unique to choice of law, apart from plain public policy, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 355-58, 364-79, 389 (2011).

84. Challenges on public policy grounds to at-will employment terminations focus on the public policy implications of the discharge, not the underlying contract. See, e.g., *Strozinsky v. Sch. Dist. of Brown Deer*, 614 N.W.2d 443, 447 (Wis. 2000).

85. See *infra* Part V.B. for further discussion of the role of judicial discretion in application of the public policy defense.

86. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2011). In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), Chief Justice Burger interpreted § 2 of the Act to mean that Congress had established national public policy in this arena. *Id.* at 10 (“In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”). This declared public policy would cloud any analysis of how courts make these decisions when there is no such bold declaration (by statute or by the Supreme Court) on point.

87. I did, however, include examples involving unlicensed contractors, even though they may have a flavor of their own, as I discuss in Part IV.A.1. There is not a separate doctrine *per se* that covers these cases, but they do nicely and neatly embody statutory/regulatory conflict with a private bargain.

of cases could be justified for an analysis of the public policy defense like the one I present here. For other purposes, choices of inclusion and exclusion could be adjusted to either expand or restrict the scope of what I examined. This analysis aspires to serve as a point of departure for different approaches with different purposes.

After completing the process I devised for selecting cases, I identified 103 opinions from this period at the state and federal level that met the criteria.⁸⁸ Though the sample I used here may be slightly smaller when compared with similar studies,⁸⁹ some definitive conclusions can still be drawn with statistical significance.⁹⁰ The sample affords a valid description of the defense as modernly litigated.

With this data set in place, I set out to find whether there was order to be found within these cases. Was this “horse” as “unruly” as Judge Burrough and subsequent scholars and judges believed? Were there different *breeds* of horses that were more “unruly” than others? Given that there has not been a systematic look at these cases, this Article attempts to answer those questions in a modest, directional way by examining a slice of them.

IV. CONTENT ANALYSIS OF CASE LAW

I set out to evaluate the set of opinions that I had isolated to see if any patterns emerged that could enable ordering of a defense labeled “very unruly.” The first question I raised and addressed was how often the public policy defense was successful when pled and resolved. In the cases examined, the underlying contract was successfully attacked in 46 out of 103 instances. (Put another way, this constitutes a forty-five percent success rate for the public policy defense in “voiding” the contract.) Given that this defense to contract worked roughly half of the time, we can assume that this is a vibrant defense to contract enforcement when raised. In the aggregate, however, this finding does not answer the question about whether “unruliness” is the norm in this corner of contract doctrine.

88. Within this sample, no appeals appeared of cases decided within this short timeframe.

89. Robert Hillman built his well-known study of promissory estoppel on 362 cases. See Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 582-83 n.15 (1998). One other recent study of promissory estoppel analyzed 383 cases. See Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669, 687 (2010). A study of unconscionability used a data set of 187 cases, a number in the neighborhood of this study of the public policy defense. See Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1092-93 (2006).

90. As discussed *infra* Part IV, note 91, the sample in this Article provides enough data to yield statistically-significant results at the level of distinguishing the outcomes between defenses rooted in statutes and regulations and defenses rooted in broader appeals to public policy.

At a summary level, the content analysis revealed a significant difference in outcome between cases that invoked a statute or regulation as the basis for the public policy defense and cases that invoked a broader public policy claim. Additionally, the cases in both categories almost unanimously avoid any balancing of interests, as suggested by the Restatement, in the analysis that leads to the outcome.

I first separated the cases into two categories. Although categorizing cases can be a challenging and subtle exercise, a sizable number of these cases can be cast as attacks based on the underlying agreement's contravention or undermining of a statute or regulation. The remainder of the cases can be classified as an attack on the contract based on broader, more general public policy grounds and interests. Comparing these two categories reveals a primary distinction that may help bring some order to an understanding of the public policy defense. Where an attack on a contract is based more closely on contravention of a statute or regulation, the contract appears more likely to fall victim to the attack. In such cases, we find that there is success with the public policy gambit nearly *twice* as frequently than with the broader cases.⁹¹

Table 1

Success of Defense by Category of Defense

Category of Public Policy Defense to Contract⁹²	Total Cases	"Successful" Cases (Where defense succeeds)	Success Rate
Defense Rooted in Statute/Regulation	49	29	59%
Defense Rooted in General Appeal to Public Policy	49	15	31%
<i>Hybrid of Both</i>	5	2	40%
Total	103	46	45%

91. When the "hybrid" cases are stripped out, we see that the differences in result between statute/regulation and broader public policy are statistically significant. Running a chi square test, the two variables are not independent. $X^2 = 8.08425$, $DF=1$, $p=0.004465$.

92. Cases that presented a hybrid defense were categorized into statute/regulation or broader public policy if they leaned heavily in one direction or the other. Those that fit into neither category were determined to be hybrids.

A. Contravention of Statutory/Regulation Cases

As I describe below, the statutory and regulatory contravention cases run the gamut from the government voiding an agreement forged through bribery of an undercover agent to parties trying to collect on a bargain for services provided by them without legally required licensure. As noted above, but worth emphasizing again because of the primacy of this finding, the public policy defense to contract appears to be roughly twice as successful in this context.

Methodologically, I include in this category public policy opinions that involve a statute or regulation and reference it as the source of the public policy. In these cases, the public policy is constructed through a political process,⁹³ not an adjudicative process. In my descriptions of these cases, which immediately follow, I only include public policy defenses that prove successful because, in these cases, the court would be compelled to perform a more complete public policy analysis.⁹⁴ To provide a flavor of the defense in action, I describe some licensure cases, then some cases that involve a criminal statute and, finally, cases that involve agreements to limit or shift liability (e.g., exculpatory clauses). Table 2 breaks down the cases involving agreements that contravene statute or regulation.

93. Or “nonjudicial” process. I categorize regulatory cases as political.

94. In analysis of the broader category of cases, I do describe unsuccessful attempts to invoke the defense because unsuccessful attempts dominate that category.

Table 2
Success by Type of Defense Involving Contravention of
Statute or Regulation

Direct Contraven- tion of Statute/ Regulation Cases	Total Cases	“Successful” Cases	Success Rate
Agreements Counter to Licensure or Code	12	9	75%
“Criminal Agreements”	7	4	57%
Agreements That Limit or Shift Liability	12	7	58%
Other	18	9	50%
Total Direct Contra- vention of Statute/ Regulation⁹⁵	49	29	59%

1. Contracting Counter to Licensure

A common circumstance where the public policy defense is invoked involves scenarios where a service of value has been provided to the defendant but the service was performed in contravention of a code, or more commonly, the work was performed without proper licensure. Even though these opinions have their own distinct flavor, in some respect like the arbitration or restraint of trade cases, I include them because they embody a frequent public policy defense that cleanly invokes the argument that enforcement of the contract runs contrary to statute.

The licensing cases directly raise two important issues. First, should a court enforce a contract when a party performs an obligation but fails to comply appropriately with statutory or regulatory licensing requirements? Second, how should courts balance the tension between upholding the public policy purpose of a statute with inflicting significant forfeiture on the unlicensed party? These questions cut to the core of what courts must encounter when handling the public pol-

95. One case is counted in both the “illegal” and “contravention of statute/regulation” categories.

icy defense in a scenario where a statute or regulation expressly speaks to the problem.

During the time period of the search, twelve licensure opinions fell into this category—contracting counter to regulation or code. The defense to contract enforcement succeeded in nine of these cases. Though this study does not have enough data to fully confirm this, a strong hypothesis would lie in that these cases are especially “ruly.” The more granular separation of cases displayed in Table 3 shows that the defense in this context stands apart, even from the other cases that contravene statutes and regulations.

Table 3
Separating Licensure/Code Cases from Other Direct
Contravention Cases

Direct Contravention of Statute/Regulation	Total Cases	“Successful” Cases	Success Rate
Agreements counter to licensure or code	12	9	75%
Other direct contravention of statute/regulation	37	20	54%
Total	49	29	59%

Section 181 of the *Restatement (Second) of Contracts* (“Effect of Failure to Comply with Licensing or Similar Requirement”) purports to address these circumstances.⁹⁶ Though not frequently cited by name,⁹⁷ the spirit behind this section of the Restatement appears

96. This section provides:

If a party is prohibited from doing an act because of his failure to comply with a licensing, registration or similar requirement, a promise in consideration of his doing that act or of his promise to do it is unenforceable on grounds of public policy if

(a) the requirement has a regulatory purpose, and

(b) the interest in the enforcement of the promise is clearly outweighed by the public policy behind the requirement.

97. As of June 11, 2011, Westlaw only counted forty-four total historical case citations or mentions—and none within the timeframe of the case search I conducted. One reason for the paucity of citations to section 181 might lie in the fact that the licensing statutes often speak explicitly to contract enforceability questions and parties and courts plead “public policy” as a defense, quickly pointing to the relevant statutory text—not the Restatement.

very much alive and remains a vibrant basis for a defense to contract. The public policy defense to contract that invokes a failure to comply with licensing appears to succeed quite often.⁹⁸ I also include similar cases that appear to invoke compliance with a regulation or code.⁹⁹ The balancing test suggested by section 181(b) (that an agreement will be unenforceable if the “interest in . . . enforcement is . . . clearly outweighed by the public policy . . .”) does not seem to be explicitly or implicitly invoked in the cases I examined. Courts appear to undo bargains directly and with little hesitation when this particular species of the public policy defense is raised, often, but not always, eschewing quasi-contract remedies. With this category—and with others—I try to inject some vibrancy into the analysis by providing descriptions of some of the successful invocations of the defense, as the judicial reasoning tends to be more explicit in these circumstances.

(a) *Halpern v. Greene*

A colorful example of the public policy defense in action was described in an unpublished opinion from a lower court in New York. In *Halpern v. Greene*,¹⁰⁰ a boxer, Greene, challenged the enforceability of a personal services management agreement the boxer had struck with two managers.¹⁰¹ The managers, unlicensed as boxing managers by the state of New York, were trying to collect on the agreement, claiming that a valid contract existed.¹⁰² Over time the managers had paid for thirteen of the boxer’s first fourteen fights, including expenses relating to travel, promotion, and publicity providing the purses for the boxers.¹⁰³ The managers invested significant effort through contacts and negotiations to enable Greene to achieve “a Top Ten World Ranking,” while attempting to cut deals with major promoters

See, e.g., *Davis Moreno Constr., Inc. v. Frontier Steel Bldgs. Corp.*, No. CV-F-08-854 OWW/SMS, slip op. (E.D. Cal. Nov. 9, 2009).

98. See, e.g., *id.*; *KLW Enters. v. W. Ala. Commercial Indus.*, 31 So. 3d 136 (Ala. Civ. App. 2009); *Mousa v. Saba*, 222 Ariz. 581 (Ct. App. 2009); *Balt. St. Builders v. Stewart*, 975 A.2d 271 (Md. Ct. Spec. App. 2009); *Webb ex rel. Webb v. Clark Cnty. Sch. Dist.*, 218 P.3d 1239 (Nev. 2009) (finding in part that unlicensed provision of services amounting to practice of psychology were not enforceable in contract); *Talented IT, Inc. v. Data Grp., Inc.* No. L-10232-07, 2009 WL 3488465 (N.J. Super. Ct. App. Div. Oct 28, 2009); *Halpern v. Greene*, No. 108302/2008, 2009 WL 2972386 (N.Y. Sup. Ct. Sept. 15, 2009).

99. Often, these cases involve construction and compliance with permits and building codes. See, e.g., *White v. Cridlebaugh*, 100 Cal. Rptr. 3d 434 (Ct. App. 2009); *Mid-Ohio Mech., Inc. v. Eisenmann Corp.*, Nos. 07 CA 000035, 08 CA 00012, slip op. (Ohio Ct. App. Nov. 2, 2009) (involving unsuccessful challenge to contract using this flavor of the public policy defense where the court would not permit unknowing subcontractor to fall victim to general contractor’s failure to license).

100. *Halpern*, 2009 WL 2972386.

101. *Id.* at *1-3.

102. *Id.* at *3.

103. *Id.* at *2.

to get Greene into televised matches.¹⁰⁴ The managers also procured Greene a \$1000 per week contract for the boxer to spar with another boxer.¹⁰⁵ According to the pleadings, “[a]s a result of plaintiffs’ efforts, Greene . . . remained undefeated and rose quickly in the boxing community, which resulted in his ranking as one of the top ten boxers in the Middleweight Division.”¹⁰⁶

The agreement laid out a structure for how Greene would be compensated, and that the managers would receive one-third of the boxer’s income plus reimbursement for expenses relating to travel and training.¹⁰⁷ Ultimately, the promoters would invest \$225,000 in Greene’s career.¹⁰⁸

The defendants (Greene’s father was also a defendant)¹⁰⁹ challenged the management agreement on the basis that the plaintiffs were not licensed as promoters, managers, or matchmakers pursuant to the authority of the New York State Athletic Commission.¹¹⁰ The defendants also argued that “[e]ven if all proper licenses [were] secured, the regulations do not recognize any management contract between a boxer and a manager as valid, unless both parties appear at the same time before the Commission and receive its approval,”¹¹¹ pursuant to the New York state regulation on boxer-manager contracts.¹¹² Given that the managers failed to meet the requirements of this regulation, the court was left with no choice but to find the management services contract invalid. The court also noted:

The state regulation of boxing parallel[ed] the federal legislation encapsulated in the Professional Boxing Safety Act, . . . [which] emphasize[d] the importance of state regulation of boxing to safeguard “the welfare of professional boxers and serve the public interest.” Both the state and federal regulation of boxing was adopted not as revenue generating measures, but solely for the purpose of uprooting entrenched repeated occurrences of disreputable, coercive and abusive business practices in the boxing industry.¹¹³

Taken altogether, the court refused to enforce the management agreement in contract because it ran against the public policy of

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at *1 n.1.

108. *Id.* at *2.

109. After his son started to enjoy some success under the direction of the plaintiffs, the father began to insert himself as a manager. *Id.*

110. *Id.* at *3.

111. *Id.* at *4.

112. N.Y. COMP. CODES R. & REGS. tit. 19, § 208.5 (2012) (“A contract is not valid between manager and boxer unless both parties appear at the same time before the commission and receive its approval unless otherwise directed or authorized by the commission. A copy of all boxer-manager contracts must be filed with the commission for approval.”).

113. *Halpern*, 2009 WL 2972386.

New York and the United States as expressed through a state and federal statute and regulation. Despite this clarity of result on the challenge to the contract, however, the court welcomed an alternative argument in quasi-contract.¹¹⁴

Ultimately, the *Halpern* court would not permit the boxer to use the public policy defense as the proverbial sword rather than a shield.¹¹⁵ The court refused to dismiss the managers' claim for unjust enrichment, leaving open the possibility for the managers to recoup "direct financial contributions which are separate and apart from any earnings Greene . . . may have made."¹¹⁶ Drawing from New York case law, the court noted that "fee forfeitures are disfavored and that such forfeitures are perhaps particularly inappropriate when other regulatory sanctions exist for noncompliance."¹¹⁷

In sum, the court refused to enforce an agreement that directly contravened a statutory/regulatory scheme. But the *Halpern* court was nonetheless willing to entertain a claim outside of contract that would soften the justice of the result. As I explain, courts, however, are not generally this forgiving to those who form agreements that similarly run contra to a statute involving a licensing requirement.

(b) *Ron Medlin Construction v. Harris*

In *Ron Medlin Construction v. Harris*, the Court of Appeals of North Carolina decided a construction case involving, at its essence, an agreement between a general contractor and two individuals for whom the contractor had built a home.¹¹⁸ At the time the parties entered into the agreement, the plaintiff contractor was unlicensed.¹¹⁹ After completion of the construction of a home valued at \$1,300,000—and after payments from the defendants to the plaintiff of \$725,000, a dispute arose over the remaining balance owed to the contractor-plaintiff. The defendants successfully maintained that they did not owe any additional money in contract because the contractor was unlicensed.¹²⁰

This court, however, in contrast to the *Halpern* court in New York, would not permit the contractor to pursue a separate cause of action from the once unlicensed contractor based on implied contract or *quantum meruit*. This court characterized the agreement at issue¹²¹

114. *Id.* at *6-7.

115. *Id.* at *7.

116. *Id.*

117. *Id.* at *5 (citing *Benjamin v. Koepfel*, 85 N.Y.2d 549, 553 (N.Y. 1995)).

118. *Ron Medlin Constr. v. Harris*, 681 S.E.2d 807 (N.C. Ct. App. 2009).

119. *Id.* at 808.

120. *Id.* at 810-11.

121. As one might expect with construction disputes, the case involved a set of agreements and relationships between multiple subcontractors, the individual general contrac-

as an “express contract”¹²² between the general contractor and the defendants.¹²³ The *Ron Medlin Construction* court held that because the subject matter of the express agreement was essentially the same as the subject matter of the *quantum meruit* claim,¹²⁴ the latter claim was equally invalid.¹²⁵

The court looked toward a North Carolina Supreme Court decision, *Brady v. Fulghum*,¹²⁶ for a rationale for prohibiting recovery in any form for unlicensed contractors on public policy grounds. The *Brady* court explained, with citations to Corbin’s treatise:

[W]hen a legislature invokes its police power to provide statutory protection to the public from fraud, incompetence, and irresponsibility, as ours has done with the contractor licensing statutes, courts impose greater penalties on violators. Making contracts unenforceable by the violating contractor produces “a salutary effect in causing obedience to the licensing statute.” These public policy considerations militate against permitting unlicensed general construction contractors to enforce their contracts. Denying the contractor the right to enforce his contract effectuates the statutory purpose and legislative intent of providing the public with optimum protection.¹²⁷

The *Ron Medlin Construction* court took a completely different turn than the *Halpern* court on the *quantum meruit* question. The court saw no sense in allowing the plaintiffs to achieve through *quantum meruit* what they could not achieve through a contract that violated public policy—it would frustrate the same policy interests.¹²⁸

This result stands apart from the *Halpern* court’s desire to avoid a forfeiture, though a distinction could be made on the basis that contractor licensing goes much more toward the essence of a safety policy. The *Ron Medlin Construction* court acknowledges the drastic implications of the outcome of this case: “If this result seems harsh, our

tor, and his intertwining partnerships. This summary boils down the facts to the essence of the public policy dispute.

122. The description of this arrangement as a “contract” again runs contrary to the language of RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981): “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” In this instance, the court afforded no remedy, even if there was a breach.

123. *Ron Medlin Constr.*, 681 S.E.2d at 810.

124. The court so held even though the party making the claim was Ron Medlin Construction, not George Ronald Medlin, individually. George Ronald Medlin was unlicensed when he entered into the agreement and the court was not willing to allow him to evade the licensing issue by transferring the agreement to Ron Medlin Construction. *Id.* at 810-11.

125. *Id.*

126. 308 S.E.2d 327 (N.C. 1983).

127. *Ron Medlin Constr.*, 681 S.E.2d at 810 (citations omitted) (citing *Brady*, 308 S.E.2d at 331).

128. *Id.* at 811.

Supreme Court in *Brady* has already observed: ‘If, by virtue of these rules, harsh results fall upon unlicensed contractors who violate our statutes, the contractors themselves bear both the responsibility and the blame.’”¹²⁹ The North Carolina courts viewed this harsh result as necessary for perpetuation of the regulatory scheme and for protecting the public.

Although there seems to be “ruliness” within this category in terms of declining to enforce contracts that run against licensure, as reported in section 181 of the *Restatement (Second) of Contracts*, how “ruly” are the actual results when factoring in other avenues for recovery? Are plaintiffs frequently permitted by courts to make end-runs that permit *quantum meruit*?

Though I do not have a sample size to make an absolute conclusion, a few states apparently take different postures toward contracts with unlicensed contractors, notably California, which provides not just a shield from enforcement of a contract by unlicensed contractors, but also a statutory sword that enables service recipients to disgorge any money conveyed to unlicensed contractors.¹³⁰ The *Halpern* case enabled the unlicensed parties to recover in quasi-contract, but in the eight other cases where a public policy defense succeeded because the court found that a party ran afoul of licensure,¹³¹ no recovery outside of contract was permitted.¹³² This would offer support for a hypothesis that the defense proves especially effective in this context.

(c) *Baltimore Street Builders v. Stewart*

The public policy defense can occasionally have the harsh effect of shutting out the unlicensed provider from any recovery. In *Baltimore*

129. *Id.* (citing *Brady*, 308 S.E.2d at 332).

130. *See Davis Moreno Constr., Inc. v. Frontier Steel Bldgs. Corp.*, No. CV-F-08-854 OWW/SMS, 2009 WL 1476990, at *20 (E.D. Cal. May 26, 2009) (comparing California’s approach (allowing for disgorgement of moneys from unlicensed contractors) with Colorado’s approach (absence of state-level licensing requirements and no allowance for disgorgement)); *White v. Cridlebaugh*, 100 Cal. Rptr. 3d 434, 442-44 (2009) (citing CAL. BUS. & PROF. CODE § 7031(a) (West 2009) (“[N]o person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required.”)) (demonstrating application of the shield).

131. *See Davis Moreno Constr., Inc.*, 2010 WL 4513388; *KLW Enters. v. W. Ala. Commercial Indus.*, 31 So.3d 136 (Ala. Civ. App. 2009); *Mousa v. Saba*, 218 P.3d 1038 (Ariz. Ct. App. 2009); *White*, 100 Cal. Rptr. 3d at 434; *Balt. St. Builders v. Stewart*, 975 A.2d 271 (Md. Ct. Spec. App. 2009); *Webb, ex rel. Webb v. Clark Cnty. Sch. Dist.*, 218 P.3d 1239 (Nev. 2009); *Talented IT, Inc. v. Data Group, Inc.*, 2009 WL 3488465 (N.J. Super. Ct. App. Div. Oct. 28, 2009); *Ron Medlin Constr.*, 681 S.E.2d 807.

132. In *Mousa v. Saba*, unjust enrichment was forbidden for services relating to the licensed activity of real estate brokerage, but the court left open a possibility for recovery in unjust enrichment for other services. *See Mousa*, 218 P.3d at 1043.

Street Builders v. Stewart,¹³³ nearly half of the balance that would have been due to the unlicensed contractor was left unpaid. The *Baltimore Street Builders* court explained the justification for the harsh result by ultimately appealing to section 598 of the *Restatement (First) of Contracts*, comment a: “The court’s refusal [to enforce the agreement] is not for the sake of the defendant, but because it will not aid such a plaintiff.”¹³⁴ Explaining the logic for not permitting any recovery in quasi-contract, “‘the contention that there is unjust enrichment of the defendants [is un]tenable. To permit a recovery on a *quantum meruit* would defeat and nullify the statute.’”¹³⁵

This corner of the public policy defense seems to be well-ordered, even within the more measured context of defenses that are based on a statute or regulation. As I describe next, the justifying theme of *Baltimore Street Builders*, namely that courts refrain from enforcement of an illegal contract regardless of the equities, echoes in other applications of the defense beyond the licensing cases. Courts do not want to reward any parties that enter them, they wish to deter unlawful behavior, and they simply recoil from using power to enforce something impure.

2. Criminal Agreements

The purest form of a public policy defense case would be one where a court refuses to enforce a contract because it promotes the violation of a criminal statute. Pure versions of this phenomenon are difficult to find for good reason. A “contract killer” would need to muster a certain amount of nerve to collect an unpaid bill for a murder he successfully committed, using the public courts as the mechanism. I did identify several cases that did involve contracts that brushed up against public interests expressed through criminal statutes. Though there is no significant difference between the outcome of these cases and other cases within the agreements that “run contrary to statutes and regulations” category, they are prominent enough to examine. Note that the term “illegal contract” is often used broadly¹³⁶—here, we are specifically focused on the use of the public policy defense in the context of a criminal statute.

133. 975 A.2d 271.

134. *Id.* at 278 (quoting *Thorpe v. Carte*, 250 A.2d 618, 622 (Md. 1969)).

135. *Id.* (quoting *Harry Berenter, Inc. v. Berman*, 265 A.2d 759, 763 (Md. 1970)).

136. For example, the court in *Lindmark v. Heuer*, No. B205788, 2009 WL 3355098 (Cal. App. Ct. Nov. 3, 2009), used the term “illegal contract,” but the alleged “illegal” act runs afoul of the California State Bar Rules of Professional Conduct, not a statute—or even a criminal statute. Note that though the *Restatement (First) of Contracts* (see, e.g., §§ 580, 597, 598) uses illegality in its headers, the drafters of the *Restatement (Second) of Contracts* do not. See PERILLO, *supra* note 4, § 22.1. The language often continues to slip between illegality and some form of violation of public policy. Calamari & Perillo use the title “Illegal Bargains” but appear to use it synonymously with other commentators’ approach to

Out of the forty-nine opinions involving contractual contravention of a statute or regulation, seven could be deemed to involve criminal statutes in some way, directly or indirectly.¹³⁷ Within these seven criminal contracts cases, four agreements were successfully attacked. Though this presents a small sample, a description of a few of the successful defenses sheds light on what happens in this zone.

(a) *Kardoh v. United States*

One of the oddest factual situations involving a criminal statute was taken to the Ninth Circuit Court of Appeals in *Kardoh v. United States*.¹³⁸ Syrian national Abdul Masih Kardoh found himself caught in a federal sting operation. He paid \$40,000 to an undercover agent in exchange for alien registration cards for people who were not permitted to enter the United States.¹³⁹ Kardoh was deported but never prosecuted.¹⁴⁰ Despite admitting to the undercover agent that he knew what he was doing was illegal,¹⁴¹ Kardoh demanded his money back from the government.¹⁴² The district court agreed with Kardoh that he was entitled to the return of his property under F.R.C.P. 41(g).¹⁴³ On appeal, the government successfully argued that the underlying contract was illegal and that Kardoh should not be able to get his money back—in spite of the fact that he had not been convicted of any crime.¹⁴⁴

The Ninth Circuit, drawing upon an *in pari delicto* rationale, determined that the government should keep the \$40,000.¹⁴⁵ Quoting *United States v. Farrell*,¹⁴⁶ the court noted:

It has long been the settled rule that property delivered under an illegal contract cannot be recovered back by any party *in pari delicto*. The general rule, in its full Latin glory, is “*in pari delicto potior est conditio defendentis*,” or “[i]n case

the public policy defense. *Id.* at § 22. The language tends to be slippery, but the intended meaning with respect to the defense appears similar with either set of words.

137. Because of the overlapping nature of the issues in these cases (for example, insurance coverage relating to criminal acts), some of these “criminal” illegal contracts can also be categorized elsewhere.

138. 572 F.3d 697 (2009).

139. *Id.* at 698.

140. *Id.*

141. *Id.* at 699.

142. *Id.* at 698.

143. *Id.* at 699-700. Rule 41(g) provides that “[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return.” *Id.* at 699 n.1.

144. *Id.* at 700.

145. *Id.* at 698.

146. 606 F.2d 1341 (D.C. Cir. 1979).

of equal fault the condition of the party defending is the better one."¹⁴⁷

In essence, the court held that in a case like this, the court was not going to intervene to shift money or property around: "[I]t is contrary to public policy to permit the courts to be used by the wrongdoer [] to obtain the property he voluntarily surrendered as part of his attempt to violate the law."¹⁴⁸ One scholar described this as the "pure fountain" justification for the public policy defense.¹⁴⁹ Put simply, the court does not want to enforce sordid bargains, and this notion seems to permeate all of these cases.

The *Kardoh* court noted that the *in pari delicto* approach was originally used to prevent funds used to bribe public officials to be returned to the briber,¹⁵⁰ and was later applied to illegal transactions like buys of controlled substances from undercover officers before statutes existed to specifically provide for a forfeiture.¹⁵¹ I categorize the *Kardoh* case as a criminal statutory case because, ultimately, the public policy question focuses on preserving the interest that the criminal statute was advancing. Even though there was an absence of statutory law on the direct point of the forfeiture, the nature of the transaction and its relationship to criminal illegality was the focus of the court.

Of note here is that even in a seemingly simple case, courts look closely to see where property should ultimately lie—and implicitly consider whether a public court should be used as an instrument to order the movement of property in these circumstances.¹⁵² Ultimately, defenses to contract often force courts to consider the wisdom of using their public coercive power to move property around. Where the subject matter is "illegal," courts seem less inclined to sul-
ly their prestige.¹⁵³

147. *Kardoh*, 572 F.3d at 700 (quoting *id.* at 1348 & n.21) (internal quotation marks and citations omitted). One can see how this maxim also implicitly applied to the licensing cases.

148. *Id.* at 701 (quoting *Farrell*, 606 F.2d at 1350).

149. See Shand, *supra* note 3, at 148-57.

150. *Kardoh*, 572 F.3d at 700.

151. *Id.* at 701.

152. See, e.g., *id.* at 699-701. This is consistent with the United States Supreme Court's summary of these basic principles in *Gibbs & Sterrett Mfg. Co. v. Brucker*, 111 U.S. 597, 601 (1884) ("The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction.").

153. See *A Law and Economics Look*, *supra* note 18, at 1449 ("As Lord Chief Justice Wilmut wrote in *Collins v. Blantern*, 95 Eng. Rep. 847, 852 (K.B.1767), 'no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, . . . you shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back.'").

(b) Lucky Jack's Entertainment Center v. Jopat Building Corp.

Among true private parties (as opposed to contracts between undercover agents and their dupes), the underlying purpose of a contract might support an illegal activity, giving a court justification for invalidation on public policy grounds.¹⁵⁴ In *Lucky Jack's Entertainment Center v. Jopat Building Corp.*,¹⁵⁵ an Alabama Supreme Court opinion, the contract involved a shopping center store lease. Lucky Jack's Entertainment Center agreed in the lease that "[t]he Premises shall be used and occupied for the purpose of operating a video sweepstakes center and for no other purpose without the prior written consent of Lessor."¹⁵⁶ While the lease agreement was negotiated, the parties were aware that in other pending litigation in Alabama, the legality of video-sweepstakes enterprises was being challenged. The parties proceeded to execute the lease anyway, with the "hope" that the operation of video sweepstakes centers would be found lawful.¹⁵⁷ Several months into the lease, the Alabama Supreme Court ruled that these operations were indeed unlawful, pursuant to a statute already on the books.¹⁵⁸ Almost immediately after this ruling, Lucky Jack's vacated the premises. At issue between the parties was the enforceability of the early termination provision of the lease, which, if enforceable, would have been extremely expensive for Lucky Jack's.¹⁵⁹

The *Lucky Jack's* court ultimately approached the problem in a similar manner to that of the *Kardoh* court, applying *in pari delicto* principles, though not expressly. Citing a similar case¹⁶⁰ where operation of a lease would have "furthered an unlawful restraint of trade,"¹⁶¹ the court emphasized that "it is a sound principle that when premises are leased for the *express* purpose of enabling the lessee to accomplish an unlawful purpose, the agreement is void and there can be no recovery at the suit of either party against the other."¹⁶² The lessee was not compelled to adhere to the termination clause

154. Under the law-and-economics taxonomy, this case might fit well into the bucket of contracts to "commit legal acts that themselves facilitate acts against public policy." *Id.* at 1449.

155. *Lucky Jack's Entm't. Ctr. v. Jopat Bldg. Corp.*, 32 So. 3d 565 (Ala. 2009).

156. *Id.* at 566 (emphasis omitted).

157. *Id.* at 566-67.

158. *Id.* at 567. See ALA. CODE § 13A-12-27 (1975); *Barber v. Jefferson Cnty. Racing Ass'n*, 960 So.2d 599 (Ala. 2006).

159. *Lucky Jack's Entm't Ctr.*, 32 So. 3d at 567. Lucky Jack's had only been operating the business since September 2006 and the Alabama Supreme Court delivered its ruling on December 1, 2006. The termination provision provided "Lessee may terminate the Lease at any time after twelve (12) full months of paying rent, provided Lessee gives Lessor ninety (90) days advance written notice and paid a sum equal to four (4) months of the then monthly rent with the termination notice." *Id.*

160. *Id.* at 569 (citing *Ex parte Rice*, 61 So.2d 7 (Ala. 1952)).

161. *Id.*

162. *Id.* (citing *Rice*, 61 So. 2d at 9).

despite the fact that the purpose of the lease was legal at the time of its formation.¹⁶³

(c) *Neve v. Davis*

The South Dakota Supreme Court permitted a substantial forfeiture in *Neve v. Davis*.¹⁶⁴ “Neve and Davis frequently gambled with each other” at the Elks Club in Sioux Falls, South Dakota. From Neve’s account, on one night in December 1992, Neve lost \$1500 to Davis and was unable to pay him.¹⁶⁵ Neve had a litany of other financial problems, including taxes overdue to the Internal Revenue Service.¹⁶⁶

To help Neve meet all of his debts, Davis loaned him \$2500 in short order and the parties executed a promissory note for that amount. Neve’s continued financial distress led Davis to refer Neve to a bankruptcy attorney.¹⁶⁷ After the attorney had reviewed Neve’s finances, Davis loaned Neve an additional \$30,000.¹⁶⁸ Neve maintained that this \$30,000 amount “included repayment of the \$1,500 gambling debt.”¹⁶⁹ Davis put the \$30,000 in a trust account at the bankruptcy attorney’s law firm and made arrangements for a \$33,000 promissory note to be executed.¹⁷⁰ The amount reflected the \$30,000, “plus \$3,000 representing a renewal of the \$2,500 note from December, 1992 and \$500 in interest.”¹⁷¹ Neve later maintained at trial that Davis cautioned him not to tell the attorney “that the proceeds of the note ‘were going to be used to pay off’ the gambling debt.”¹⁷² The lawyer managed the disbursements of the proceeds of the \$30,000 in the trust account.¹⁷³ Neve testified that \$1500 from a \$4000 check from the account was applied to pay down “his gambling debt to Davis.”¹⁷⁴

Well over a decade later, Neve sought to have the promissory note declared void, citing section 53-9-2 of South Dakota Codified Laws, which provides that promissory notes given in consideration of gambling debts are void.¹⁷⁵ The balance due on the note was significant.

163. *Id.* at 569-70; *see Rice*, 61 So. 2d at 8-9.

164. 775 N.W.2d 80 (S.D. 2009).

165. *Id.* at 81.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 81-82.

170. *Id.* at 82.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* Though a criminal statute is not being cited here, I note that this statute is proximate to criminal statutes about illegal gambling. *See* S.D. CODIFIED LAWS § 22-25-1 (1998) (“Any person who engages in gambling in any form with cards, dice, or other imple-

Netting out payments made and including interest accrued, Davis counterclaimed against Neve for over \$80,000.¹⁷⁶

The Court noted that for over a century, “the [South Dakota] [l]egislature has provided that if *any part of the consideration* for a note is for the repayment of money lost in gambling, the entire note is absolutely void,”¹⁷⁷ and proceeded to declare the entirety of the \$80,000 note void. As the statute dictates:

Any note, bond, or other contract made and entered into, *where the whole or any part of the consideration thereof shall be for money or other valuable thing, won or lost, laid, staked, or betted at or upon any game of any kind, under any name or by any means; or for the repayment of money or other thing of value, lent or advanced, at the time and for the purpose of any game, play, bet, or wager, or being laid, staked, betted, or wagered thereon shall be absolutely void.*¹⁷⁸

Relying upon this statute, South Dakota courts have “consistently voided such promissory notes.”¹⁷⁹ The dissent maintained that the connection between the gambling debt and the promissory note was too “attenuated” and that “[i]t would be unfair and contrary to the law to allow Neve to void his debt.”¹⁸⁰ The majority, however, found the statute to be on point and viewed the facts to support the connection between the gambling debt and the note. The Court recognized that this statute would yield “harsh results in cases where only part of the consideration was for gambling, [and that] well established law [did] not support the circuit court’s semantical distinction permitting parties to do indirectly what the Legislature has expressly prohibited.”¹⁸¹

This language should ring familiar. Just as in the licensure cases, where courts would tend not to permit unlicensed contractors to collect in quasi-contract when a contract was voided, in these criminal-flavored cases, courts seek to avoid frustration of the purposes of the underlying public policy. In *Neve*, as elsewhere, the court, upon finding that the contract (promissory note) ran afoul of statute and public policy, refrained from enforcing the tainted agreement. The court will not compel the debtor to honor the debt. Here, the lender lost recovery on a large promissory note because it was *partially* tainted with an unlawful activity. The windfall accrues to the debtor, *perhaps* unjustly on an instant basis, but the ruling preserves the interests of

ments or devices of any kind wherein anything valuable is wagered upon the outcome . . . is guilty of a . . . misdemeanor.”).

176. *Neve*, 775 N.W.2d at 82.

177. *Id.* at 83.

178. *Id.* at 83-84 (underlined emphasis added) (citing S.D. CODIFIED LAWS § 53-9-2 (1990) (emphasis added)).

179. *Id.* at 84.

180. *Id.* at 89 (Meierhenry, J., dissenting).

181. *Id.* at 86 (majority opinion).

the public, through deterrence of entry into unlawful bargains,¹⁸² for example. One is again reminded that the courts' rulings in these cases are not meant to reward parties like Neve. In the spirit of section 598 of the *Restatement (First) of Contracts*, comment a, these cases are not about rewarding a given party—they are about declining to aid any party through enforcement of an illegal bargain.

The common result running through these cases is that the courts seem to leave the parties where they stood prior to the litigation.

3. *Agreements That Limit or Shift Liability*

The remaining largest segments of cases in the contravention of statutes or regulations involve indemnification, exculpatory clauses, and general agreements to shift or limit liability. The number of cases—they constitute about twenty-nine percent of *all* of the public policy cases in my sample—justifies a separate exploration of the content of the category. Though statistically the sample size is small, it appears that the defense is twice as successful within the “direct contravention” category than it is in the “general public policy” category, mirroring the larger sample. This category of cases has proven troublesome for some to analyze, but I offer a few illustrations here of where the defense presents a statutory conflict. Where a statute speaks, as demonstrated in the other cases, a court's analytical task becomes much less burdensome. Again, I describe the successful instances of public policy defense because the judicial process is more explicit.

(a) *Dubey v. Public Storage, Inc.*

In the Illinois appellate case, *Dubey v. Public Storage, Inc.*,¹⁸³ the public policy defense issue involved an exculpatory clause.¹⁸⁴ The plaintiff sought damages from a storage-unit rental company for loss of her property.¹⁸⁵ Dubey entered into a rental agreement with Metropublic for a storage unit.¹⁸⁶ The rental agreement contained clauses¹⁸⁷ that stated that Metropublic's total liability for any loss of Dubey's property would be limited to \$5000.¹⁸⁸

182. See generally Kostritsky, *supra* note 17.

183. *Dubey v. Public Storage, Inc.*, 918 N.E.2d 265 (Ill. App. Ct. 2009).

184. *Id.* at 274.

185. *Id.* at 271.

186. *Id.*

187. The clauses at issue stated:

3. USE OF PREMISES AND PROPERTY AND COMPLIANCE WITH LAW.

Occupant shall store only personal property that belongs to Occupant. Because the value of the personal property may be difficult or impossible to ascertain, Occupant agrees that under no circumstances will the aggregate value of all

After a series of misunderstandings and blunders, the defendant ultimately auctioned off Dubey's property for \$99,145 pursuant to the defendant's interpretation of other clauses in the lease and the Illinois statutes.¹⁸⁹

At trial, the jury found the defendant liable on a number of counts, returning \$5000 verdicts for both breach of contract and conversion, plus \$745,000 in punitive damages for the conversion count.¹⁹⁰ From the bench, the trial court tried the count that alleged a violation of the Illinois Consumer Fraud Act, awarding \$69,145 in compensatory damages and \$207,435 in punitive damages, in addition to \$185,849 in costs and attorney fees.¹⁹¹

On appeal, Metropublic argued that in awarding damages in excess of \$5000, the court improperly ignored the contract's limitation of liability clause. At trial, Dubey successfully contended that despite the fact that the rental agreement was for a storage unit and not a residential lease, the contract constituted a lease that was covered under the Illinois Landlord and Tenant Act.¹⁹² This distinction mattered because the Landlord and Tenant Act looked unfavorably upon liability-limitation clauses. The appellate court upheld the trial court's finding that the Landlord and Tenant Act invalidated the \$5000 damages limitation provision. When the parties entered into a rental agreement, the Landlord and Tenant Act stated:

[E]very covenant, agreement or understanding in or in connection with . . . any lease of real property, exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, . . . in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.¹⁹³

personal property stored in the Premises exceed, or be deemed to exceed, \$5,000 and may be worth substantially less than \$5,000.

5. LIMITATION OF OWNER'S LIABILITY; INDEMNITY. Occupant shall indemnify, defend, and hold Owner and Owner's Agents harmless from and Loss incurred by Owner or Owner's Agents in any way arising out of Occupant's use of the Premises or the Property. Occupant agrees that Owner's and Owner's Agents' total responsibility for any Loss from any cause will not exceed a total of \$5,000.

Id.

188. *Id.*

189. *Id.* at 273. For an illustration of what this process probably looked like, see the television series *Storage Wars* (A&E Television).

190. See *Dubey*, 918 N.E.2d at 273.

191. *Id.*

192. 765 ILL. COMP. STAT. 705/0.01 (West 1998); see *Dubey*, N.E.2d at 275.

193. 765 ILL. COMP. STAT. 705/0.01 (West 1998); see *Dubey*, N.E.2d at 275.

The statute proved dispositive in determining that the exculpatory clause would not be enforced on public policy grounds, because the “legislative directive [was] to the contrary.”¹⁹⁴ The statute helped the plaintiff immensely because “[c]ontractual limitations are generally held valid in Illinois, unless it would be against the settled public policy of the state to do so,”¹⁹⁵ as it was there.

Interestingly, the case law did leave the door open for other public policy challenges to the contractual limitations outside of settled policy, noting that such a clause could be voided if “there is something in the social relationship between the parties militating against upholding the agreement.”¹⁹⁶ In Part IV.B., I return to the damage-limitation cases to describe a few of the successful “broad appeals to public policy.”

(b) *Hubner v. Spring Valley Equestrian Center.*

The next damage-limitation case involved an *actual* “unruly” horse, one that injured the plaintiff. *Hubner v. Spring Valley Equestrian Center*¹⁹⁷ addressed a familiar type of exculpatory clause, a clause that shifts liability for personal injury related to use of a product, service, or property onto a consumer. Hubner entered into an agreement with Spring Valley Equestrian Center where the Center would provide horses for her to ride on Equestrian Center property under the guidance of an employee.¹⁹⁸ Before she mounted a horse, Hubner “signed a rental agreement and a release discharging Spring Valley of its liability for any injury she might sustain due to the ordinary negligence of Spring Valley or its agents in relation to its ‘premises and operations.’”¹⁹⁹

Through a grimly described series of events that may have been the result of “Spring Valley’s negligence in equipping and using its

194. *Dubey*, 918 N.E.2d at 276.

195. *Id.*

196. *Id.* (citing *First Fin. Ins. Co. v. Purolator Sec., Inc.*, 388 N.E.2d 17, 20 (Ill. App. Ct. 1979)).

197. *Hubner v. Spring Valley Equestrian Ctr.*, 975 A.2d 992 (N.J. Super. Ct. App. Div. 2009), *rev’d*, 203 N.J. 184 (2010). As established *supra* Part III, the analysis in this Article has no stake in subsequent results, such as reversal. This analysis consistently focuses on the run of decisions during this period in 2009. Therefore, the intermediate appellate court’s reasoning remains relevant for my purposes.

198. *Id.* at 994.

199. *Id.* “The release agreement provided: ‘In consideration of THIS STABLE allowing my participation in this activity, . . . I, the rider . . . do agree to hold harmless, release, and discharge THIS STABLE, its owners, agents, employees . . . and others acting on its behalf . . . of and from all claims, demands, causes of action and legal liability . . . due to THIS STABLE’S . . . ordinary negligence; and I do further agree that except in the event of THIS STABLE’S gross negligence and willful and wanton misconduct, I shall not bring any claims, demands, legal actions and causes of action, against THIS STABLE . . . for any economic and non-economic losses due to bodily injury, death, property damage, sustained by me . . . in relation to the premises and operations of THIS STABLE.’” *Id.* at 997-98.

barn,”²⁰⁰ Hubner was thrown from her horse before even leaving the stable. The horse fell on top of the plaintiff, rolling over her. Hubner suffered fractures and other injuries.²⁰¹

Spring Valley maintained that the exculpatory clause shielded it from liability. Hubner argued that the clause was unenforceable on public policy grounds. Just as in *Dubey*, the state legislature had spoken to this specific problem directly, though not through a traditional statute *per se*. In New Jersey, the legislature had passed a finding and declaration of the public policy of the state regarding “equine animal activities” and risk allocation between operators like Spring Valley and consumers like Hubner.²⁰² The legislature also detailed some exceptions from this general declaration of public policy, including exceptions to the “limitations on liability for operators.”²⁰³

The court, in considering the legislative stance, noted that the “inherent risks” assumed by a participant “[did] not include every danger on a training track or in a riding ring.”²⁰⁴ The court ultimately focused on whether the exculpatory provision was unenforceable because the plaintiff’s injuries were caused by “Spring Valley’s use of faulty equipment or its acts or omissions ‘constitut[ing] negligent disregard for [her] safety.’”²⁰⁵ The court viewed that the facts were sufficiently alleged to support a claim that Spring Valley knew that the

200. *Id.* at 995.

201. *Id.* at 994-95.

202. *Id.* at 994. This specific proclamation of public policy is worth examination:

The Legislature finds and declares that equine animal activities are practiced by a large number of citizens of this State; that equine animal activities attract large numbers of nonresidents to the State; that those activities significantly contribute to the economy of this State; and that horse farms are a major land use which preserves open space.

The Legislature further finds and declares that equine animal activities involve risks that are essentially impractical or impossible for the operator to eliminate; and that those risks must be borne by those who engage in those activities.

The Legislature therefore determines that *the allocation of the risks and costs of equine animal activities is an important matter of public policy* and it is appropriate to state in law those risks that the participant voluntarily assumes for which there can be no recovery. (emphasis added).

N.J. STAT. ANN. § 5:15-1 (West 1998).

203. See *Hubner*, 975 A.2d at 995 (citing N.J. STAT. ANN. § 5:15-9 (West 1998)). Among them:

(a) *Knowingly providing equipment or tack that is faulty to the extent that it causes or contributes to injury . . .* (d) *An act or omission on the part of the operator that constitutes negligent disregard for the participant’s safety, which act or omission causes the injury . . .* (emphasis added).

N.J. STAT. ANN. § 5:15-9 (West 1998).

204. See *Hubner*, 975 A.2d at 996 (citing N.J. STAT. ANN. § 5:15-3 (West 1998)).

205. *Id.* at 998 (first alteration in original).

equipment it provided to Hubner was faulty and negligently placed in an improper position.²⁰⁶ These factors, taken together, satisfied the legislature's explicit exceptions to exculpatory clause enforceability.²⁰⁷

For these reasons and others, the court refused to affirm the trial court's summary judgment ruling in favor of Spring Valley.²⁰⁸ The general policy approach in New Jersey toward exculpatory agreements stands in contrast to that of Illinois', as described in *Dubey*, where "contractual limitations are generally held valid."²⁰⁹ In New Jersey, "[e]xculpatory agreements have long been disfavored in the law because they encourage a lack of care. For that reason, courts closely scrutinize liability releases and invalidate them if they violate public policy"²¹⁰ In this instance, New Jersey went to some pains to describe the exception to this rule (and the exceptions to the exceptions) with respect to recreational activities.

These damage limitation cases strongly reflect the common law approaches followed by the individual jurisdictions—and at the risk of making an observation that may seem redundant, rely heavily on the jurisdiction's statutory regime. Though the presumptions about exculpatory provisions can lean one way or the other, the justification for escaping from the liability-shifting or limiting provision reflects how the legislature addressed the specific subject matter relating to the underlying activity.

4. Other Cases and Summary

The subject matter of the other public policy defense cases involving contravention of a statute and regulation span the gamut of commercial and human relations. The eighteen cases excluded from the categories of licensure, criminality, and limitation or shifting of liability constitute thirty-seven percent of the remainder. The subject matter of these cases broadly ranges from attorney ethics codes and attorney fee agreements,²¹¹ to securities,²¹² family law,²¹³ and assorted insurance matters,²¹⁴ among others.

206. *Id.* at 997.

207. *Id.* See N.J. STAT. ANN. § 5:15-9(a) & (d) (West 1998).

208. See *Hubner*, 975 A.2d at 999.

209. *Dubey v. Public Storage*, 918 N.E.2d 265, 276 (Ill. App. Ct. 2009).

210. See *Hubner*, 975 A.2d at 998 (quoting *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 386 (N.J. 2006)).

211. See, e.g., *Shafron & Kammer, LLP v. Krane & Smith*, No. B200392, 2009 WL 2152902 (Cal. Ct. App. July 21, 2009); *Sunglass Designs, Inc. v. Wild Style Sunglasses*, No. CV-08-1984-PHX-DGC, 2009 WL 2827953 (D. Ariz. Sept. 1, 2009).

212. See, e.g., *Frishman v. Maginn*, 912 N.E.2d 468 (Mass. App. Ct. 2009); see also *More Light Invs. v. Morgan Stanley DW Inc.*, No. CV 08-0580-PHX-MHM, 2009 WL 2382997 (D. Ariz. Aug. 4, 2009).

213. See, e.g., *Chenault v. Banks*, 296 S.W.3d 186 (Tex. App. 2009).

The public policy defense in these miscellaneous cases is successful fifty percent of the time, below that of the other categories within the direct-contravention cases when combined (sixty-five percent), but still substantially *above* that of the success rate of the defense in general public policy cases (thirty-one percent).

Put in the broadest terms, the public policy defense is more often successfully invoked and resolved in the most “ruly” manner when it is closely linked to a statute or promulgated regulation than when it is not. Occasionally, the public policy emerges directly from a statute, as in many of the licensing cases—and sometimes state legislatures expressly spell out public policy, as they did with respect to enforceability of exculpatory clauses.

As I move to explore the comparatively less successful public policy defense efforts that do not cite to a statute or regulation, but rather appeal more broadly, I do so with the hypothesis that this is where the descendants of the “unruly horse” that Judge Burrough described in 1821 now run wild.²¹⁵

B. Content of General Public Policy Cases

The public policy defense “horse” starts to buck a bit more in the set of cases that appeal more broadly toward a general violation of public policy rather than a statutory one. As noted, the success rate of the defense in this category appears to be half that experienced in the statutory/regulatory category of cases. Fewer bright patterns emerge in this category, as the cases tend not to cluster as tightly around subject matter or other dimensions, with the exception of agreements that limit or shift liability. No particular subsets of broader, nonstatutory public policy defense cases or subject matter seem to reflect differing levels of success.

This makes description of these cases somewhat more challenging, especially in light of the fact that sixty-nine percent of defenses brought in this category fail. It is much easier to describe the reasons and conditions for the defenses that succeed (the logic tends to be more explicit) than it is for defenses that fail. Nonetheless, I attempt to describe some distinct phenomena exhibited in both scenarios.

In examining the content of the broader public policy cases, I first look at the cluster of cases that fall under agreements that limit or shift liability, focusing on a few of the successful claims so that the reasoning can be examined more closely. Then, I examine a few other

214. See, e.g., *Abay v. DaimlerChrysler Ins. Co.*, No. 283624, 2009 WL 2477623 (Mich. Ct. App. 2009); *Nationwide Mut. Ins. Co. v. Garzone*, Nos. 07-4767, 08-3895, 2009 WL 2996468 (E.D. Pa. Sept. 17, 2009).

215. *Richardson v. Mellish*, (1824) 130 Eng. Rep. 294, 303; 2 Bing 229, 252 (Burrough J.).

successful claims in this “general public policy” category to see if a pattern can be discerned. Finally, I select a handful of cases that are difficult to aggregate within the “general public policy” defense category—the cases where the defense fails. A closer examination of the failed defenses in the “other” category is required,²¹⁶ even if firm conclusions cannot be drawn outside of the fact that the “other category” might contain the parties who are pursuing defenses that would prove highly unruly if accepted by courts.

In this category, one can hypothesize that if case law exists to support the public policy claim, the defense is more likely to be successful. This is why I have labeled those types of cases “somewhat ruly” and the remaining unsuccessful cases “unruly.”

Table 4
Broad Defenses that Contravene Limit/Shift Liability
Versus Other

Contravention of Broader Public Policy	Total Cases	“Successful” Cases	Success Rate
Agreements That Limit or Shift Liability	17	4	24%
Other	32	11	34%
Total	49	15	31%

1. Agreements that Limit or Shift Liability

As discussed in Part IV.A, exculpatory and indemnity clauses and other contractual limitations of liability comprise a significant number of cases where the public policy defense is invoked. In the limitation/shifting of liability cases, the defense succeeds roughly half as often in the “general category” as it does in the “contra statute/regulation” category. (This finding mirrors the overall set of cases.) Visiting the opinions that illustrate a successful public policy defense in the “general” category can inform an understanding of how these courts make decisions in the absence of a statute—and can inform the question of how “unruly” they are.

216. Within the general public policy category, twenty-three cases where the public policy defense failed fell into the “other” classification. This subset of cases constitutes just over twenty percent of the entire sample.

(a) *Tatman v. Space Coast Kennel Club, Inc.*

Tatman v. Space Coast Kennel Club, Inc., a Florida appellate case, presents a classic example of a successful general public policy challenge to an exculpatory clause.²¹⁷ The plaintiff, Tatman, entered her dog into a dog show operated by the Kennel Club and signed an entry form that contained the following language:

I certify that I am the owner of this dog and furthermore, I(we) certify and represent that the dog entered is not a hazard to persons or other dogs. I agree to not hold [Space Coast Kennel Club] or Brevard County Parks & Rec Dept. liable for any accident or injury.²¹⁸

On the day of the dog show, Tatman suffered injury when she was bitten in the ankle by a “100-pound, non-neutered male Akita.”²¹⁹ Though she had signed a form where she agreed to assume the risk for accident and injury, the court refused to enforce the exculpatory clause in favor of the Space Coast Kennel Club. Drawing upon Florida precedent, the court noted that “[t]hese clauses are by public policy disfavored in the law because they relieve one party of the obligation to use due care, [shifting] the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid injury and bear the risk of loss.”²²⁰ Tatman marshaled the facts to meet this judicially created standard, and she prevailed.²²¹

Importantly, the court sourced public policy in this case from *other courts*—essentially using previous opinions about public policy as legal precedent. No legislation or regulation was situated proximate to the reasoning. In the next case, *Vistein v. American Registry of Radiologic Technologists*, this method of using precedent also appears. After laying out the facts of *Vistein*, I highlight the problem that underlies this subcategory of “general” public policy cases.

(b) *Vistein v. American Registry of Radiologic Technologists*

In *Vistein*,²²² a radiologic technologist challenged the validity of a clause in a form contract indemnifying her profession’s private accrediting agency for any legal fees relating to her application or renewal of registration.²²³ After a dispute involving some alleged mis-

217. *Tatman v. Space Coast Kennel Club, Inc.*, 27 So.3d 108 (Fla. 5th DCA 2009).

218. *Id.* at 109.

219. *Id.* at 110.

220. *Id.* (citing *Loewe v. Seagate Homes, Inc.*, 987 So.2d 758, 760 (Fla. 5th DCA 2008) and *Cain v. Banka*, 932 So.2d 575, 578 (Fla. 5th DCA 2006)).

221. *Id.* at 111.

222. *Vistein v. Am. Registry of Radiologic Technologists*, 342 F. App’x 113 (6th Cir. 2009).

223. The clause in question:

deeds on the part of Vistein with respect to her registration, the accrediting agency attempted to collect \$150,000 in costs and attorney fees pursuant to the clause.²²⁴

On appeal, the Sixth Circuit considered Vistein's claims that the indemnity clause (which, in effect, is a clause intended by the accrediting agency to shift risk and liability related to litigation costs) was unenforceable.²²⁵ Vistein also argued that the clause should be invalidated on grounds of unconscionability.²²⁶ She separately contended that enforcement of such a clause would violate the public policy of the state of Ohio.²²⁷

In this case, the court looked to Ohio case law precedents and found that the clause, as applied to attorney fees, was enforceable. According to the court:

In *Scotts* [], we . . . recognized the long-standing rule in Ohio that "a stipulation by parties to a contract which permits attorney fees to be awarded as costs of collection upon default is void and against public policy," while acknowledging that several Ohio courts have carved out an exception where the parties have *specifically negotiated* the provision.²²⁸

In this instance, the attorney-fee component of the clause was not specifically negotiated—it was part of a boilerplate adhesion contract.²²⁹ The Sixth Circuit barred the accrediting agency from enforcing that portion of the clause and receiving indemnity for the fees because it would violate public policy to do so.²³⁰

I hereby waive and release, and shall indemnify and hold harmless, the [American Registry of Radiologic Technologists "ARRT"] . . . from, against, and with respect to any and all claims, losses, costs, expenses, damages, and judgments (including reasonable attorney's fees) that arise or are alleged to have arisen, from, out of, with respect to, or in connection with this application, . . . the failure of the ARRT to renew the registration of a certificate previously issued to me, or the ARRT's notification of legitimately interested persons of such actions taken by the ARRT.

Id. at 119.

224. *Id.* at 118.

225. *Id.* at 118-28.

226. The court rejected the argument that the clause met the criteria for procedural or substantive unconscionability and moved on to address the public policy question. *Id.* at 119-24. Unconscionability is a defense rooted in the transactional relationship and process between the two parties, as opposed to any public interest. The public policy defense—in contrast—seems to be more explicitly focused on the appropriateness of the use of a public court as a mechanism for enforcing a private contract, as the criminal agreement cases indicate, and on the impact on the public.

227. *Id.*

228. *Id.* at 124 (emphasis added) (citing *Scotts Co. v. Cent. Garden & Pet Co.*, 403 F.3d 781, 791 (6th Cir. 2005)).

229. *Id.*

230. *Id.* at 124-25.

Here, this general appeal to a public policy defense was presented much like any garden-variety, common law decision. Because Ohio law was developed in this area, the radiologic technologist had solid ground to plead on. The appeal may have been broad, but it was an appeal to established case law. Nonetheless, at its very root, the public policy declared in this instance was developed by the courts—not by the legislature.²³¹

When the public policy defense is raised, if a statute or regulation is not expressly involved, the source of the public policy could be anything. The approach to discerning public policy by a court could resemble a common law adjudicative approach, similar to the *Vistein* opinion, but it can be broader. A comprehensive census of the sources drawn upon for public policy could provide material for separate study. But an open invitation for a court to discern public policy could indeed become somewhat “unruly” if the sources are unconstrained.²³² In this case, the public policy was manufactured in previous opinions and then strengthened through further citation until the *Vistein* court applied it.

In the context of tort law, noted scholar and judge, Hans Linde, identified the trouble inherent in having judges apply public policy without a legislative source:

The decisive difference . . . is that legislation is legitimately political and judging is not. Unless a court can attribute public policy to a politically accountable source, it must resolve novel issues of liability within a matrix of statutes and tort principles without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function.²³³

Linde’s legitimacy problem emerges within this subset of “general” cases. The structural problem he identified almost certainly contributes to the “unruly horse” perception. Should the Ohio courts have spoken on this attorney fees indemnity question in *Vistein*, or should they have deferred to the legislature—or perhaps other rules regulating attorney fees? Similarly, should the Florida courts have spoken about public policy at all in evaluating this tort exculpatory clause in *Tatman*? A fundamental structural tension emerges between the legislative role in creating public policy and its political nature and the adjudicative role. In this context, I can only attempt briefly

231. Beginning, apparently, in this instance, with *Colonel’s Inc. v. Cincinnati Milacron Mktg.*, Nos. 96-1243, 96-1244, 1998 WL 321061 (6th Cir. June 1, 1998).

232. See McNeal, *supra* note 24, at 157-74 for a further complicating discussion of the different areas in private law where public policy questions are injected into judicial decisionmaking.

233. Hans A. Linde, *Courts and Torts: “Public Policy” Without Public Politics?* 28 VAL. U. L. REV. 821, 855 (1994). For a slightly more expansive view of the judicial role, see Gellhorn, *supra* note 21, at 695.

to describe this phenomenon, as it raises extremely complex jurisprudential issues.

On closer inspection, these “successful cases” appear to be at an intermediate level of ruliness (I call them “somewhat ruly”). The judges in the cases use the term “public policy” when perhaps they should be using the language of the common law. The words “public policy” take on a different meaning than the common law—a politically-charged meaning, as Linde observed. Though the results in these two cases from the sample (and the next two successful cases I discuss in Subsection 2 of this Part) rely on a series of precedents—the “public policy” language gives a misimpression that the courts are making a political call, rather than discerning common law in a traditional manner.

2. General/Broad Appeal Cases Where the Defense was Successful

Outside of the exculpatory cases, nine other cases in the broader sample of “general cases” exhibited a successful deployment of the public policy defense. Below, I provide two examples.

(a) Chappell v. Butterfield-Odin School District No. 836

Chappell v. Butterfield-Odin School District No. 836 involved a federal disability discrimination complaint brought by a school teacher against a school district.²³⁴ The contract at issue was the release signed by the teacher upon her resignation.²³⁵ In exchange for a brief extension of salary and benefits, the teacher agreed to end her employment and release all claims against the district.²³⁶ In addition to the salary and benefits, the district agreed to an additional commitment: “In return the district will not report you to the Board of Teaching in the state of Minnesota regarding the revocation of your teaching license.”²³⁷

Though the public policy defense was not dispositive in *Chappell*,²³⁸ the court rendered the release clause binding the school district from reporting a teacher to the Board of Teaching for misconduct unenforceable on public policy grounds.²³⁹ This finding—which could almost be classified as *dicta*, given the severability of the

234. *Chappell v. Butterfield-Oden Sch. Dist. No. 836*, 673 F. Supp. 2d 818, 819 (D. Minn. 2009).

235. *Id.* at 827.

236. *Id.* at 827-28.

237. *Id.*

238. In part, because even though the clause was unenforceable, the release contained a severability clause. *Id.* at 831-32.

239. *Id.*

clause—was made almost summarily.²⁴⁰ The court cited to a case for the broad proposition that “[a] contract violating law or public policy is void.”²⁴¹ The *Chappell* court noted that even the school district did not “seriously dispute” the public policy issue—that the school district could not agree to surrender its duty to report information to the Board of Teaching for the public good.²⁴²

Here, the analysis did not rely on a statute or a code. The logic of *Chappell* seemed to be that it was just entirely obvious that enforcement of such an agreement would violate public policy and injure the public good.²⁴³ Though this rationale may indeed appeal directly to common sense, this declaration of public policy was accompanied by little explanation.²⁴⁴ The Minnesota legislature or educational regulatory authorities could have fashioned an explicit and clear rule about misconduct reporting, but they never did.

The question remains: Would it have been more appropriate and orderly for a court facing this problem simply to point out that the legislature and regulators had not spoken to this question, inviting interested parties to change or create the law through the political process? Would such an approach bring more order and certainty and, if so, would it be worth sacrificing the judicial flexibility? Again, these questions are easier to raise than answer. Nonetheless, though this approach is not as ordered as one that relies on established politically created law, the use of precedent, even as attenuated as it was in *Chappell*, lends some small degree of order and legitimacy.

(b) *Cope v. Cope*

The public policy defense surfaces frequently in family law,²⁴⁵ as parties contract to rearrange financial commitments after a separation or divorce. *Cope v. Cope*,²⁴⁶ an Oklahoma appellate case, considered whether a parent’s agreement to waive child support is unenforceable on public policy grounds. In *Cope*, Mother had agreed to waive child support in exchange for Father’s surrender of his visita-

240. *Id.*

241. *Id.* (citing *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354, 356 (Minn. Ct. App. 1995)). Ironically, the case the court cited to support this proposition would fall into the category of a public policy defense involving violation of a code—not a general appeal to public policy. See *Barna*, 541 N.W.2d at 356. The code at issue was Minn. R. Prof. Conduct 1.5.

242. *Chappell*, 673 F. Supp. 2d at 831.

243. The plaintiff, who would have benefited from the protection of the clause, challenged it on its face to attempt to invalidate the entire release. This proved unsuccessful. *Id.* at 831-33.

244. One also wonders why this court felt the need to make this declaration of public policy when it was not required to do so to bring about a resolution of the broader issues.

245. See RESTATEMENT (SECOND) OF CONTRACTS §§ 189-191 (1981).

246. 231 P.3d 737 (Okla. Civ. App. 2009).

tion and contact rights.²⁴⁷ Several years passed, and Mother sought to invalidate that bargain as unlawful and receive back child support.²⁴⁸

In this instance, once again, no formal legislation or rule was directly invoked in conjunction with the public policy defense.²⁴⁹ Noting that “[t]he validity and legal effect of mutual agreements to waive child support have been litigated for a substantial number of years,”²⁵⁰ the court’s analysis focused on interpreting prior case law as if it were common law, comparing and contrasting the facts of the instant case to determine whether the agreement was enforceable.²⁵¹

Having determined rather summarily that the agreement was unenforceable on public policy grounds, the court ruled that Father, in theory, would be held responsible to pay child support in spite of his agreement with Mother.²⁵² In other words, the court discerned public policy. In the end, however, the court did not need to do so since it refused to find for Mother on grounds of equitable estoppel.²⁵³ Again, as appears typical in cases where statutes or regulations fail to speak directly to the public policy question in controversy, the court relied on other judicial constructions to discern the policy itself.

Of note in *Cope*, one judge waxed about why the agreement between Mother and Father *should have been* enforceable in a special concurrence. The concurrence is worth examining in more detail because the judge engages in policy advocacy, noting that nonenforcement would have the court actively promoting undesirable ends:

I . . . assert that the contract is enforceable. . . . Father did not pay child support, but at a cost of the irrevocable loss of the joy and love of his children in the bargain. Father can never recover these fleeting childhood moments, nor can they be recreated. Mother received the entire benefit of her contract with Father. Now, she wants that consideration which she relinquished, that is the unpaid child support for her children when they were minors, but who are now adults I note that if this Court were to deny enforcement of this contract . . . such would be tantamount to condoning deceit and fraud A denial would also ignore the loss Father has endured because he honored and performed the oral contract to his detriment.²⁵⁴

247. *Id.* at 738.

248. *Id.* at 739.

249. Brief reference was made to an Oklahoma Supreme Court decision regarding support modification in the context of a related statute, OKLA. STAT. tit. 43, § 112(A)(3) (West 2008). *Id.* at 740 (citing *Hedges v. Hedges*, 66 P.3d 364 (Okla. 2002)).

250. *Id.* at 739.

251. *Id.* at 739-40.

252. *Id.* at 740.

253. *Id.*

254. *Id.* at 741 (Rapp, J., specially concurring) (emphasis added).

Could this concurrence have simply stated that the legislature has passed statutes relating to child support—but none prohibiting this type of bargain? Should the issues raised by the concurrence (and conspicuously ignored in the majority opinion) have been debated in a courtroom, or on the floor of a legislature? These questions surface when the public policy defense is entertained in a general context, outside of a statute or regulation.

Having now explored the way courts have addressed the successful broad appeals to public policy, I next explore the larger set of unsuccessful broad appeals to public policy as a defense to contract. These cases prove much more difficult to characterize.

3. *General Cases Where the Defense was Unsuccessful*

Generalizing about the cases where the public policy defense was pled or resolved broadly and unsuccessfully can prove challenging, but a noteworthy portion of the opinions falls into this amorphous category. These cases reflect situations where a party sought to invalidate an agreement and used this defense—potentially as a last resort. As Judge Burrough put it, perhaps with some overstatement, “It is never argued at all but when other points fail.”²⁵⁵

Nonetheless, in each of these cases, the court addressed and resolved the defense, upholding the contract. Because these cases do not give the defense a foothold, nor do they offer much logic for rejecting the defense, I label them “unruly.” Though it could be argued that order exists when a court rejects the defense for lack of any support, these cases seem to constitute one party pleading in the dark, looking for any way out of the contract. Just the fact that the defense invites these claims may contribute to the “unruly” reputation.

Given the variety in this group of cases, it might prove worthwhile to describe several of them summarily. The first opinion, *McDermott v. Franklin*, shows us a court that rejects the public policy defense simply because it could not find statutory, case precedent, or any hard authority to do so.²⁵⁶

(a) *McDermott v. Franklin*

In *McDermott*, a party wished to void certain obligations on the basis that the underlying contract involved ownership of a professional corporation by nonprofessionals.²⁵⁷ The voiding party argued that “the obligations in question were contrary to public policy as ex-

255. *Richardson v. Mellish*, (1824) 130 Eng. Rep. 294, 303; 2 Bing 229, 252 (Burrough J.).

256. *McDermott v. Franklin*, No. 2009-G-2903, 2009 WL 4894599 (Ohio Ct. App. Dec. 18, 2009).

257. *Id.* at *2.

pressed by statute and therefore were invalid, unenforceable contracts.”²⁵⁸ The court held that the obligations were enforceable because there was no authority that indicated otherwise. The appellants cited to some state statutes that covered professional associations, but they were “inapposite to the instant situation.”²⁵⁹ I assume that there must have been a lot of creative, unanchored bluster in the lawyering because the court concluded: “While appellants go to great lengths to make this [public policy] argument, they have failed to cite to any case law to support this proposition.”²⁶⁰ This court seemed unwilling to buy any policy arguments that were not supported by statute or case law.²⁶¹

(b) *United States v. Korangy Radiology Association*,

Korangy Radiology attempted to challenge the validity of a voluntary agreement it had entered with the Food and Drug Administration to settle a dispute over violation of the Mammography Quality Standards Act (MQSA).²⁶² Korangy Radiology had agreed to pay a penalty, then defaulted on that payment and challenged the validity of the agreement, raising eighteen affirmative defenses.²⁶³ Consistent with Judge Burrough’s observation that the public policy defense can be a last resort,²⁶⁴ the defense was raised here and quickly dispatched.²⁶⁵

The court did not address the merits of Korangy Radiology’s public policy arguments. Instead, the court turned the argument around and posited that public policy would *support* the enforcement of this agreement—because the agreement held Korangy Radiology responsible for violating the MQSA, which is established public policy.²⁶⁶

This case may be another illustration that Judge Burrough’s aforementioned “defense of last resort” observation held up well over the past 200 years. This defense may indeed be the “Hail Mary pass” of contractual defenses. But *Korangy Radiology* also raises intrigue because the court provided an interesting quirk. The defense was devoid of support, but there was public policy supporting enforcement, and it was in the interest of promoting a statute. When invited to go

258. *Id.*

259. *Id.* at *3. I decided to categorize this case as “general” and not statutory/regulatory or hybrid because the statutes that were unsuccessfully raised were attenuated from the problem.

260. *Id.* at *2.

261. Though, again, it might even be troublesome that the court *left open* the possibility that judicially-made “case law” could support a public policy finding.

262. *United States v. Korangy Radiology Ass’n*, No. RDB-09-cv-0623, 2009 WL 5108833, at *1 (D. Md. Dec. 17, 2009).

263. *Id.* at *3.

264. See *Richardson v. Mellish*, (1824) 130 Eng. Rep. 294, 303, 2 Bing 229, 252 (Burrough J.).

265. *Korangy Radiology Ass’n*, 2009 WL 5108833, at *4.

266. *Id.*

there, the court did not hesitate to take the opportunity to point out that public policy ran the opposite way.

(c) *Siuda v. Tobin*

The procedural issue in *Siuda v. Tobin* focused on whether parties could contract around statutes of limitation without violating public policy—an issue that surfaced as the crux of other cases within the general defense category.²⁶⁷ *Siuda* substantively dealt with a warranty issue with respect to the retail purchase of a modular home.²⁶⁸ The Siudas, the purchasers, made several claims about defects and deficiencies in the construction process, filing a civil complaint several years after the purchase. Tobin, the retailer, noted that the original agreement stated that “[a]ny action brought by the Purchaser against the Retailer of the home and any action brought by the Purchaser . . . whether based in tort, [or] in contract . . . must be brought and filed no later than one year from the date of the sale of the home.”²⁶⁹

The Siudas challenged this time-limitation clause, claiming that the residual statute of limitations should apply. Among other defenses, the court addressed whether the clause was unconscionable. Importantly, however, the court first noted that “[t]he Siudas have not shown a public policy clearly rooted in the law that prohibits this type of limitation.”²⁷⁰

The *Siuda* court put the burden onto the Siudas and set a standard that required “clear roots” in the law to void this part of the contract. The court did not present any further analysis in the opinion or address any specific deficiencies that the plaintiffs may or may not have raised, aside from citing a case that supported the court’s opinion.²⁷¹ Although a statute was at issue here, no general public policy argument emerged to support the notion that these parties could not be permitted to contract around the statute. This case is thus an excellent example of a court declining an open invitation to explore and discuss public policy. Here, the court deferred heavily to whether the law had spoken—and did not try to fill in the gaps.

267. *Siuda v. Tobin*, No. 285618, 2009 WL 3110817 (Mich. Ct. App. Sept. 29, 2009); see, e.g., *In re Dreier LLP*, 421 B.R. 60 (Bankr. S.D.N.Y. 2009); *Ray v. FedEx Corp. Servs.*, 668 F. Supp. 2d 1063 (W.D. Tenn. 2009); *Stecz v. Travelers Ins. Co.*, 159 Ohio Misc. 2d, 2009-Ohio-7196, 934 N.E.2d 430.

268. *Siuda*, 2009 WL 3110817.

269. *Id.* at *1.

270. *Id.* at *2.

271. *Id.*

4. *Summary*

I have reviewed cases in various different subsets of this general category. Though summarization is difficult, one conclusion is that, overall, the public policy defense appears to be substantially less successful when it is not closely linked to law created through the legislative or regulatory process. Occasionally, courts will discern or make public policy through analysis that resembles a precedent-driven, common law approach. More often, however, it appears that courts are most willing to let a contract stand unless an express rule or strongly established case law dictates otherwise.

This analysis still begs the question: How do we explain the cases—one-third of the public policy defense cases—that appeal to general public policy and fail? Perhaps these are the cases that have no support—a defense that a party brings as a last resort.

This observation may bring some consolation in the form of providing a bare modicum of order to the general category. Even if these broad unsuccessful cases cannot be explained well or must be described as unruly, nearly two-thirds of the cases can be ordered.

(a) *“Hybrid” Cases*

Occasionally, parties in these public policy defense cases seem to appeal both to a statutory argument and general public policy argument, although not many cases seem to fall into this category.²⁷² Even when this happens, the defense often leans heavily in one direction, which places it outside of the true hybrid category. Sometimes, a party will argue down both channels in an effort to be thorough, but courts appear to take the pleading in one direction or another. Although a brief mention of these “hybrid cases” completes the categorical puzzle, little emerges from these opinions to enhance our understanding of the defense.

(b) *Testing the Restatement (Second) of Contracts Section 178*

Though the Restatement of Contracts in this area was presented in Part II, it is worth briefly revisiting the purpose of the Restatement in order to test whether the purpose has been achieved in the public policy defense arena. The American Law Institute declared that:

The object of the Institute in preparing the Restatement is to present an orderly statement of the general common law of the United States

. . . .

272. In this sample, only five did; drawing conclusions from a sample that small would prove fruitless.

The object of the Institute is accomplished in so far as the legal profession accepts the restatement as *prima facie* a correct statement of the general law of the United States.²⁷³

The members of the American Law Institute who drafted the Restatement of Contracts originally aimed to summarize the common law of contracts in treatise form. Eventually, especially in the course of drafting the second Restatement, the mission evolved into a summary that also incorporated prescriptions for what contract law *should* be. The reporter of the *Restatement (Second) of Contracts*, E. Allan Farnsworth, wrote an article explaining (or confessing) that sections 158 and 272 of the second Restatement were the result of “[r]elying on the few cases that have fashioned more imaginative solutions [to govern] cases of mistake, impracticability, and frustration.”²⁷⁴ The drafters seized upon the cases that they *wanted* to serve as leading cases.

The more obvious identified aim of the Restatement, besides providing an accurate resource that “restated” the law, was to provide enough grounding to enable more precise “forecasting [of] the outcome of future legal disputes.”²⁷⁵ Practitioners, judges, and the legal academy indeed look to the Restatement for “clear-cut statements of rules.”²⁷⁶ However, the purpose of the Restatement of Contracts migrated over time from one of purely attempting to “restate the law” (in the drafting of the first Restatement) to that of a hybrid of literal “restatement” and aspirational architecture for innovations that were developed by the drafters, predictability among the goals.²⁷⁷

The drafting of the original and second Restatements “provoked an enormous body of legal scholarship, with the legal community debating the wisdom and effect of particular restatement rules.”²⁷⁸ In fact, section 178 of the Restatement (Second) provides another opportunity to debate the Restatement’s wisdom. This section is sparsely cited in the public policy opinions. Where the public policy defense is involved, the “weighing” that section 178 proposes appears not to be employed by courts. Balancing of interests in any form seems rarely to happen in the determination of whether enforcement of the contract should be void on public policy grounds. The vitality of section

273. RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS at ix (1937).

274. W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for its Amelioration*, 13 PEPP. L. REV. 23, 32 (1985) (citing E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 8 (1981)).

275. Lawrence A. Cunningham, *The Common Law as an Iterative Process: A Preliminary Inquiry*, 81 NOTRE DAME L. REV. 747, 780 (2006).

276. Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute: The Fairchild Lecture*, 1995 WIS. L. REV. 1, 6 (1995).

277. Keyes, *supra* note 274, at 54-55.

278. Abrahamson, *supra* note 276.

178(1) only seems to emerge in practice when read in conjunction with section 179(a) (where legislation is involved or invoked.) The logic and spirit of Restatement section 181 (licensing) also surfaces in action, if not citation, as described in Part IV.A.

Only one opinion²⁷⁹ out of 104 in the sample cited to Restatement section 178.²⁸⁰ Only four out the 104 opinions in the sample appeared to demonstrate any balancing or weighing in the analytical process.²⁸¹ This speaks to the low impact of the Restatement on the public policy defense. Why did the Restatement turn out to be so irrelevant? An enlightened assessment of the utility (or lack thereof) of the *Restatement (Second) of Contracts* should begin with the words of Professor E. Allan Farnsworth upon the publication of the American Law Institute's work:

It is . . . of special interest to ask in what respects the Restatement (Second) is innovative rather than traditional. To this question there is no easy answer. Sometimes innovation does not take the form of a new substantive rule but rather of a new perspective on the problem, reflected in the substitution of a new terminology or analysis for a traditional one. For example, the Restatement (Second) . . . *speaks of promises and other terms that are "unenforceable on grounds of public policy" and not of "illegal bargains."* *There is no way to assess the extent to which such innovations in terminology and analysis portend innovations of substance.*²⁸²

Professor Farnsworth's candor, specifically with respect to the innovations relating to enforceability on grounds of public policy, invites an assessment of the Restatement. It appears that this particular innovation in the Restatement (Second) has proven fruitless in the public policy area, both as an express source and as a basis for innovation in the way the drafters might have envisioned. Put simply, the Restatement has not proven useful—and this Article empirically illustrates that conclusion.

With all of this examination of the literature, and the close study of a tight sample of cases and the Restatement, a stronger basis exists for measuring up the "unruly horse" metaphor. Enough data is at the fingertips now to make some tentative conclusions about the

279. See *More Light Investments v. Morgan Stanley DW Inc.*, No. CV 08-0580-PHX-MHM, 2009 WL 2382997 (D. Ariz. Aug. 4, 2009).

280. Though the 104 cases are the product of a filtering process for "pure" cases, this one case was the citation of Restatement section 178 in the "all cases" database in Westlaw during the period of study.

281. The only cases that appear to use this approach were *U.S. ex. rel. Head v. Kane Co.*, 668 F. Supp. 2d 146 (D. D.C. 2009), *Sanchez v. County of San Bernardino*, 98 Cal.Rptr.3d 96 (2009), *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 983 A.2d 604 (N.J. Super. 2009), and *Zakresky v. Grad. Sch. of Figurative Art of N.Y. Acad. of Arts*, 899 N.Y.S.2d 64 (Table) (N.Y. Sup. Ct. 2009).

282. E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 5-6 (1981) (emphasis added) (internal citations omitted).

structure of the public policy defense—where it is “unruly” and where it is less so.

V. HOW UNRULY IS THE PUBLIC POLICY DEFENSE—AND WHAT TO DO ABOUT IT?

This analysis of a consistent set of public policy defense cases suggests that an alternative ordering scheme could be developed to enhance what was given to us by scholars, commentators, and the Restatement.²⁸³ My scheme points toward possible solutions for creating more certainty and definition through a more robust description of the defense. I recognize that a full prescription warrants separate, serious treatment and analysis in the fashion that other scholars have offered, notably, John Shand.²⁸⁴ I share a potential approach here, rooted in some of the broader literature on judicial discretion.

A. *Separating the Categories of Public Policy Cases*

As I have detailed throughout this Article, the public policy defense tends to be twice as successful in cases brought with an argument that relates closely to a statute or regulation. Given that such cases account for nearly half of the cases analyzed, this can lead to a conclusion that approximately half of the cases are “ruly.” Regardless of whether the court voids the agreement, if the defense involves a statute or regulation, a clearer path toward a result has been blazed. The court does not have to discern public policy or build on case law precedent that might have unsound roots.

With respect to the other half of cases, a substantial portion of them can also be deemed “somewhat ruly” in that they were, at the very least, built on previous case law that declared or discerned public policy. Though this approach to the defense may constitute the construction of a legitimate opinion on top of illegitimate roots, at minimum, precedent provides some degree of order. Hans Linde may find attaching any “ruly” label to this category problematic, but I assign this “somewhat ruly” label as a matter of degree.

The one-third of the cases where the defense appeals broadly to public policy (and typically fails) appears to present the most disorder and “unruliness.” Most of these opinions present conclusions about the defense without much express justification for the failure. Perhaps this portion of the cases most closely fits with the “unruly horse” metaphor.

283. Arguably, a more complete scheme could also address remedies related to the defense. Some scholars have addressed this question, see, for example, Wade, *supra* note 18, but it would be a contribution to the literature to tether remedies to the scheme I provide here.

284. See generally Shand, *supra* note 3.

B. Modest Prescriptions for Addressing These Categories

Prescriptions for reordering or simplifying the approach to the public policy defense necessarily invoke some of the broader philosophical debate about judicial discretion and theories of adjudication. Given this Article's empirical findings, the logical next step for deeper exploration of this topic is some further philosophical development of the public policy defense's underpinnings. Accordingly, below I briefly propose an approach toward the public policy defense that is anchored in the literature on discretion and positivism. I will do this with the caveat that the prescriptive angle of this topic invites an analysis and discussion that I only begin to explore here.²⁸⁵

Henry M. Hart and Albert M. Sacks define discretion as "the power to choose between two or more courses of action, each of which is thought of as permissible."²⁸⁶ Ronald Dworkin, in turn, offers an array of definitions of discretion that he aligns along a "weak" to "strong" axis.²⁸⁷ Though Dworkin's framework has been aggressively challenged,²⁸⁸ it proves helpful in framing an understanding of how one might begin to clarify our approach toward the public policy defense problem.

Judges exercise the "weakest" discretion in cases that might be defined as "ruly" or "easy"—where the rules and authorities clearly point in one direction.²⁸⁹ The first category of public policy cases, those that tether the public policy defense tightly to a statute or regulation, should be placed, in Dworkin's ordering, on the weakest side of the discretion spectrum.

In the second, "somewhat ruly" category of cases, where judges discern and declare public policy through the use of case precedent, judges seem to be exercising a slightly "stronger" (but probably still generally "weak") discretion. In these cases, judges apply the interpretations of other judges; still basing decisions on an established body of law, but leaving more room for discretion in the ultimate outcome. An extra degree of separation exists between law created through the legislative/regulatory process and the instant case. Granted, for exclusive positivists like Joseph Raz, who would argue that only expressly enacted rules or standards are the only legitimate

285. I thank Norman I. Silber for encouraging me to develop further this part of the Article. *See generally*, Edward L. Rubin, *Discretion and its Discontents*, 72 CHI.-KENT L. REV. 1299, 1300-04 (1997) (discussing and comparing the dominating definitions of discretion in the literature, particularly that of Henry Hart and Albert Sachs to Ronald Dworkin).

286. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 144 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). *See also* Rubin, *supra* note 285, at 1300-04.

287. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31-39 (1977).

288. *See* Rubin, *supra* note 285, at n.18.

289. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

sources of law, this exercise of greater discretion beyond the narrower source might prove comparatively more concerning than the previously discussed set of cases.²⁹⁰ In this second category, positivists would likely find cases based on well-settled uncontroversial precedent to be less troubling than those which rested more heavily on “moral or extra-legal judgments.”²⁹¹

In contrast, exclusive positivists would be most concerned about scenarios where judges are exercising “strong discretion” in the total absence of recognized legal sources, as in the third “unruly” category of cases, the ones that appeal broadly to public policy without reference to statute, regulation, or even precedent.²⁹² As Dworkin presents it, in these zones of strong discretion, judges would not be bound by standards or authority.²⁹³ Consistency and conformity of justice would be at risk.

In this third category, judges simply are declining the invitation to exercise discretion, where such discretion may be strongest because no pre-ordained written rules of any sort appear to govern or compel or even nudge toward a result. Where there is no written authority to support a public policy defense, empirically and anecdotally, judges seem to back away from the temptation to attack or undo the agreement at issue. They often reach this result without offering explanation.

Judges *tend* to shy away from affirmatively invalidating contracts where doing so would involve a purely moral imposition on parties that freely consented to an otherwise enforceable agreement. The exclusive positivists should be comfortable with the process and outcome of the vast run of cases in this third category because judges are reluctant to stray from preexisting sources of law. The *Siuda v. Tobin* case summarized above typifies the judicial approach in this category—if the public policy defense lacks “clear roots” in the law, judges will not recognize the defense.

290. Joseph Raz distinguished among precedent-based cases in his “sources thesis”:

“[T]he law on a question is settled when legally binding sources provide its solution. In such cases, judges are typically said to apply the law, and since it is source-based, its application involves technical, legal skills in reasoning from those sources and does not call for moral acumen. If a legal question is not answered by standards deriving from legal sources then it lacks a legal answer—the law on the question is unsettled. In deciding such cases courts inevitably break new (legal) ground and their decision develops the law (at least in precedent-based legal systems). Naturally, their decisions in such cases rely partly on moral and other extra-legal considerations.”

JOSEPH RAZ, *THE AUTHORITY OF LAW* 49-50 (1979).

291. *Id.*

292. *See id.*

293. Dworkin, *supra* note 287, at 32.

The question remains, however, about whether a hands-off, exclusive-positivist-themed rule *should* be the general approach in this third category, or whether a more pragmatic approach toward preventing objectively harmful or extremely undesirable outcomes in extreme cases could be accommodated. Perhaps the establishment of a defined, pragmatic approach would satisfy inclusive positivists like H.L.A. Hart, who wrote that “the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values.”²⁹⁴ Devising a substantive, values-driven rule for handling these cases that broadly appeal to public policy might lend more legitimacy to a rare exercise of discretion.

Using this theory about discretion, I contend that order can be brought to the public policy defense. The first way order can be brought would be simply to declare what is happening in the first two categories of cases at issue, and formalize that approach in a way that the Restatement has not. The second way order can be brought is to set a blanket rule that the public policy defense should generally fail in the third category. A “safety valve” can be created, however, to ensure that in the third category, the court can recognize this defense under dramatic circumstances.

Next, I conclude with a summary of how the public policy defense can be reordered by providing a brief prescription for how courts can handle public policy cases in each category.

1. Taming the “Ruly” Horse Where the Defense is Tethered to a Statute or Regulation.

The first step in taming the horse should be to declare that if there is no regulation or statute to invoke, the public policy defense is *completely* unavailable. These are the so-called “easy cases” associated with weak discretion. This declaration would certainly satisfy the concerns mentioned by Hans Linde about the judicial use of public policy. It would definitely bring order.

If this approach was used by itself, it could lead to some socially undesirable and harsh outcomes in instant cases. However, legislators and regulators could ultimately fix a serious glitch that emerged from any such case. Legislators and regulators are expressly charged with setting public policy and have a broader set of tools with which to develop and craft it. This step alone would draw a brighter line and bring order to the defense if courts adopted this approach consistently.²⁹⁵

294. H.L.A. HART, *THE CONCEPT OF LAW* 250 (2d ed. 1994).

295. Although not much harsher than what some of the licensure and criminal case plaintiffs experienced in the cases examined above.

2. *Taming the “Somewhat Ruly” Horse Where Case Precedent is Available.*

This second step in taming the horse should be adopted in conjunction with the first step. In sum, adopt a blanket rule that the defense is *unavailable* unless a public policy interest has already been identified in case precedent, or the legislature or regulators have formally spoken through statutes or regulations. This statement, which appears to encompass much of what courts appear to be doing, would create a degree of order and make the unruly horse tamer. The mere declaration of this broader “weak discretion” rule would promote more certainty and order than the more complex, but unused, Restatement.²⁹⁶

3. *Taming the “Unruly” Horse Where There are no Rules.*

The complexity of the public policy problem almost guarantees the presence of a significant defect in any solution. One problem that always must be addressed is the remaining judicial temptation still to take to the invitation of a broad public policy defense to prevent a severe instant injustice. Dworkin would label this zone as one of stronger discretion.

The routine yielding to such a temptation would ultimately yield uncertainty.²⁹⁷ Perhaps the right approach should be to leave the door open just a bit in narrow circumstances for creative acceptance of the public policy defense, even if the courts should take a harder line generally on accepting the defense. A new approach should preserve a public policy “safety valve,” where, in the absence of a statute or regulation, the defense could be limited to scenarios where enforcement of a contract would lead to imminent social harm. Declaring the availability of the approach and making it explicit would provide order, even though it might invite more public policy challenges.

Take, for example, a situation where a court confronts a social danger emerging from allowing a contract to be enforced. The danger emerges not just from the contract in front of the court, but from the queue of parties eager to engage in these bargains if the court renders the contract enforceable. The gestational surrogacy cases²⁹⁸ provide an illustration for that kind of a scenario. If a court deemed in those cases that gestational surrogacy contracts presented a socially harmful contractual innovation that the legislative and regulatory

296. This approach concededly leaves some disorder behind with respect to the use of judicially-constructed public policy precedent.

297. For a rich discussion of the role of certainty and predictability in this context and associated tradeoffs, see Shand, *supra* note 3, at 164-67.

298. See *In re Baby M.*, 537 A.2d 1227 (N.J. 1988) and *Calvert v. Johnson*, 851 P.2d 776 (Cal. 1993).

apparatus could not quickly address, a court could justify using a public policy defense.

This narrow exception may prove important because one can speculate that the pace of social and technological innovation may present increasingly complex public policy questions. The interests of the instant parties should still be of less concern than the stake of the public in the interim period before the political system could act.

If this exception is kept as a true exception, order can still be preserved if courts are disciplined and selective about when to apply it. Of course, one must accept once again the aphorism that Chief Justice Roberts recently repeated:

Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: "Hard cases make bad law."²⁹⁹

Implementing such an escape window must be done with an eye toward the Chief Justice's timeworn observation. Providing a tiny window for stronger discretion may invite disorder, but if the rule *about discretion* is formalized, the discretionary issue may be somewhat mitigated because courts would be afforded more legitimacy by having this defined guidepost. A framework with a narrow exception might also channel those pleading the defense to plead it in a more orderly way—and enable courts to address the defense more consistently. These exceptional cases should not *create* public policy nor should their content stand as public policy precedent *per se*. A balance must be struck. The exception can create order, but if the proverbial exception swallows the rule, the horse may prove more unruly than when Judge Burrough first warned of it.

VI. CONCLUSION

Judge Burrough's declaration that public policy was "a very unruly horse" may have led to the repetition and perpetuation of that conception. I contend that the horse today is not "*very* unruly"—that discernable patterns emerge in looking at the common run of cases. These patterns have not been studied in any previous academic work, but they do present themselves after a careful look along certain dimensions. A systematic look at judicial opinions involving the public policy defense, rather than a broader theoretical look at leading opinions, can shed different light on the public policy defense and narrow the areas of unruliness.

299. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 899 (2009) (Roberts, C.J., dissenting).

If a simpler, workable approach is applied toward these cases, based on a current reality about these cases that has not been cataloged, the perception of unruliness can diminish over time, and a more elegant jurisprudential approach can emerge.

