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The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements

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Farshad Ghodoosi*

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* LL.M. 2012, Yale Law School; J.S.D. Candidate, Yale Law School. Howard Holtzmann Fellow in International Dispute Resolution. This Article is part of my doctoral dissertation at Yale Law School, which explores the role of public policy in the alternative dispute resolution system and contemporary international litigation. I am highly grateful for the help and guidance of my advisor Professor Michael Reisman as well as my committee member Professor Susan Rose-Ackerman. I have greatly benefited from the help and encouragement of Professor Bruce Ackerman, Professor Cristina Rodriguez, Professor Ian Ayres, Professor Nicholas Parrillo and Professor David Grewal from Yale, Professor David Gartner from Arizona State University, and Professor Christopher Whytock from University of California at Irvine School of Law. I also thank the Institute for Global Law and Policy at Harvard Law School and the participants and organizers of the 2015 workshop.

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I. INTRODUCTION

There is a peculiar thread that links vast and incongruent cases: the man who restricted his own freedom to trade, a fellow who bet on Napoleon's life,¹ a parent who fettered his estate for perpetuity, a married man who proposed to another woman while he was still in the process of divorce,² a company that appointed an employee as trustee in an insolvency proceeding to make the company a creditor of itself,³ and an arbitral award delivered in favor of a country with strained political relation with the country of the court's proceedings.⁴ In most instances mentioned here, contracts or awards were found to be unenforceable. Yet, these cases—and many more similar ones—hardly shed any light on this peculiar thread called public policy. It is only through redefining and revisiting the concept of public policy that we can finally begin to make sense of this historically convoluted and often-neglected doctrine.

In a liberal democracy it is well settled now that public order is as important as individual freedom. Creating a public sphere and accessing it by citizens require certain limitations on the liberty of the citizens. In the language of John Rawls, "[M]aintenance of public order is understood as a necessary condition for everyone's achieving his ends"⁵ Liberal democracy is a public dialogue⁶ with preconditions that limit the scope of the very same public dialogue.⁷ For better or worse, and because of a lack of any viable alternatives, it is through the government apparatus that those limits are placed in society. The limits appear and are justified in various forms: public order, public security, public health, public interest, public policy, and so forth. All these forms are designed to save, maintain, and potentially expand the public sphere for citizens.⁸

1. *Gilbert v. Sykes* (1812) 16 East 150 (Eng.).

2. *Fender v. Mildmay* [1938] A.C. 1 (Eng.).

3. *Farmer's Mart v. Milne* [1915] A.C. 106 (Eng.).

4. *Nat'l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800 (D. Del. 1990).

5. JOHN RAWLS, *A THEORY OF JUSTICE* 187 (6th ed. 1999).

6. BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 93 (1980) ("The liberal state is not a private club; it is rather a public dialogue by which each person can gain social recognition of his standing as a free and rational being.").

7. *Id.* at 298 ("[T]he effort by all citizens to ground their power relations upon a political culture that all may recognize as falling within the conversational limits defined by Neutrality.").

8. In a liberal democracy, the logic of the public sphere is highly procedural and formalistic. Eva Illouz, *Reinventing the Liberal Self: Talk Shows as Moral Discourse*, in *THE POLITICS OF SELFHOOD: BODIES AND IDENTITIES IN GLOBAL CAPITALISM* 137 (Richard-Harvey Brown ed., 2003).

Yet, what remains unclear is the extent to which the limits mandated by the public sphere⁹ constrain the private legal acts of citizens. In other words, it remains unsettled which aspects of our public life—for instance certain economic policies related to antitrust—render contrary private legal acts such as contracts unenforceable, and through which logic. It is precisely the cross section of public-affair mandates and private law that is the focus of this Article and that I refer to as the doctrine of public policy.

The concept of public policy exists in almost all legal systems. Yet, it is one of the most elusive concepts in law given the contradictory case law and convoluted literature. It is pleaded on a daily basis in various courts before various national and international judges. A simple search of U.S. case law, for instance, shows that in the last twelve months, the term “public policy” has been used in more than 7,000 cases.¹⁰ Globally, in the area of international arbitration, for example, a search reveals that more than 160 arbitral awards—at least those that have been made public¹¹—have referred to the term “public policy.”¹² Similarly, a brief survey of the U.N. Treaty database indicates that the phrase “public policy” has been inserted in more than 1,600 international instruments.¹³ Furthermore, the doctrine of public policy is a truly trans-substantive doctrine in law. The specter of public policy hovers over a multitude of subfields of law—for instance contract law, conflict of laws, arbitration, employment law, and family law.¹⁴

Recently, we have witnessed a resurgence of the discussion surrounding public policy. This is largely due to its critical impact on the developing alternative dispute resolution system, both domestically and in an increasingly globalized world.¹⁵ The conceptualization of

-
9. Historically, the concept of the public sphere developed out of the distinction that was drawn between opinion and public opinion. Jurgen Habermas et al., *The Public Sphere: An Encyclopedia Article* (1964), 3 *NEW GERMAN CRITIQUE* 49, 50 (1974).
 10. Case search of “public policy,” WESTLAW, <http://www.next.westlaw.com> (follow “Advance Search” hyperlink; search for phrase “public policy” in “this exact phrase” search bar; change date to “last 12 months”; search for all cases at federal and state level).
 11. Most commercial arbitration cases do not become public and remain confidential.
 12. Arbitral award search, KLUWER ARBITRATION, <http://www.kluwerarbitration.com> (follow “Advance Search” hyperlink; search for term “public policy” in “free text” tab; check box “awards” next to “text type” tab).
 13. Treaty Database Search, UNITED NATIONS, <https://treaties.un.org/> (follow “Advance Search” hyperlink; follow link “Full-text Search”; type “public policy” in search bar; change search criteria to “exact”).
 14. *See infra* note 58.
 15. *See, e.g.*, Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 *AM. BUS. L.J.* 511 (1988); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 *ST. MARY’S L.J.* 259 (1990); Alfred W. Blumrosen, *Public Policy Considerations in Labor Arbitration Cases*, 14 *RUTGERS*

public policy determines, to a large extent, the role of arbitrators and mediators in matters involving public policy concerns. The extent to which arbitrators and mediators can assess *public* policies, as they come up during proceedings, remains highly unsettled. Furthermore, the scope of authority afforded to judges and national courts that review and enforce public policies has proven to be highly discretionary.¹⁶ Discussing each topic requires a separate analysis and this Article will not address these questions in depth. However, the discussion put forward in this Article is a critical first step that yields direct and important implications for the discussion of public policy in alternative and international dispute resolution among other areas.

The objective of this Article is to open the black box of public policy and unravel its components. It aims to re-conceptualize the doctrine in a way that is more accessible to lawyers and judges. Public policy is generally perceived as an elusive concept, which is “but a shifting and variable notion appealed to only when no other argument is available”¹⁷ However, I believe one of the most important reasons that public policy has become an elusive concept and “the 53rd card in the

L. REV. 217 (1959); S. I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1 (2008); Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J. L. ETHICS & PUB. POL'Y 173 (1998); Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. DISP. RESOL. 91 (2000); Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1980); George J. Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1 (1972); David M. Glanstein, *A Hail Mary Pass: Public Policy Review of Arbitration Awards*, 16 OHIO ST. J. ON DISP. RESOL. 297 (2001); James Michael Magee, *The Public Policy Exception to Judicial Deferral of Labor Arbitration Awards—How Far Should Expansion Go?*, 39 S.C. L. REV. 465 (1988); Stephen L. Hayford & Anthony V. Sinicropi, *The Labor Contract and External Law: Revisiting the Arbitration's Scope of Authority*, 1993 J. DISP. RESOL. 249 (1993); Carie Fox & Brian Gruhn, *Toward a Principled Public Policy Standard: Judicial Review of Arbitrators' Decisions*, 1989 DET. C.L. REV. 863 (1989); Laurie A. Tribble, Note, *Vacating Arbitrators' Awards Under the Public Policy Exception: Are Courts Second-Guessing Arbitrators' Decisions?*, 38 VILL. L. REV. 1051 (1993); Judith Stilz Ogden, *Do Public Policy Grounds Still Exist for Vacating Arbitration Awards?*, 20 HOFSTRA LAB. & EMP. L. J. 87 (2002); Donald J. Petersen & Harvey R. Boller, *Applying the Public Policy-Exception to Labor Arbitration Awards*, 58 DISP. RESOL. J. 14 (2004); Henry Drummonds, *The Public Policy Exception to Arbitration Award Enforcement: A Path Through the Bramble Bush*, 49 WILLAMETTE L. REV. 105 (2012); Paula A. Barran & Todd A. Hanchett, *Public Policy Challenges to Labor Arbitration Awards: Still a Safe Harbor for Silly Fact Finding?*, 38 WILLAMETTE L. REV. 233 (2002).

16. A related and equally important discussion is the extent to which courts enforce foreign public law in cases involving public matters such as criminal, tax, anti-trust or securities law. For a comprehensive discussion on this issue, see William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L. J. 161 (2002).

17. *Kenneweg v. Allegany Cnty. Comm'rs*, 62 A. 249, 251 (Md. Ct. App. 1905).

deck”¹⁸ is the lack of serious academic and intellectual engagement with this doctrine. Additionally, the exceptional and ambiguous nature of public policy—which might empower judges and arbitrators—reduces the incentive of the courts and tribunals to lower their potential authority by clearly delineating the doctrine of public policy.

In this Article, I argue that public policy is not a monolithic concept but rather consists of three distinct—yet intertwined— notions of *public*. These three categories are public interest, public morality, and public security. The public interest category views the private arrangement of citizens as equal to public arrangements and tries to strike a balance between the two. The majority of cases, I posit, fall into the public interest category, which calls for less court engagement and a balancing approach. The public security category aims to protect citizens from outside threats that might endanger their well-being and consequently eliminate the public sphere. The public morality category, however, attempts to safeguard the ties and mutual identities between citizens that shape and maintain societal life. In cases involving public morality and public security, which are rare and extreme cases, the courts should play a more active role and apply methods other than balancing.¹⁹ The reason for calling these instances “extreme” rests on the idea that the trumping capacity of public life over private arrangements is at its highest when involving cases of public security and morality.

In order to tackle this challenging topic, it is imperative that the doctrine of public policy be situated in legal history and legal theory. Part II provides a brief history of the notion of public policy in common law, as well as its historical paradigm shifts. It shows how the doctrine of public policy evolved from a community-based notion to a modern statehood tool exerting mandates of public order. The extent to which the doctrine of public policy follows the logic of efficiency is the focus of Parts III and IV. These two Parts attempt to show the good, bad, and ugly aspects of the doctrine of public policy in light of the law and economics approach. Part III lays out the economic justifications for the doctrine of public policy in order to discover the best interpretation of this doctrine under the law and economics approach. Part IV discusses the shortcomings of the law and economics approach in its failure to fully grasp all aspects of the doctrine of public policy. It shows why courts need to play a more active role in certain cases involving public policy concerns. It also investigates the reasons that

18. W. Michael Reisman, *Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration*, in *INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?* 849, 854–55 (Albert Jan van den Berg ed., 2008).

19. In all cases involving public policy concerns courts can act *sua sponte*, yet the level of court involvement differs depending on the matter before it.

judicial systems need a multi-level analysis of the doctrine of public policy.

After the historical (diachronic) as well as a-historical (synchronic) analysis of the doctrine, Part V dissects the notion of public policy in order to show the three main components of it. This Part aims to crack open the long-closed box of public policy to suggest that there are in fact three constitutive grammars and logics at play in the doctrine of public policy, not one. Much of the confusion, omission, and rejection concerning the doctrine of public policy relates to this very fact.

I should emphasize that the Article focuses on instances where the public sphere can, and should trump private legal acts. It is the intersection of public order and private legal acts that is the focus of the Article's intellectual endeavor. Sections II.C and II.D aim to clarify the scope of the Article in more depth.

Furthermore, a terminological clarification is needed at the onset: the doctrine of public policy is commonly invoked when a legal act is deemed to violate a rudimentary public interest. The most common usage of the term "public policy" in the legal community occurs when a contract, foreign judgment, arbitral award, or a foreign law is claimed to violate the public policy of *lex fori*, meaning the tribunal's seat. Courts often declare such contracts or arbitral awards are "contrary to public policy." However, in this Article, the phrase "doctrine of public policy"²⁰ or "concept of public policy" is preferred for two reasons: (1) One of the most important instances where courts must struggle to identify the trumping elements of *public* life on private legal acts, e.g., contracts, is when courts apply the public policy exception.²¹ Although case-specific, it inevitably stems from an *over-arching doctrine* that dictates which aspects of the *public* sphere have the trumping capacity over the *private* acts of citizens; and (2) The public policy exception cuts through various fields of law at the national and interna-

20. The term "public policy doctrine" has been used in earlier pieces. See, e.g., W.S.W. Knight, *Public Policy in English Law*, 38 L.Q.R. 207 (1922). The term has also been defined in the conflict of laws field. See, e.g., Arthur Nassbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L. J. 1027 (1940); Monrad Paulsen & Michael Sovern, *Public Policy in Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

21. Note the term "contracts against public policy" presents an internal contradiction. 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) (defining the term "contract" as used in the UCC).

tional level. Each field cherishes certain basic norms that should not be encroached upon. One such example is the unconscionability doctrine that aims to protect fairness in bargains as a basic norm. Interestingly enough, however, each field lumps other unforeseen concerns into the residual category of the public policy exception. It is a form of protecting the *public* if any critical aspect of the public sphere has been left unnoticed in legislation or precedents. This residual category merits close scrutiny—not under a rubric of one specific field, but as it is linked in various fields of law.

In summary, this Article argues that the doctrine of public policy is a multi-faceted concept with three distinct—yet intertwined—constitutive logics. The confusion of courts indicates the often-neglected intricacies of the discussion on public policy. Courts' opinions have oscillated between a moralistic account—e.g., analyzing it based on “basic notions of morality and justice”²²—and a rigid positivistic interpretation that subjugates the doctrine only to “laws and precedents.”²³ This Article attempts to open this trans-substantive topic and show the several logics at play in the hope that we witness a more nuanced and accurate analysis of the doctrine of public policy.

II. PUBLIC POLICY V. PUBLIC POLICY

A. Paradigm Shift

The term “public policy” did not appear until the eighteenth century in common law. Prior to that, there were general references to “*encounter commune ley*,” which meant prejudicial to the community or against the benefits of the commonwealth. Knight, a legal histo-

22. See, e.g., *Parsons & Whitmore Overseas v. Societe Generale De L'industrie Du Papier*, 508 F.2d 969, 974 (2d Cir. 1974); *Waterside Ocean Navigation Co., Inc. v. Int'l Navigation Ltd.*, 737 F.2d 150, 153 (2d Cir. 1984); *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 5 F. Supp. 3d 25, 42 (D.D.C. 2013); *Yukos Capital S.A.R.L. v. OAO Samaraneftgaz*, 963 F. Supp. 2d 289, 297 (S.D.N.Y. 2013); *Telenor Mobile Comm'n AS v. Storm LLC*, 524 F. Supp. 2d 332, 356 (S.D.N.Y. 2007); *Karen Maritime Ltd. v. Omar Int'l, Inc.*, 322 F. Supp. 2d 224, 226 (E.D.N.Y. 2004); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004); *Termorio S.A. v. Electranta S.P.*, 487 F.3d 928, 937–38 (D.C. Cir. 2007).

23. See, e.g., *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2002) (“[P]ublic policy must be explicit, well defined, and dominant, and must be ascertained by reference to laws and legal precedents and not from general considerations of supposed public interest.”). Similar language may be found elsewhere. See *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 32–33 (1987); *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 767 (1983); *Muschany v. United States*, 324 U.S. 49, 68 (1945); David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 612 (2012) (showing that the public policy defense is less likely to succeed if it is not linked to a statute or regulation).

rian, considers *Dyer's Case*²⁴ to be one of the oldest cases referring to *encounter commune ley*.²⁵ This case reflects what I call the traditional approach to public policy: a notion designed to guard against violations of communal values and mores.²⁶

One of the first instances where courts employed the term “public policy” was in the case of *Mitchel v. Reynolds*.²⁷ In that case, Lord Macclesfield invalidated a contract that would result in restraint of trade: “[T]o obtain the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of law.”²⁸ The doctrine of public policy first appeared explicitly here in a case involving the restraint of trade.²⁹ Later, it extended to other areas such as the rule against perpetuities, sales of offices, marriage contracts, and wagering.

In 1750, Lord Hardwicke offered one of the first definitions of public policy that was illuminating: contracts against public policy are of no effect not because either of the parties has been deceived but because they are a “general mischief” to the public.³⁰ More importantly, Lord Hardwicke transformed the concept from being simply against the community to being against *res publica*, i.e., public affairs. In other words, he politicized the concept of public policy in such a way that sovereign considerations would receive significant weight in the courts:

[P]olitical arguments in the fullest sense of the word, as they concern the government of a nation, must, and have always been, of great weight in the consideration of this court, and though there may be no *dolus malus*, in contracts as to other persons, yet if the rest of mankind are concerned as well as the parties, it may properly be said, that it regards the public utility.³¹

24. Y.B. 2 Hen. 5, fol. 5, pl. 26 (1414). This case was about a non-compete clause in which John Dyer promised not to use his art for half a year or else the other party could forfeit Dyer's deposit bond. The court rejected this arrangement. See KEITH N. HYLTON, *ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION* 33 (2003).

25. Knight, *supra* note 20, at 207; Robert F. Brachtenbach, *Public Policy in Judicial Decisions*, 21 GONZ. L. REV. 1, 4 (1985).

26. Winfield believes that the doctrine of public policy's history traces back to even before the equity system in common law. Long before that, judges would consider the benefit of the public when considering new writs. Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 77–79 (1928); Knight, *supra* note 20, at 209–10; Kent Murphy, *Traditional View of Public Policy and Ordre Public in Private International Law*, 11 GA. J. INT'L & COMP. L. 591 (1981).

27. (1711) 24 Eng. Rep. 347 (Q.B.); Brachtenbach, *supra* note 25, at 5.

28. *Mitchel*, 24 Eng. Rep. at 349.

29. Amasa M. Eaton, *On Contracts in Restraint of Trade*, 4 HARV. L. REV. 128, 129–30 (1890).

30. Knight, *supra* note 20, at 209.

31. *Id.*

This could be marked as the start of the modern approach to the doctrine of public policy.³² Lord Mansfield's interpretation of the doctrine of *ex dolo malo non oritur actio* laid another important foundation for the modern doctrine of public policy: courts should not lend their resources to aid a man whose cause of action is based on illegal or immoral ground.³³ As Knight noted, the eighteenth century reshaped the doctrine of public policy as something distinct from bare immorality or illegality.³⁴ The modern approach to public policy entailed political considerations, not merely shared communal values for its justification and its substance.

The politicization of the doctrine of public policy provoked the resistance and hesitation of nineteenth-century common law. The paradigm shift from *encounter commune ley* to counter *res publica* incited two main reactions. One group was dismissive of the notion and believed it should lie within the sole authority of the legislative body to decide the policies related to the public. For instance, in *Richardson v. Mellish*, Justice Burrough famously called public policy "a very unruly horse" and "when you get astride of it, you never know where it will carry you."³⁵ This has become the most oft-quoted sentence on the doctrine of public policy to date.³⁶

32. The shift seems to be in line with the emergence of modern contract law, according to some legal historians. Contract law underwent two major paradigms: up to the late eighteenth century, contract law was centered on the fairness of the bargain. Afterwards the focus shifted to the will theory of contract law and less so on the very fairness of the bargain. Morton J. Horowitz, *The Historical Foundation of Modern Contract Law*, 87 HARV. L. REV. 917–19 (1974).

33. *Id.*; see also THOMAS CUNNINGHAM, THE LAW OF SIMONY 52 (1784) (discussing *The Bishop of London v. Fytche*, in which the House of Lords held that resignation bonds were illegal under the law of simony); *Fletcher v. Lord Sondes* [1826] 3 Bing. 501, 590 (U.K.); *Rex v. Waddington* [1800] 1 East 143 (Eng.) (providing an account of the historical development of contracts held unenforceable due to illegal terms).

34. Knight, *supra* note 20, at 210 ("The departure lies in the confusion of the principle of public policy with bare immorality and illegality . . .").

35. *Richardson v. Mellish*, (1824) 130 Eng. Rep. 294, 303.

36. This case has been cited in various contexts: in the area of law and economics see, for example, Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975); in the area of criminal law and contract law see, for example, John Shand, *Unblinking the Unruly Horse: Public Policy in the Law of Contract*, 30 CAMBRIDGE L.J. 144 (1972); in the field of conflict of laws see, for example, Nicholas deBelleville Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087 (1956); in the area of alternative dispute resolution see, for example, Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 MARY'S L.J. 259 (1990); in the area of family law see, for example, Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163 (1985); in the area of tax law see, for example, Cathryn V. Deal, *Reining in the Unruly Horse: The Public Policy Test for Disallowing Tax Deductions*, 9 VT. L. REV. 11 (1984); in the area of international arbitration see, for example, Reisman, *supra* note 18, at 854–55; Loukas Mistelis,

There were similar doubts in the famous case of *Egerton v. Brownlow*: Lord Alderson found it to be “inexpedient” in the opinion of a sensible man.³⁷ Lord Parke opined that it should be the legislator, not the parties and the courts, that determines public good and public policy. *Egerton* is an important case because for the first time the conflicting views of judges on public policy were shaped and articulated clearly. One view conceptualized public policy as only a guide for ascertaining the object and purpose of statutes, whereas the opposite view saw it as an abstract legal standard independent of time and circumstances.³⁸ The thrust of the dissents’ argument revolved around the same concerns as voiced earlier by Justice Burrough: public policy lies in the discretion of legislature, not the judicature. In short, with a multitude of statutes, there was no need for judicially crafted public policy.³⁹

The second group suggested that the courts concentrate on the state’s interests in cases involving a public policy exception. For instance, in *Cooke v. Turner*, while deciding the enforceability of a will the Judge declared that a condition could be void on the ground of public policy if it restrained a party “from doing some act which it is supposed the State has or may have an interest to be done,” for example conducting trades or marrying.⁴⁰ However, if “the State has no interest whatsoever apart from the interest of the parties themselves”⁴¹ the court’s involvement would not be necessary, particularly under the rubric of public policy.

Lord Watson’s opinion in *Nordenfeldt v. Maxim* serves as another example for the second group approach:

A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its courts.⁴²

A distinction between these two approaches—most notably—lies in the fact that the former endorses a more passive role in the assessment of the public policy exception, whereas the latter encourages

Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards, 2 INT’L L. FORUM DU DROIT INT’L 248 (2000).

37. *Egerton v. Brownlow* [1853] 10 Eng. Rep. 359, 437 (H.L.). The case involved a contingent interest in an estate in the form of condition subsequent. The House of Lords found the arrangement void. 24 RULING CASES 118 (Irving Browne et al. eds., 1901).

38. Winfield, *supra* note 26, at 88.

39. *Id.* at 88–89.

40. *Cooke v. Turner* (1845) 60 Eng. Rep. 449, 502.

41. *Id.*

42. *Nordenfeldt Guns & Ammunition Co.* [1894] A.C. 535, 553 (emphasis added).

courts to actively assess and enforce the state's interests in this context. Still, today similar approaches are traceable in courts' positions towards this topic.

B. Unruliness of Public Policy

As discussed in the previous section, some judges started to cast doubt on the applicability of the doctrine of public policy. Most notably, Justice Burrough called it a "very unruly horse." Yet, despite the multitude of references to the unruliness of public policy,⁴³ it is not clear why the resistance towards the notion of public policy emerged. In other words, this section investigates the very unruly characteristic of the doctrine of public policy as it has subsisted until today in our legal culture.

The unruliness of public policy relates to its exogenous nature vis-à-vis the logic of legal reasoning. Simply put, the constitutive narrative of public policy departs from the structure of legal reasoning. Historically, the discussion of public policy has been enmeshed with contract law.⁴⁴ The law of contracts is the bedrock on which many legal systems have developed throughout history. In short, a contract is the result of correspondence involving an offer and an acceptance.⁴⁵ There are formation defects that may prevent the agreement from coming into existence, commonly as a result of lack or defect in consent. For example, there will be no contract if acceptance does not unconditionally match the essential terms of an offer,⁴⁶ or if acceptance is expressed while one person is intoxicated to an extreme level.⁴⁷ In these instances, no contract or agreement is ever formed between the parties.

43. See *supra* note 36.

44. Brachtenbach, *supra* note 25, at 5; Arthur Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 *YALE L.J.* 1027, 1029 (1940) ("[T]he contracts use of the public policy concept can be traced back to the fifteenth century and its conflict use to the eighteenth century.").

45. Historically and under English common law, the modern conception of the contract came as result of recognition of the notion of *assumpsit*. In short, *assumpsit*, which emerged in the sixteenth century, allowed the non-breaching party in an agreement to claim damages from the breaching party in the event of mere non-performance. Before, the non-breaching party would be liable only if (s)he was at fault. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 40–43 (2d ed. 2014).

46. See, e.g., *Iselin v. United States*, 271 U.S. 136, 139 (1926) ("[A] proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested.").

47. See, e.g., *Seminara v. Grisman*, 44 A.2d 492, 494 (N.J. Ch. 1945) ("A contract should not be enforced where the mind of the party was so disqualified by excessive and complete intoxication that he was at the time mentally incapable of understanding the subject of the agreement, its nature, and probable consequences.").

On the other hand, there are instances where a contract, after being fully formed by the parties, does not yield its usual consequences. Illegality of a contract is one of the prime instances where the contract is devoid of legal impact. Usury is a good example in the history of contract law. Following Christianity⁴⁸ and Greek economic theory, receiving extra payment for the use of a loan was prohibited. As a result, contracts that led to usury were found to be unlawful, and thus void.⁴⁹

The public policy exception belongs to the second category. It does not bear on the formation of contracts but on their effects. Historically, for Medieval lawyers the contract was either illegal or not. No other categories such as public policy existed.⁵⁰ Similarly, during the sixteenth and early-seventeenth centuries in common law, illegality was a general category encompassing contracts rendered void by statute, contracts contrary to public policy, contracts to commit crimes, and other categories.⁵¹ It was not until later in history that public policy became a category independent from illegality. Parties could not evade public policy by entering into private contracts. In other words, private contracts could not be avenues to circumvent the public policy of states. As a result, private legal arrangements became systematically subject to public affairs thanks to the doctrine of public policy. At the time, three types of contracts were deemed to be against public policy: (1) contracts that ousted the jurisdiction of the court, (2) contracts that tended to prejudice the status of marriage, and (3) contracts that restrained trade.⁵²

Courts gradually employed the category of public policy as a type separate from illegality in contract law to render certain contracts unenforceable. If a contract is against public policy it is not void, yet it is unenforceable. It is best described in the words of Lord Denning in *Bennett v. Bennett*:

They are not "illegal," in the sense that a contract to do a prohibited or immoral act is illegal. They are not "unenforceable," in the sense that a contract within the Statute of Frauds is unenforceable for want of writing. These covenants lie somewhere in between. They are invalid and unenforceable.⁵³

48. St. Thomas Aquinas famously argued that usury is double payment because the person who loans receives extra payment for something that does not have an independent existence. See 1 ALFRED WILLIAM BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF ACTION OF ASSUMPSIT 510 (1987).

49. See, e.g., *Sanderson v. Warner* [1622] 81 Eng. Rep. 1087. This case is cited in SIMPSON, *supra* note 48; see generally MARK ORD, AN ESSAY ON THE LAW OF USURY (1809).

50. SIMPSON, *supra* note 48, at 129.

51. *Id.* at 508.

52. M.P. FURMSTON, CHESHIRE FIFOOT & FURMSTON'S LAW OF CONTRACT 470 (15th ed. 2007).

53. *Bennett v. Bennett* [1952] 1 KB 249, 260 (Eng.), reprinted in MICHAEL FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 460 (16th ed. 2012).

This excerpt attests to the exceptional nature of public policy in contract law. The concept of public policy is not only exceptional but more importantly it is exogenous. It is imposed by an external necessity or force and has not been duly integrated into the fabric of contract law jurisprudence. It is “somewhere in between,” as Denning opines, because it does not entirely fit within traditional *illegality* doctrine as existed in contract law.

Contract law is primarily a matter of private law in which parties are deemed to be of equal footing. Neither party has a privilege because of its social or political status. Yet, the modern doctrine of public policy rests on the idea that enforcing a contract is a matter of public law. Delivering justice is a public affair and is done at the public expense and, therefore, should be monitored. Public resources should not be employed for the execution of an agreement that is injurious to public morality or interest.⁵⁴ The words of Chief Justice Wilmot demonstrate this approach: “It is the duty of all courts of justice to keep their eye steadily upon the interests of the public, even in the administration of commutative justice; and when they find an action is founded upon a claim injurious to public.”⁵⁵

Henceforth, contract law had to confront an entity that was beyond the logic resulting from the offer-acceptance paradigm. Even if all four corners of the documents complied with provisions of jurisprudence of contract law, an external moral or legislative concern could render it unenforceable. The very exogenous feature of the public policy doctrine differentiates it from other similar doctrines such as unconscionability. An unconscionable term goes to the heart of the balance of considerations in a bargain; public policy doctrine does not concern itself with the logics of contract law, such as consideration. This is what’s unruly about public policy. It has a logic of its own, separate from the internal logic of private legal acts of citizens.⁵⁶ More importantly, it could prevent a lawful act from yielding results.

54. ELISHA GREENHOOD, *THE DOCTRINE OF PUBLIC POLICY IN THE LAW OF CONTRACTS: REDUCED TO RULES 2* (1886) (“The strength of every contract lies in the power of the promise to appeal to the courts to appeal to the courts of public justice for redress for its violation. The administration of justice is maintained at the public expense: the courts will never, therefore, recognize any transaction which, in its object, operation, or tendency, is calculated to be prejudicial to the public welfare.”).

55. C.J. Wilmot’s Opinions (*Low v. Peers*), 377; see also *Crawford & Murray v. Wick*, 18 Ohio St. 190, 204 (1868) (quoting Chief Justice Wilmot); *Gleason v. Chicago, M. & St. P. R. Co.*, 43 N.W. 517, 518 (Iowa 1889) (same).

56. James D. Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 *BROOK. L. REV.* 323, 323 (1970) (“To base a decision on the ground of public policy, however, introduces into the judicial process an element with different characteristics than the other grounds. It brings into the case an element extrinsic from the conduct of the parties—the exercise of community control quite apart from statute, judicial precedent or doctrine.”).

Public policy is also distinct from illegality. It is external, exceptional, and rather haphazard. Scholars find it almost impossible to pin down an overarching theory regarding this doctrine. All these factors explain the general tendency to contain the public policy doctrine. Additionally, in a globalized world in need of predictability, the public policy doctrine has remained the most unpredictable aspect of global judicialization.

C. Definition

We hear the phrase “public policy” on a daily basis from media outlets to scholarly debates in law and other fields. Yet, the doctrine of public policy in law has a distinct and nuanced framework that needs to be delineated before we embark on analyzing it. This section provides an overview on various applications and definitions of the phrase “public policy”.

The phrase “public policy” is discussed in four contexts: (1) public policy in a modern sense, i.e., policies pursued and enacted by governments (especially the administrative aspects);⁵⁷ (2) public policy as a mandatory rule that trumps the parties’ contractual agreement; (3) public policy as it appears in conflict of laws, limiting the application of foreign rules;⁵⁸ and (4) public policy that bars the enforcement of foreign judgments or arbitral awards.

57. Here are some leading definitions in this category: “The term public policy always refers to the actions of government and the intentions that determine those actions.” CLARKE E. COCHRAN ET AL., *AMERICAN PUBLIC POLICY: AN INTRODUCTION* (1999); “Whatever governments choose to do or not to do.” THOMAS R. DYE, *UNDERSTANDING PUBLIC POLICY* (1992); “Stated most simply, public policy is the sum of government activities, whether acting directly or through agents, as it has an influence on the life of citizens.” B. GUY PETERS, *AMERICAN PUBLIC POLICY: PROMISE AND PERFORMANCE* (1999); see, e.g., Richard H.W. Maloy, *Public Policy—Who Should Make It in America’s Oligarchy?*, 1998 DET. C. L. REV. 1147, 1147 (1998). Often, the term “public policy” does not refer to specific laws and regulations but a practice by the government that has not been incorporated into law. PCA Snyman, *Public Policy in Anglo-American Law*, 19 COMP. & INT. L. J. OF S. AFR. 220, 221 (1986) (citing *Nashville C & St. L. Ry. v. Browning*, 310 U.S 362 (1940)); Nussbaum, *supra* note 44, at 1027 (“[P]ublic policy is relied upon in order to solve doubts as to the interpretation of legal rules.”).

58. See, e.g., Herbert F. Goodrich, *Public Policy in the Conflict of Laws*, 36 W. VA. L. Q. 156 (1930); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Nussbaum, *supra* note 44; Charles B. Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 MINN. L. REV. 196 (1935); John Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647 (1985); Conrad G. Paulsen & Michael I. Sovren, *“Public Policy” in Conflict of Laws*, 56 COLUM. L. REV. 969 (1956); Herbert W. Greenber, *Extrastate Enforcement of Tax Claims and Administrative Tax Determinations Under the Full Faith and Credit Clause*, 43 BROOK. L. REV. 630 (1977); Robert A. Leflar, *Extrastate Enforcement of Penal and Government Claims*, 46 HARV. L. REV. 193 (1932); Willis L. M. Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339 (1952). For more

Public policy, in its first sense, encompasses general *public* policies pursued by the government. Governments try to achieve certain *public* goals, such as promotion of education, prohibition of drug usage, increased economic efficiency, protection of basic rights, and many other policies. Which public policies best suit each government is a science and a field of study. Almost all well-reputed universities offer a degree or a non-degree program in public policy.

Courts often utilize the aforementioned meaning of public policy. For example, a quick survey of U.S. Supreme Court decisions demonstrates that this usage of the phrase has been quite common. For example, in *Marbury v. Madison* the Court found that reasons of public policy were an underlying ground for the writ of mandamus.⁵⁹ In *U.S. v. Procter & Gamble Co.*, the Court confirmed “the strong public policy of preserving the secrecy of grand jury proceedings.”⁶⁰ In *Owen v. City of Independence* and *Malley v. Briggs*, the Court favored qualified immunity because of, *inter alia*, considerations of public policy.⁶¹ An-

recent discussions see, for example, Thomas G. Guedj, *The Theory of the Lois de Police: A Functional Trend in Continental Private International Law—A Comparative Analysis with Modern American Theories*, 39 AM. J. COMP. L. 661 (1991); Barbara Cox, *Same-Sex Marriage and the Public Policy Exception in Choice of Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61 (1996); Todd C. Hilbig, *Will New York Recognize Same-Sex Marriage?: An Analysis of the Conflict-of-Laws’ Public Policy Exception*, 12 U. J. PUB. L. 333 (1998); Lynn L. Hogue, *State Common-Law Choice-of-Law Doctrine in Same-Sex Marriage: How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29 (1998); Murphy, *supra* note 26.

59. *Marbury v. Madison*, 5 U.S. 137, 169–70 (1803) (“Lord Mansfield, in 3d Burrows 1266, in the case of the *King v. Baker, et al.* states with much precision and explicitness the cases in which this writ may be used. ‘Whenever,’ says that very able judge, ‘there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government.’ In the same case he says, ‘this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.’”).
60. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 690 (1958) (“I fully subscribe to the view that the strong public policy of preserving the secrecy of grand jury proceedings should prevent the general disclosure of a grand jury transcript except in the rarest cases.”).
61. *Owen v. City of Independence*, 445 U.S. 622, 667 (1980) (“Important public policies support the extension of qualified immunity to local governments.”); *see also Malley v. Briggs*, 475 U.S. 335, 335 (1986) (“Neither the common law nor public policy affords any support for absolute immunity. Such immunity cannot be permitted on the basis that petitioner’s function in seeking the arrest warrants was similar to that of a complaining witness, since complaining witnesses were not absolutely immune at common law. As a matter of public policy, qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”); *Imbler v. Pachtman*, 424 U.S. 409, 409 (1976) (“The same considerations of public policy that underlie the common-law rule of abso-

other example is the *Mitsubishi* case in which the Court declared the law endorsed the public policy in favor of competition.⁶²

Public policy, as used in other contexts, refers to an aspect of *public* life, emanating from various sources including public policy in the above-mentioned sense that holds a trump card against contracts, judgments, and foreign rules. It seems impossible to define “public policy” considering its multi-dimensional character. Lord Truro put forward a classical definition of “public policy” in 1853 that has been repeatedly reiterated by subsequent courts. Lord Truro, in the landmark case *Egerton v. Brownlow*, states that public policy is “that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed . . . the policy of law or public policy in relation to the administration of the law.”⁶³ In the literature, Winfield provided a basic definition for the concept of public policy: “[A] principle of judicial legislation or interpretation founded on the current needs of the community.”⁶⁴

Yet, only certain types of public policies—in the first sense—could exert an impact on the enforceability and legality of private contracts as well as foreign judgments and awards. The vexing question is how to draw the line between the two and how to frame the public policy exception both descriptively and normatively. Descriptively, it has become almost impossible to find a pattern that courts have followed when finding contracts against public policy. From the normative standpoint, it remains a challenging task to find an all-encompassing theory that courts should follow in cases involving the public policy defense.

“Public policy” in this Article refers to situations where private legal acts, e.g., contracts, become unenforceable due to their conflicts with a *public* policy deduced from legislation or judge-made rules. Rationales put forward for the functionality of this theory are manifold. In the area of contract law, historically, courts have leaned towards three main justifications, at least when contracts are against criminal law. For contracts in violation of a criminal code, the justification was that public policy punishes the wrong behavior by refusing to enforce

lute immunity of a prosecutor from a suit for malicious prosecution likewise dictate absolute immunity under [section] 1983.”)

62. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 653 n.21 (1985) (“The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.”)

63. *Egerton v. Brownlow* [1853] 10 Eng. Rep. 359, 437 (H.L.). Earlier, Chief Justice Tindal provided a similar definition in *Hornor v. Graves*: “Whatever is injurious to the interests of the public is void, on the grounds of public policy.” [1831] 131 Eng. Rep. 284, 287.

64. Winfield, *supra* note 26, at 92.

the agreement.⁶⁵ Moreover, it proscribes lending help to those who have violated an important public interest.⁶⁶ Thirdly—more relevant to legal acts contrary to a criminal prohibition—is the deterrent effect of the doctrine of public policy.⁶⁷

One final note is necessary regarding the contours of the public policy doctrine as it appears in this Article. This piece does not address the situations where the law explicitly declares the contrary agreements to be unenforceable. This refers to instances where a statute declares unequivocally that contrary agreements are void and enforceable.⁶⁸ These are easy cases, requiring no significant discussion and analysis. In fact, these cases do not even belong in the discussion of public policy and invoking the doctrine in these instances seems to be an erroneous practice.

D. Taxonomy

This section looks at taxonomy and classifications suggested in the literature for the public policy exception. Despite the issue's importance, the existing literature has not addressed the matter thoroughly. Except for a few notable recent pieces, the majority of the scholarship dates back to pre-1950. In 1935, Walter Gellhorn wrote a classic piece, published in the *Columbia Law Review*, in which he favored what could be called the legislation-based doctrine of public policy.⁶⁹ Criticizing the judicial-based approach to public policy, he argues that the role of courts is to discover public policies underlying

65. Shand, *supra* note 36, at 148.

66. *Id.* at 151.

67. *Id.* at 154. In *McMullen v. Hoffman*, the Supreme Court of the United States referred to it as a rationale underlying doctrine of public policy:

[T]o refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law

174 U.S. 639, 669–70 (1899). In situations where contracts impose costs on third parties, legislatures and courts face a dilemma: whether they should hold the parties subject to criminal or civil liability while leaving the contract intact. The other option is to declare the contract unenforceable. For example, in *Mincks Agri Center, Inc., v. Bell Farms, Inc.*, the court had to decide whether imposing criminal penalties for lack of license would be enough for the deterrence effect. The court decided that the contract concluded during the time the plaintiff did not have a property license was unenforceable. 611 N.W.2d 270, 270 (Iowa 2000). In contrast, in *Hirman Ricker & Sons v. Students International Mediation Society* the court did not declare the contract unenforceable, even though the plaintiff did not have a sanitation license. The court found the additional penalty of non-enforceability was harsh and unsound. 342 A.2d 262, 267 (Me. 1975).

68. *See infra* note 93.

69. Walter Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 679–80 (1935).

statutes rather than foisting new policies. What falls under public policy “is for the legislature to determine” according to Gellhorn, whereas the judicial body is limited to investigating the content of public policy.⁷⁰ He finds penal code provisions to be one effective way of ascertaining legal acts that are detrimental to public interest. Even absent clear-cut legislative intent, contracts assisting or resulting in certain prohibited criminal acts should be declared unenforceable as contrary to public policy.⁷¹ The last argument was a response to those who viewed unenforceability of contracts as an additional sanction to a prohibited act, not stipulated by the legislature.⁷²

Gellhorn’s piece marks the start of the American approach to the doctrine of public policy. It essentially seeded skepticism towards the judicially based public policy doctrine. Paradoxically, in a common law system encouraging judicial review, the determination of public policy was viewed primarily as a task of statutory interpretation. The judge’s task was reduced to eliciting non-legal policy deductions from essentially non-legal materials.⁷³ This approach was probably the reason behind the general popularity of *Richardson v. Mellish* among courts and its oft-quoted description of public policy as an “unruly horse.”⁷⁴ This view yields to a transcendental view of public policy, a hidden wisdom that judges should extract from legislation.⁷⁵ In sharp contrast, during the same period Holmes was laying the foundation of

70. *Id.* at 685.

71. *Id.* at 683–84.

72. *Id.* at 683.

73. I MORRIS R. COHEN & FELIX S. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 187 (1951).

74. *See supra* note 36. Justice Burrough differed from Chief Justice Abbott who took an opposite view in an earlier case, *Card v. Hope*, on the issue of public policy. Winfield, *supra* note 26, at 87; *Richardson v. Mellish* [1824] 2 Bing. 229, 251. Interestingly enough, his views have been rarely invoked in the discourse on public policy doctrine. Winfield, *supra* note 26, at 87.

75. The suggested passive role of judges regarding public policy has a notable consequence for alternative dispute resolution. For the purpose of this section, it is worth noting Gellhorn’s theory attracted a group of scholars and practitioners in international arbitration. With a reduced role for judges in this area, it remains less of a challenge to prove that arbitrators not only have the authority to adjudicate public policy-related matters, but also that courts would have limited judicial review discretion. JAN PAULSSON, THE IDEA OF ARBITRATION 134–35 (2013). Arbitrators are as competent as judges to discover the intent of the legislative body as to the underlying public policy of a certain act or regulation. I will discuss the merits of this argument in a separate Article. Yet, one point is worth considering now: this approach seems to dodge the very vexing question of discovering the nature of *public* in public policy. The role of arbitrators is inextricably linked to the conceptualization of public policy. The public nature of these policies needs to be dissected and investigated. The exiting literature on alternative dispute resolution shuns away from probing into the tricky nature of what’s *public*. As I lay out in this Article, public policy is not simply a constructed policy behind legislation, but rather consists of at least three distinct notions.

American jurisprudence relying heavily on the role of judges in policy making.⁷⁶ This idea has remained an important component of American jurisprudence since then. For instance, McDougal and Lasswell find it inevitable—and even desirable—that lawyers engage in shaping policies.⁷⁷ In spite of this theoretic and practical turn, the public policy doctrine remained an outlier in the discourse of American legal realism. The skeptical view of the unruliness of public policy, whether articulated by the legislature or the courts, has become the prevailing narrative.

All scholars, however, do not share this view. While Gellhorn's theory summed up—and by one account initiated—a long-lasting tradition in regards to the concept of public policy, opposing theories challenged this reductionist view. Roscoe Pound's theory probably furnishes the most important counter-argument to Gellhorn's approach. Pound's theory rests on the social implications of law and not on any abstract notions, such as natural rights or positivism. His general theoretical interest lies in the ways through which law controls the social sphere. In furtherance of his theory, in his seminal piece in the *Harvard Law Review*, *A Survey of Social Interests*, he grapples with the doctrine of public policy in common law.⁷⁸ Pound points out that public policy focused on the individual's natural rights from the seventeenth century to the end of the nineteenth century. Social interests, according to Pound, were marginalized due to the prevailing public policy approach or were construed in the shadow of the abstract individual right paradigm.⁷⁹ Consequently, the notion of public policy routinely conjured up the image of an "unruly horse" and "you never [knew] where it [would] carry you."⁸⁰ Courts became too apprehensive to apply or too hostile to seriously engage the notion of public policy. They only paid lip service to it, as Pound mentions:

In truth, the nineteenth-century attitude toward public policy was itself only the expression of a public policy. It resulted from a weighing of the social interest in the general security against other social interests which men had sought to secure through an overwide magisterial discretion in the stage of equity and natural law.⁸¹

76. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 231 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in any court.")

77. JUSTIN ZAREMBY, *LEGAL REALISM AND AMERICAN LAW* 99 (2014).

78. Roscoe Pound, *A Survey of Social Interest*, 57 *HARV. L. REV.* 1 (1943).

79. *Id.* at 5.

80. *Richardson v. Mellish* [1824] 2 *Bing.* 229, 251.

81. Pound, *supra* note 78, at 6.

As a result, courts forged a few judicial public policies⁸² in light of the enlightenment teachings⁸³ and the rest of what constitutes public policy was left for the legislature to decide. According to Pound, courts retained their status as a guardian of “general security exclusively in terms of individual rights” and did not find it cumbersome to weigh “social interest in terms of the general security” in the sense described.⁸⁴ Yet, the courts voiced their skepticism about their role in the advancement of other social interests finding those interests to be too vague and ill-defined.⁸⁵ Furthermore, courts noted that they were restricted to adjudicate the merits of cases before them—a matter they found limiting to further or establish public policies.

Pound’s piece shed light on the shortcomings of the doctrine of public policy in common law and specifically in American jurisprudence. Juxtaposing it with Gellhorn’s theory, one could understand the conceptual framework on which public policy in American jurisprudence is premised. In this framework courts are tasked with protecting mainly individual rights under the doctrine of public policy, whereas for other public interests the legislature sets the policies and the court’s task is to investigate them. Pound’s piece aims to demonstrate that the reductionist view leads to undermining other forms of social interests. For him, social interests are manifold. General security is of paramount importance, which consists of general safety, general health, and the security of transactions.⁸⁶ He enumerates the security of social institutions such as marriage and religious institutions as

82. Pound enumerates the most prominent judicial public policies created by courts over the nineteenth century:

First and most numerous are policies with reference to the security of social institutions. As to political institutions, there is a recognized policy against acts promotive of crime or violation of law—in other words, a policy of upholding legal institution—and a policy against acts prejudicially affecting the public service performed by public officers. As to domestic institutions, there is the well-known policy against acts affecting the security of the domestic relations, or in restraint of marriage. As to economic institutions, there is the policy against acts destructive of competition, the policy against acts affecting commercial freedom, and the policy against permanent or general restrictions on the free use and transfer of property. Secondly, there are policies with reference to maintaining the general morals. Thus there is a recognized policy against acts promotive of dishonesty. Also there is a recognized policy against acts offending the general morals. Thirdly, there are policies with reference to the individual social life: a policy against things tending to oppression, and a policy against general or extensive restrictions upon individual freedom of action.

Id. at 7–8 (footnotes omitted).

83. Hegel’s idea of liberty influenced nineteenth-century jurisprudence, and as a result the notion of public policy. *Id.* at 5.

84. *Id.* at 12.

85. *Id.*

86. *Id.* at 17–20.

the second important social interest.⁸⁷ Third is the social interest in the general morals, so called *boni mores* in Roman law.⁸⁸ Fourth, he identifies the conservation of social resources as a public interest, which should be preserved against individual desires.⁸⁹ Public interest in general progress constitutes the fifth category of social interest according to Pound.⁹⁰ Lastly, and most importantly for Pound, is the very value of individual life such that every human should be able to enjoy rights such as individual self-assertion, individual opportunity, and individual conditions of life.⁹¹

Pound was the first scholar to provide a taxonomy of public policy under the rubric of social interests. He aimed to broaden the perspective of what constitute public interests and to change the discourse on legal order “as one of adjusting the exercise of free wills to one of satisfying wants, of which fee exercise of will is but one.”⁹² He was probably the first who viewed public policies as graded and not as a monolithic or an untouchable notion.

There have also been several attempts to formulate public policy by its sources. This classification is premised on the clarity of legislative intent. The first category belongs to public policies declared explicitly by the legislature. Often statutes proclaim unequivocally their objectives in the preamble of the document or in the text.⁹³ For instance, the Public Housing Law of New York State devotes a section to describing in detail the policy and purpose of the law.⁹⁴ The judge’s task in these instances is minimal since the public purpose of the statute has been declared by the legislature. In most cases, judges have to extrapolate the intent of the legislature to determine the policy underlying the statute. Judges investigate the legislative history and the context in which the legislation was passed to identify the policy behind it.⁹⁵ Lastly, in the absence of a legislative or constitutional declaration or a reasonable inference thereupon, courts are permitted to venture into the area of declaring public policy.⁹⁶ Antitrust law is a good example where, due to the vagueness of the Sherman Act, judges

87. *Id.* at 20–23.

88. *Id.* at 25. He opines that in cases involving moral issues “we much reach a balance between social interest in the general morals, and the social interest in general progress, taking form in a policy of free discussion.” *Id.* at 26.

89. *Id.*

90. *Id.* at 30.

91. *Id.* at 33.

92. *Id.* at 1.

93. Hopkins, *supra* note 56, at 325–26.

94. N.Y. Pub. Hous. Law § 2, (McKinney 1961) (Policy of State and Purpose of Chapter).

95. Hopkins, *supra* note 56, at 326; Brachtenbach, *supra* note 25, at 18.

96. Hopkins, *supra* note 56, at 330.

gradually crafted a body of public policies to protect the society from unfair competition.⁹⁷

A taxonomy based on the sources of public policy, as described above, oversimplifies the complicated problem of public policy. Not only does it not provide any substantive guide as to the nature of public policy, but its classification might also be easily deconstructed. For instance, the preamble of the Patriot Act clearly lays out the purpose of the statutes “to deter and punish terrorist acts in the United States and around the world.”⁹⁸ Even if the policy here is clearly declared it does not render any help to judges. Judges confront a multitude of statutes with conflicting public policies, making it almost impossible to use a statute’s declared policy as a guideline. In the example above, the Patriot Act’s public policy turned out to be in conflict with other documents, including the Constitution.⁹⁹ The conflicting policies and vague language of statutes leaves almost all categories open to a judicially based public policy. In addition, statutory interpretations by various courts would routinely result in conflicting outcomes. Therefore, we can hardly accept that public policy is a matter exclusively for the legislature to decide. Judicial public policy and legislative policies serve inherently distinct functions; the former resolves disputes at micro level, whereas the latter aims to set broader policies.¹⁰⁰

A few scholars have proposed several substantive classifications of public policy, mainly in the field of contract law. Furmston divides the doctrine of public policy into five categories. First, he pays attention to instances where contracts are not illegal but rather unenforceable due to public policy concerns. The example he provides is *Beresford v. Royal Insurance Co. Ltd.*,¹⁰¹ in which the court exonerated an insurance company from executing the insurance contract because the beneficiary had committed suicide. The decision was based on public policy and not the contract, which would have supported the view of the beneficiary’s family. The House of Lords barred the contract to yield its results—yet not on the grounds of illegality but rather based on public policy concerns.¹⁰²

The second category pertains to instances where contracts lead to prohibited acts, notably crimes. These are easy cases where, for exam-

97. See generally HYLTON, *supra* note 24.

98. USA PATRIOT Act of 2001, Pub. L. No. 107-58, 115 Stat. 272.

99. See, e.g., John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for Homeland Security: A Constitutional Analysis of the USA Patriot Act and the Justice Department’s Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2001).

100. Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 889 (1991).

101. [1938] A.C. 586, *affirming* [1937] 2 K.B. 197 (Eng.).

102. M. P. Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L. J. 267, 268 (1965).

ple, contracts prescribe committing a crime.¹⁰³ The third category is the opposite of the second one. In instances where the policy of law is to promote a particular act, no legal acts, including contracts, can restrain or prohibit it. The paramount examples are contracts that restrain marriage or trade.¹⁰⁴ The next category involves situations where a contract does not lead to an illegal act, but rather promotes a tendency that is contrary to the policy of the law. An example is where a couple signs a separation agreement for their potential future divorce. This very contract might induce divorce, a matter that is contrary to the marriage law policy.¹⁰⁵

Lastly, a contract might violate public policy if the intention of one party (or both) is to use it as preparation for an unlawful act. For instance, if a person rents a place with the intention of using it for prostitution, the lease is lawful yet the intention makes the contract contrary to public policy.¹⁰⁶ This study is illuminating as to the various ways that public policy could affect legal acts. Yet, it is a descriptive study and does not provide a theoretical ground on which a general public policy could be premised.

In another recent case, Friedman endeavors to bring order to the complicated public policy matters by analyzing data collected from court decisions. He finds that in practice, public policy defenses rooted in a statute or regulation had a 59% success rate, whereas general appeals to public policy resulted in only a 31% success rate.¹⁰⁷ Among the first category, those cases involving an agreement in direct contravention of licensure or a code had the higher success rate (75%). The rest belongs to criminal agreements (57%), agreements that limit or shift liability (58%) and others (50%).¹⁰⁸ This study confirms the special status of the legislative branch in setting the public policies and the heavy weight courts place on policies declared by it. In spite of illuminating empirical data, this piece leaves the pressing questions about the nature of public policy unanswered.

As noted, the current literature does not engage itself with rigorous and substantive analysis of the doctrine of public policy. Still, most of the important pieces on this matter date back to opinions in eighteenth- and nineteenth-century England and pre-1950 works. New changes in conflict of laws, contract law, and more importantly alternative dispute resolution necessitate serious scholarship on this

103. *Id.* at 280. For instance, in *Evert v. Williams* an individual sued for a financial dispute arising out of a partnership formed to commit a robbery. [1983] 9 L.Q.R. 197 (Eng.).

104. Furmston, *supra* note 102, at 292.

105. *Id.* at 297–98.

106. *Id.* at 306.

107. David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 581 (2011).

108. *Id.* at 583.

front. Integration of the world economy, globalization, and increasing cross-border disputes are among the many factors that render public policy a pivotal doctrine and a pressing issue. It could serve as a guardian for national values and also as a deterrent for cross-border trade, if used disproportionately.

III. DOES PUBLIC POLICY PROMOTE EFFICIENCY?

If philosophy in the twentieth century is marked by its linguistic turn, law has experienced an economic turn. This turn came about as a result of the intellectual contribution of Holmes and other scholars who desired to replace general standards for legal problems in lieu of moral blameworthiness.¹⁰⁹ In short, the endeavor of law and economics intellectuals is to institute an economic method for the analysis of legal problems.¹¹⁰ The ultimate goal is economic efficiency.

The practice of contracting between parties is highly cherished because, by properly allocating resources, the total wealth of a society can be increased. Prices are most efficiently determined through a free market, which allows for freedom of contract among various players in the market.¹¹¹ However—unlike some judicial opinions, including the Supreme Court in *Baltimore & Ohio Southwestern v. Voight*¹¹²—contracts are not sacred from the law and economics perspective; they are means to an ultimate goal, which is efficiency and the increase of wealth.¹¹³

Scholars in this field, however, have rarely engaged the doctrine of public policy directly although their entire area of research is directed toward promoting the particular public policy of efficiency.¹¹⁴ Yet, one relevant problem has turned out to be a vexing issue for them: providing justifications for bans on certain types of contracts and transactions. In other words, why should certain external prohibitions bar contracts from yielding their normal legal consequences?

109. “The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 77 (Mark DeWolfe Howe ed., 1963); GILMORE, *supra* note 45, at 54.

110. See generally Susan Rose-Ackerman, *Economics, Public Policy and Law*, 26 *VICTORIA UNIV. WELLINGTON L. REV.* 1 (1996).

111. *Id.*

112. 176 U.S. 498, 505 (1900) (“[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by court of justice.” (quoting *Printing & Numerical Registering Co. v. Sampson*, LR 19 Eq. 462, 465 (Eng. 1875))).

113. This is a moralistic approach to contract law according to some authors. See, e.g., Prince, *supra* note 36, at 164.

114. One exception is a Note in the *Harvard Law Review*. Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 *HARV. L. REV.* 1445 (2006).

Borrowing from this scholarship, I posit that there are three strands of public policy conceivable under the law and economics approach.

1. Public policy as a protection for parties in the contract (paternalism);
2. Public policy as a protection for third parties outside of the contract (negative externalities); and
3. Public policy as a means for redistributive justice.

Synchronically, policy considerations are imposed on contract law in two stages: (1) *ex ante*, when parties are contracting; and (2) *ex post*, when there is a dispute about the contract. At the *ex ante* stage, contract law divides rules into two categories: default rules and mandatory rules. What differentiates the two types of rules is parties' ability to contract around them. Parties can contract around default rules, while mandatory rules are not contractible. Mandatory rules refer to rules derived from public policy; parties cannot deviate from these rules by entering into a private contract.¹¹⁵ Policy considerations prevent these rules from being contractible.

There is controversy over whether mandatory rules produce economic efficiency.¹¹⁶ In the case of market failures—for instance, where there is asymmetry of information—mandatory rules may foster efficiency and distributive goals.¹¹⁷ Willy Rice, after analyzing state supreme court decisions on insurance contracts from 1900 to 1991—specifically those involving implied covenant of good faith clauses—concluded that courts unwittingly discriminate against the litigants. One of the study's aims is to show that mandatory rules such as the covenant of good faith do not necessarily lead to efficiency or distributional goals, especially because of disparate impact discrimination.¹¹⁸ Similarly, the skepticism towards mandatory rules exists among those scholars who view the firm as a contract or a “nexus of

115. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 609–10 (2003).

116. *Id.*

117. Daniel P. Kessler & Daniel L. Rubinfeld, *Empirical Study of Civil Justice System*, in 1 *HANDBOOK OF LAW AND ECONOMICS* 343, 350 (A. Mitchel Polinsky & Steven Shavell eds., 2007).

118. This is a term coined by the United States Supreme Court in the context of employment discrimination. *See, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Under the Court's disparate impact analysis, a Title VII plaintiff may state a prima facie employment discrimination claim by making a statistical showing that the neutral scheme caused the hiring disparity. *See* LEE M. MODJESKA, *EMPLOYMENT DISCRIMINATION LAW* § 1.8, at 30 (2d ed. 1988). But in the context of the present discussion, a disparate impact analysis permits a presumption, based on a statistical showing, that a state supreme court's neutral rule, practice, or policy harms members of a certain group, such as female policyholders, automobile insurers, life insurance insurers, or excess liability insurers.

contracts.”¹¹⁹ These scholars believe that mandatory rules are only justified to prevent adverse effects on third parties. Contracts that result in pollution and contracts negatively affecting competition are among those contracts that should not be enforceable.¹²⁰ Yet, contracts related to business or governance do not involve substantial effects for third parties and, therefore, should not be limited. Justification for state intervention is not applicable to intra-corporate affairs.¹²¹

In contrast, Ayres aims to show in a study that mandatory provisions lead to efficiency. He analyzes mandatory disclosure by sending 203 testers to negotiate for the purchase of a new car. He finds that mandatory disclosure leads to economic efficiency and reduced price discrimination.¹²² However, the latter study goes to the heart of the asymmetry of information problem rather than the first study, which deals with the traditional covenant of good faith in contracts. In other words, it does not refute the presumption that some mandatory rules do not necessarily increase economic efficiency.

In the enforcement stage, considerations related to public affairs are part of the doctrine of public policy. As discussed, public policy concerns the enforcement of contracts. There are significant overlaps between mandatory rules and the doctrine of public policy. However, they are distinct from each other. An example will clarify this distinction: even if the legislature did not criminalize prostitution, a contract for prostitution would remain unenforceable.¹²³ In other words, the illegality of prostitution is recognized only if judicial resources are used for enforcement. Mandatory rules are designed to shape parties behavior, while contracting and public policy is a bar to enforcing their contractual terms where the overall objective or outcome of the contract is against public policy.

So far we have realized that three possible explanations or scenarios can be found in the law and economics approach regarding the issue of the public policy exception: (1) protecting parties in the contract; (2) protecting third parties; or (3) advancing redistributive

119. Harold Demsetz, *The Theory of the Firm Revisited*, in *THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT* 159, 169–71 (Oliver E. Williamson & Sidney G. Winter eds., 1993); MICHAEL JENSEN & WILLIAM MECKLING, *THEORY OF THE FIRM, MANAGERIAL BEHAVIOR, AGENCY COSTS AND OWNERSHIP STRUCTURE* 8–10 (1976). For the limits of the contract theory of the firm, see Ian Ayres, *Making a Difference: The Contractual Contribution of Easterbrook and Fischel*, 59 U. CHI. L. REV. 1391, 1395–97 (1992).

120. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 23 (1996).

121. *Id.* But see Ayres, *supra* note 119.

122. Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Care Negotiations*, HARV. L. REV. 817, 817–22 (1991).

123. R. A. BUCKLEY, *ILLEGALITY AND PUBLIC POLICY* 90 (2d ed. 2009).

goals. In the following sections I analyze each explanation in depth and at the end try to show why, in my opinion, public policy in the enforcement state (*ex post* phase) should be mainly applied in cases involving protection of third parties.

A. Protecting Parties

In the real world, parties almost never enjoy having an equal footing at the time of contracting. People around the world hold diverse social, political, and cultural status. For example, a car dealer of a famous Japanese car brand has relative economic leverage over its buyers and could more or less incorporate its preferences in the sales contracts. It is similarly true for a cable service provider, which does not face formidable competitors in a certain area. However, these differences and leverages do not render the contract unenforceable. The law protects the weaker party—in the language of law and economics—only in cases where there is serious asymmetry of information between the parties. One assumption of law and economics is that contracts maximize welfare when made with perfect information regarding parties' payoffs. Protection against formation defects—such as the infancy of a party, fraud, and, to a great extent, unconscionable contractual terms—occur because one party is gravely under-informed compared to the other party. In other words, asymmetry of information exists when one party has an informational privilege over the other. This informational advantage might lead to market failure. In his seminal article, economist George Akerlof explains how asymmetry of information leads to market failure.¹²⁴

The question is whether the doctrine of public policy should concern itself with asymmetry of information between parties in contracts or agreements. The controversy over unconscionable terms helps us to frame the issue more accurately. Pursuant to unconscionability doctrine, courts should invalidate contracts with egregious and unjust terms for a contracting party.¹²⁵ One instance of unconscionable contracts is where one party is economically and socially feeble to the point that that the other party could easily exert influence on him or her. A contract for the sale of an umbrella on a rainy day for \$200 instead of the usual \$10 is an example of unconscionability.¹²⁶ Law and economics scholars have grappled with this because they believe courts impose their views on the rights and duties of parties when

124. George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 488–89 (1970).

125. Guido Pincione, *Welfare, Autonomy, and Contractual Freedom*, in THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 219, 224 (Mark D. White ed., 2009).

126. Some frame it as economic duress. The discussion on this matter is beyond the scope of this Article.

invoking this doctrine.¹²⁷ Alan Schwartz endeavored to limit its scope while remaining silent about situations where unconscionability results from a lack of information.¹²⁸ Richard Epstein voices a stronger objection to this doctrine. He posits that the doctrine of unconscionability does not serve any function beyond prohibition against fraud, duress, and incompetence. The only difference is that the bar for the standard of proof is lower in the doctrine of unconscionability. This reduces the total error in enforcement of unjust contracts.¹²⁹ Epstein's approach is dismissive of substantive unconscionability (i.e., invalidation on grounds of unjust terms for instance unfair prices).¹³⁰ In short, for Epstein the doctrine of unconscionability is acceptable only in instances where there is some incapacity of a contracting party, a matter that results in informational deficiency for one of the parties. His theory allows the courts to police the incompetency of parties, in addition to formation defects, in a limited fashion.¹³¹

Similar to unconscionability, one presumed function of public policy is that it should protect parties where asymmetry of information strips off the "bargain" feature of transactions. Yet, it is doubtful that there is a need for another doctrine to protect the information of parties on their contractual payoff. There are ample theories and safeguards carved into the edifice of contract law aiming to protect symmetry of information between parties. Fraud, economic duress, unconscionability, and mistake are among the main theories designed to protect parties.

However, in other aspects of the public policy doctrine—for instance in the enforcement of arbitral awards—courts have no choice but to employ the doctrine of public policy. If judgments and awards are based on a contract with serious asymmetry of information between parties, the only tool remaining in the courts' toolbox is public policy (since economic duress and unconscionability can be invoked

127. Epstein, *supra* note 36.

128. Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1053–54 (1977). Alan Schwartz suggests four categories for non-substantive unconscionability: In the first instance, the poorer party cannot impose his or her preferences. In the second category, market dynamics limit the buyer's option. The third instance is where the buyer is too unsophisticated to be able to dictate his or her preferences. Lastly, lack of information creates a situation where a contracting party cannot make his or her preferences "either because the information is unavailable or because the cost of finding and absorbing it exceeds, at the margin, the value of the information." *Id.* at 1054. Schwartz argues that the three first instances do not provide a justification to invalidate the contract. Regarding the last category his article is silent.

129. Epstein, *supra* note 36, at 302.

130. His examples are add-on clauses, waiver-of-defense, exclusion of liability for consequential damages, due-on-dale clauses, and termination-at-will clauses. *Id.* at 306–15.

131. *Id.* at 315.

only in the litigation phase of contractual disputes). In short, courts might consider serious and significant asymmetry of information between parties when enforcing awards and judgment based on the doctrine of public policy.

Yet, non-enforcement should not be a punishment for the less informed party because she is “less morally blameworthy.”¹³² The advantaged party cannot reap the benefits resulting from non-enforcement of contracts or awards. In contract law this has been reflected in the doctrine of *in pari delicto*.¹³³ Under this theory the plaintiff can recover if she is not equally in wrong with the defendant, even if the contract is contrary to public policy. For instance in *Karpinski v. Collins*, the plaintiff had to provide kickbacks to the defendant in order to receive grade-A products.¹³⁴ The market dynamics would not allow the plaintiff to obtain a similar product without paying the kickback. Notwithstanding the illegality of kickbacks, the court enforced the contract.¹³⁵ In this case the plaintiff knew about the illegality of kickbacks. But it is similarly applicable, *mutatis mutandis*, to a situation where the plaintiff does not have information about the illegality involved in transactions.

B. Protecting Third Parties

The second function of public policy in law and economics mandates that negative externalities be avoided in contract law. Negative externalities or external diseconomies refer to situations where production of a product (in economics) or exercise of a right (in law) incurs costs that outweigh the benefits it gives to the society. A classical example is pollution. A plant in the middle of a city would create costs from polluting the city that are greater than the benefits it confers to the welfare of the society. In contrast, pollution from cars is tolerated because of the benefits it has on transportation. Prevention of negative externalities is one economic rationale for the involvement of governments in economics and law.¹³⁶ In other words, states intervene

132. *McIntosh v. Mills*, 17 Cal. Rptr. 3d 66, 76 (Cal. Ct. App. 2004); *Medina v. Safe-Guard Prods.*, 78 Cal. Rptr. 3d 672, 675 (Cal. Ct. App. 2008).

133. On the doctrine of *in pari delicto*, see generally T.S. Ellis III, *In Defense of In Pari Delicto*, 56 A.B.A. J. 346 (1970).

134. *Karpinski v. Collins*, 60 Cal. Rptr. 846 (1967).

135. *Id.* at 849.

136. Alfred Marshall coined the notion of externalities and his pupil, Arthur C. Pigou, developed Marshall's theory and based his welfare economics on the notion of externalities. ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* (5th ed. 1907); A.C. PIGOU, *THE ECONOMICS OF WELFARE* (1920). Pigou favors taxing the activities which create negative externalities and providing tax breaks for activities such as education, which result in positive externalities. JOHN E. ANDERSON, *PUBLIC FINANCE* 110–15 (2011). R. H. Coase disagrees. He believes we can reduce externalities by reducing transaction costs, which allow the people creating the externalities and those affected to bargain. R. H. Coase, *The Problem of Social Cost*, 3

by enacting laws and enforcing various standards to prevent the negative externalities as much as possible.¹³⁷

Courts should engage in balancing various interests in order to ascertain the best possible outcome when negative externalities are at issue. Laws protecting against unfair competition serve as an illuminating example. Companies should not engage in tying arrangements that minimize total welfare by reducing competition in the market. The *Microsoft* decision brought before the D.C. Circuit established the balancing test in the area of antitrust in which the burden of proof was divided between plaintiff and defendant.¹³⁸ In this case, the United States brought a case against Microsoft for violation of the Sherman Act on multiple grounds: Microsoft maintained a monopoly in the market for Intel compatible PC systems, it attempted to gain a monopoly in the internet explorers' market, and it tied its two products—i.e., Windows and Internet Explorer (IE)—illegally. On the latter issue (the alleged tying arrangement), the court delegated the balancing task to the parties to evaluate whether the anticompetitive harm of the Java design is outweighed by the efficiencies that resulted from that design to society.¹³⁹ Following the *Jefferson Parish* case, the Court declared that tying arrangements should not be subject to per se analysis because they do not necessarily stifle competition.¹⁴⁰

J.L. & ECON. 1, 1–2 (1960). There is also strong skepticism as to the functionality of governments in reducing externalities from the public choice school of economics. See generally KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1951); DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); WILLIAM A. NISKANEN, BUREAUCRACY & REPRESENTATIVE GOVERNMENT (2007); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965); WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962).

137. JOHN B. TAYLOR, ECONOMICS 399 (5th ed. 2007). Economists worry about positive externalities as well. Positive externalities happen when a product or right has a positive spill over, yet the costs are not efficiently distributed. For instance, a neighbor who renovates the lobby out of pocket is benefiting the other neighbors. Yet, the market place has failed in equally distributing the costs among all stakeholders, in our example, the neighbors. UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 60 (2000).
138. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); Sangin Park, *Market Power Revisited*, in RESEARCH IN LAW AND ECONOMICS 8–9 (Richard O. Zerbe & John B. Kirwood eds., 2012); WILLIAM H. PAGE & JOHN E. LOPATKA, THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE 195–96 (2007).
139. *Microsoft Corp.*, 253 F.3d at 96 (“[P]laintiffs must show that Microsoft’s conduct was, on balance, anticompetitive. Microsoft may of course offer precompetitive justifications, and it is plaintiffs’ burden to show that the anticompetitive effect of the conduct outweighs its benefit.”).
140. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) (“It is far too late in the history of our antitrust jurisprudence to question the proposition that cer-

Central to the tying issue was whether the Microsoft's action harmed or benefited the public and whether the public interest was served better or worse by Microsoft's action. The court aptly applied a balancing test to weigh the different interests at stake.

Stifling competition is an example of a negative externality, which should be avoided in contracts and in the enforcement of awards. Courts ought to take a similar approach in regards to other negative externalities. The *Microsoft* case serves as valuable precedent for similar cases that might arise under the rubric of the public policy doctrine. When dealing with public interest matters, the doctrine of public policy allows courts to weigh the interest of parties (or one party) in enforcing the contract or award vis-à-vis the interest of society in non-enforcement.¹⁴¹ Protecting society in this sense is the principal mandate of the public policy doctrine under the law and economics approach.

C. Protecting Redistributive Justice

Lastly, and most controversially, public policy might serve to promote the redistributive feature of law. Generally speaking, in the law and economics camp the basic idea centers on contracts that produce efficient results, which subsequently result in a surplus.¹⁴² This surplus could be redistributed throughout society. Thus, in a nutshell, there should be no redistribution concerns at the contract level. Courts should not render any contracts unenforceable simply due to distributive concerns. Fried, one of the proponents of this approach, maintains: "[R]edistribution is not a burden to be borne in a random, ad hoc way by those who happen to cross paths with persons poorer than themselves."¹⁴³ Similar views have been expressed to buttress the idea that redistribution is a business of the state through the tax and welfare system, not through courts.¹⁴⁴

Although Posner certainly shares Fried's general claim that the courts ought not to be the locus of the redistributive policy, he does argue that in the area of usury law judicial intervention to limit private choice would have a beneficial redistributive effect. He believes

tain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'").

141. See *infra* section V.A.

142. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 674 (1994) (arguing that efficient legal rule leaves all individuals equally well off and leaves the government with a surplus).

143. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 106 (1981).

144. See, e.g., Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1321 (1980); Kaplow & Shavell, *supra* note 142, at 674–75.

over-reliance on the welfare system prompts risky borrowing behavior, which racks up the costs of the welfare system. He believes that states are committed both to promote the free market and to ameliorate poverty through welfare systems. He argues that a “hands-off” approach to the first function, i.e., free market promotion, will incur heavy costs on the second function, which is redistribution, because it incentivizes suboptimal risk taking.¹⁴⁵ The long-held ban on usury in common law is a good example of how the courts can limit reliance on welfare. Usury is a practice in which the creditor imposes higher-than-market interest rates on the debtor. In the case of *Dunham v. Gould*, Chancellor Kent expressed a very strong and brief justification for usury:

Lord Redesdale said in 1803, many years after Jeremy Bentham, to whom the learned counsel referred for an able defense of usury, had first published his letters, that the statute of usury was founded on great principles of public policy. It was intended, he said, to protect distressed men, by facilitating the means of procuring money on reasonable terms, and by refusing to men who sit idle as high a rate of interest, without hazard, as those can procure who employ money in hazardous undertakings of trade and manufactures. I trust that theoretic reformers have not yet attained, on this subject any decided victory over public opinion . . . The statute of usury is constantly interposing its warning voice between the creditor and the debtor, even in their most secret and dangerous negotiations, and teaches a lesson of moderation to the one, and offers its protecting arm to the other. I am not willing to withdraw such a sentinel.¹⁴⁶

High-risk creditors, mainly impoverished people according to Posner,¹⁴⁷ tend to take loans with high interest rates. The chances of their default are high, eventually subjecting them to the welfare system. Usury law is to protect this risky behavior and ultimately help with the retributive function of the state.¹⁴⁸ Posner’s idea adds a new wrinkle to the underlying policies courts should take into account when adjudicating contractual issues. He reintroduced usury law as a modern theory justifiable under the law and economics perspective.

However, it is not clear whether redistributive justice requires a separate consideration besides what we discussed for negative externalities. The redistributive concerns are related to the costs society has to pay if careless individuals engage in risky behaviors. It is linked to balancing societal interests in benefits and the costs of enforcing a certain risky contract or risky award. If enforcing a certain type of risky contract ultimately eventuates in unbearably high costs

145. Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 285 (1995).

146. JAMES AVERY WEBB, A TREATISE ON THE LAW OF USURY, AND, INCIDENTALLY, OF INTEREST 12–13 (1899) (citations omitted).

147. Posner, *supra* note 145, at 318.

148. *Id.* at 316–17.

on the redistributive mechanism of a particular state, it could be barred from enforcement under the doctrine of public policy. Certainly, one contract or an arbitral award can hardly incur such a high cost, but judicial enforcement of that type of contract or award could snowball the conclusions of similar contracts or the issuance of similar awards in future.

In summary, this Part analyzed three underlying justifications for the doctrine of public policy under the law and economics approach. First, it may protect the parties' aim to regulate informational defects between them at the time of concluding agreements. Considering other mechanisms and legal theories designed to protect parties in this regard, there is no need for the doctrine of public policy to engage itself with this matter. Second, it could protect third parties, which is the most important function of the doctrine of public policy. It shelters society from potential negative externalities derived from the enforcement of contracts or arbitral awards. The last category addresses an essential element of today's society, which is redistributive justice. However, as described, the concerns of redistributive justice could be addressed under the negative externality rubric by utilizing the balancing test.

IV. THE LEADING ROLE OF PUBLIC POLICY

Thus far, we have reviewed the historical genesis of the doctrine of public policy and its development in the common law. In Part II we discussed the impact of legal theory and the emergence of the welfare state on the metamorphosis of the public policy exception in the twentieth century. In the preceding Part, we scrutinized the law and economics analysis of the doctrine of public policy in order to grasp the economical justifications for the doctrine. In this Part, however, we will observe the insufficiency of the law and economics approach in dealing with all instances of the public policy exception. This Part aims to show that there is more in the doctrine of public policy than a simple cost-benefit analysis of the parties' interests vis-à-vis societal interests. In the first section, I argue that policy arguments in courts are inevitable. The doctrine of public policy has a leading role, not a passive one, in our judicial system.

A. Incompleteness of the Law and Economics Approach

Imagine the following scenario: An immigrant, who is on the brink of being deported by authorities, approaches an employer and asks her to sign a document certifying that she is hiring the immigrant. The employer does not need the immigrant and his skills, yet signs the document because the immigrant is a minority in his home country and is likely to be persecuted upon his return to his homeland. After a

short period, the relationship between them turns sour, and the immigrant petitions the court to enforce the employment contract in order to reap the benefits of it. The employer attests that he lied because of the likely persecution of the immigrant in his home country. The court faces a dilemma: whether to enforce an inefficient contract that is contrary to public policy or prevent the probable human rights violations of the immigrant's government. The law and economics approach and balancing test is not much help here. In fact, some law and economics scholars believe immigration results in negative externalities *per se*, although that is not the common view.¹⁴⁹ However, would it be fair?

In an actual case, a Jewish individual bribed an official in France in order to enter the United States.¹⁵⁰ The official promised that he would secure him a visa before the Nazi army reached France in exchange for money. The plaintiff provided \$28,000 worth of jewelry to the official. The official absconded the jewelry without fulfilling his promise. Later, upon meeting the defendant in New York, the plaintiff sued the defendant for the return of his jewelry. The defendant claimed that the contract was void based on the public policy doctrine. The court rejected the motion, declaring: "[T]here is no question of public policy involved in a case like this where a man is attempting to save himself from an enemy who has violated all the laws of civilization."¹⁵¹ This case is rightly decided. Yet, scholars using the law and economics approach have trouble justifying this case.¹⁵² Although not explicitly invoked by the court, it is the doctrine of public policy that guided the court to reach this decision. As is discussed later,¹⁵³ it is the public-morality strand of public policy that led the court to rule in favor of the plaintiff. For the purpose of this section, this case illuminates one aspect of judicial decision-making that is overlooked by the

149. ÖRN B. BODVARSSON & HENDRIK VAN DEN BERG, *THE ECONOMICS OF IMMIGRATION: THEORY AND POLICY* 178–79 (2009).

150. *Liebman v. Rosenthal*, 57 N.Y.S.2d 875, 877 (N.Y. Sup. Ct. 1945), *aff'd*, 59 N.Y.S.2d 148 (N.Y. App. Div. 1945).

151. *Id.* at 877. A similar case is *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 14 N.E.2d 798 (N.Y. 1938), in which an employee was dismissed pursuant to non-Aryan laws before the expiration of his employment contract. Subsequently, the employee sued for indemnification in U.S. court. The lower court invoked the doctrine of public policy to argue that non-Aryan laws are not applicable and the employee is entitled to compensation. The Court of Appeals of New York rejected the public policy argument because of jurisdictional concerns. *Id.*; *see also*, Nussbaum, *supra* note 44, at 1030–31 (discussing the public policy doctrine in the American legal system).

152. "The result of the case seems institutively correct, but its underlying argument should be tightly constrained to its facts . . . [I]t also injects uncertainty of non-enforcement into what would otherwise have been clearly unenforceable contracts, which can have negative welfare effects." Note, *supra* note 114, at 1452–53.

153. *See infra* section V.B.

literature of law and economics: it goes to the heart of judicial activism.¹⁵⁴

The law and economics movement cannot entirely capture all aspects of public policy. Its methodology is highly useful for dissecting various types of public policy in law. It also provides us with a balancing method in cases where negative impacts arise from contracts or their enforcement. However, law and economics cannot fully explain the reasons, let's say, why contracts against prostitution, or even bribery are unenforceable. The approach lacks methodological tools to clarify the reason a profitable arms sale contract with North Korea should be barred from enforcement when it creates numerous jobs in a stagnant economy. There is more to the doctrine of public policy than merely balancing economic interests. Not all aspects of social living can be reduced to cost-benefit analysis. Moreover, the court's role should not be restricted to a mere calculation of various interests.

This brings us to the other aspects of public policy, which are—what I call—“educative” and “protective.” In this respect, courts have a more active role and there is no need for balancing. Judges have a crucial role where a basic moral norm of society is in jeopardy or there is a potential threat to public safety. It might be argued that even in these instances courts follow the balancing approach. Enforcing a morally egregious contract or award that will jeopardize public safety is clearly outweighed by societal interest in non-enforcement of the contract or the award. However, there is a fine distinction between the two balancing approaches. The first one relies on economic analysis (the cost-benefit approach) of the various interests at stake. In a case of a plant causing pollution to a neighborhood, data could be shown about the benefits the neighborhood receives from job creation versus the costs incurred on the health of its residents as a result of pollution. The same analysis could not be done when issues of morality and security are at stake. Looking back at *Liebman*, it was absolutely impossible for the court to collect numerical data on the costs incurred as a result of the moral wrongdoing of the officer. Similar issues exist for cases involving public security yet they are subtly different. Public security concerns are—and ought to be—taken seriously. The sensitivity of the matter requires that even slight chance of threat to public safety overrides the normal cost-benefit analysis. The

154. For discussions on judicial activism, see, for example, Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *YALE L.J.* 1287 (1982); Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 *CALIF. L. REV.* 1441 (2004); J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 *CORNELL L. REV.* 1 (1968); P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 *COLUM. J. TRANSNAT'L L.* 561 (1984); Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 *JUDICATURE* 236 (1982).

logic of public morality and public safety is distinct from prevailing cost-benefit logic associated with ascertaining the public interest.¹⁵⁵

B. Public Policy Arguments in Courts

Montesquieu famously said that a judge is “no more than the mouth that produces the words of law.”¹⁵⁶ American legal thought, and in particular judicial philosophy, took a completely opposite trajectory from this approach to law. Inspired by pragmatism, Holmes was one of the first prominent American legal thinkers to lay the foundation for American realism. Holmes believed that judges should not follow the law blindly. Recognizing “judicial legislation,” Holmes posited that judges should take into “consideration of what is expedient for the community concerned.”¹⁵⁷ According to him, the “secret root” of law is the core from which “law draws all the juices of life.”¹⁵⁸ Holmes suggested that judges extrapolate the underlying public policy of laws rather than apply them blindly without any intellectual endeavor. Judges should form the law, not simply follow it.¹⁵⁹ They could shape the public policy of their community: “Judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy to which the traditions of the bench would hardly have tolerated a reference fifty years ago.”¹⁶⁰

This view reverberates with the claim that judges inevitably have to enter the area of political arguments.¹⁶¹ Historically, in 1750 Lord

155. For an in-depth discussion on this matter, see *infra* Part V.

156. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 209 (Thomas Nugent trans., Univ. Cal. Press 1977) (1750).

157. HOLMES, *supra* note 109, at 32.

158. *Id.*

159. This tradition has influenced other legal systems as well. Justice Barak, the former president of the Supreme Court of Israel posits, “I reject the contention that the judge merely states the law and does not create it. It is a fictitious and even a childish approach.” Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *HARV. L. REV.* 19, 23 (2002). Barak believes that a supreme court justice should take into consideration: “(1) the coherence of the system in which he operates; (2) the powers and limitations of the institution of the judiciary as defined within that system; and (3) the way in which his role is perceived.” *Id.* at 30.

160. DAVID M. RABBAN, *LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* 241 (2013).

161. Chief Justice Shaw gave a classic expression to this view in *Norway Plains Co. v. Boston & Maine Railroad*, 67 Mass. (1 Gray) 263 (1854):

It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law

Harwicke realized this ramification of the doctrine of public policy for the judicial branch, a task that involved “[p]olitical arguments, in the fullest sense of the word, as they concern the government of a nation”¹⁶² However, with the empowerment of a democratic parliament, this view lost its appeal. As we observed in Part II, skepticism towards the doctrine of public policy became the prevailing paradigm. This skepticism reached its culmination when the House of Lords suggested that courts should no longer engage in creating new categories of public interest in situations where they find the legislative policy undesirable.¹⁶³

A recurrent objection to the doctrine of public policy is its interference with the legislative role of the legislature. Yet, this argument does not seem to conclusively rule out the possibility and desirability of judicial interference. After all, discovering the “legislative intent” seems to be highly difficult, if not impossible. As Posner mentions, it is more “knowledge by empathy” than it is reading the mind of the legislator.¹⁶⁴

John Bell suggests three models under which policy arguments in judicial decisions are justified: (1) *The Consensus Model*: Under this theory, judges are voices for the communal values of the society and ought to articulate them.¹⁶⁵ This follows from a basic distinction between the judicial and legislative branch. The legislature could pass laws that do not reflect popular opinion, whereas the judicial branch is restrained to conform to the consensus of society at large. Judges should not enter areas that are contentious and where no consensus exists on fundamental values.¹⁶⁶

(2) *The Rights Model*: This model is based on Ronald Dworkin’s theory. Dworkin keenly observes that in practice it is impossible to rule out the possibility of judicial decision-making. Moreover he objects to the mainstream idea that judicial lawmaking is “parasitic” on the legislative branch.¹⁶⁷ He distinguishes between policy and principle in order to portray the distinct role of the legislative branch vis-à-vis the

consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it.

Id. at 267.

162. *Chesterfield v. Janssen* [1750] 1 Atk. 339, 352 (Eng.).

163. *Janson v. Driefontein Consol. Mines, Ltd.* [1902] 27 A.C. 484; JOHN BELL, *POLICY ARGUMENTS IN JUDICIAL DECISIONS* 157 (1983).

164. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 851 (1987). Posner has voiced his view on intent in other fields of law as well. In intentional torts, he believes intent does not play a role besides alluding to certain characteristics of tortious acts. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 149–50 (1987).

165. BELL, *supra* note 163, at 11.

166. *Id.* at 12.

167. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 106 (1997).

judiciary. Policy arguments refer to a political decision that advances some collective goal of the community as a whole. On the other hand, arguments of principle vindicate a political decision by resorting to a group or individual right.¹⁶⁸ An argument for a tax increase on wealthy people is an argument of policy. In contrast, arguments centered on antidiscrimination are arguments of principle. Dworkin posits that legislative programs—especially complex legislation—often have both aspects of policy and principle. Alternatively, judicial decisions “characteristically are and should be generated by principle not policy.”¹⁶⁹ Dworkin cleverly pinpoints a distinctive feature of the judiciary as a guardian of rights vis-à-vis collective welfare. These rights could derive from constitution, statutes, or common law.¹⁷⁰

(3) *The Interstitial Legislator Model*: Proponents of this model argue that judges essentially legislate when dealing with hard cases.¹⁷¹ In hard cases, judges confront a number of rules and standards that might run counter to the existing law. Taking into account the interest of society at large, judges adjudicate based on their judgments. Although inconsistent at times, these theories show that there is something distinctive about judicial policy-making.¹⁷² It cannot and should not be eliminated. There is always an empty space in law that should be filled with judgments of ethics and policy by courts.¹⁷³

The doctrine of public policy has remained one of the few avenues of judicial policy-making. Subordination of judicial policy-making to the legislature runs the risk of weakening the judicial branch.¹⁷⁴ From its early history, the doctrine of public policy was viewed as a separate category of the law. In 1853, the House of Lords opined that public policy holds a different meaning from the “policy of the law.” It rejected the majority view in *Egerton v. Brownlow*, which found public

168. *Id.* at 107.

169. *Id.* at 84.

170. BELL, *supra* note 164, at 15.

171. Article I(2) of the Swiss Code of 1807 exemplifies this model: “[I]f no rule can be derived from the statute, the judge should decide in accordance with the rule which he would promulgate if he were the legislator.” Richard Posner strongly objects to this model as both unedifying and misleading. LANDES & POSNER, *supra* note 164, at 130–31. This view leads to ontological skepticism on the existence of intent and even objectivity. Posner, *supra* note 164, at 866–71.

172. Barak, *supra* note 159, at 116.

173. Posner, *supra* note 164, at 891.

174. Justice Barak gives an illuminating example on the role the doctrine of public policy can play. In 1994, a dispute came before the Supreme Court of Israel in which two political parties of Israel signed a “coalition agreement.” The agreement stipulated that when any supreme court statutory-interpretation decision changed the status quo on religion and state, the two parties would vote to restore the status quo. The majority opinion held the contract was not contrary to public policy. Conversely, Justice Barak believed that this agreement reduced the confidence in the judicial branch and it was therefore against public policy. Barak, *supra* note 159, at 135.

policy and the policy of the law to be equivalent notions—meaning both refer to the object and policy of a particular law.¹⁷⁵ An example helps illustrate this fine distinction. In *Adams v. Howerton*¹⁷⁶ the issue was whether a same-sex couple could qualify under the Immigration and Nationality Act to apply for legal permanent resident status. The couple was legally married by a minister in Colorado. The court opined that the marriage should be valid under both state law and the Immigration and Nationality Act (INA). After investigating the legislative history of the INA, the court found that Congress’s intent was clearly not to recognize same-sex marriages.¹⁷⁷ The Ninth Circuit did a thorough and convincing investigation on the “intent” of the legislature and policy of the INA. Yet, it is not clear whether it was a sound public policy, especially since the court could resort to states’ exclusive power to regulate domestic relations. In other words, the policy of law in this case overshadows the public policy, which resulted in a weak decision.

In summary, the judicial branch’s endeavor cannot and should not simply be to investigate the intent of the lawmakers. If so, it sacrifices its inherent and distinctive feature. The doctrine of public policy should be seen in this light.

V. WHICH PUBLIC?

Thus far, one thing is apparent from our discussion: the doctrine of public policy does not offer a simple, overarching theory. It is indefinable, similar to many other concepts in law such as justice and fairness. As with justice and fairness, public policy is pleaded and referred to in courts by lawyers and judges on a daily basis. Several scholarly pieces attempted to classify the doctrine of public policy from various angles.¹⁷⁸ Yet, none of the definitions and classifications have proven to be satisfactory and effective. It is partly due to the protean nature of the doctrine of public policy. Additionally, however, the confusion about this topic arises from the fact that the scholarship has not surgically dissected the very notion of public policy. Hardly any theory has tried to open the black box of the public policy defense. This Part attempts to fill the void by identifying three logics that are at play in the doctrine of public policy.

I categorize public policy into three strands: public interest, public morality, and public security. This approach is both descriptive and normative. On the descriptive side, the triangle look facilitates our

175. Knight, *supra* note 20, at 216. This view has been contested since then. *Id.* at 216–17.

176. 673 F.2d 1036, 1041–42 (9th Cir. 1982), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

177. *Id.*

178. *See supra* section II.D.

understanding of cases involving public policy while helping us make sense of seemingly incongruent cases. On the normative side, this tripartite framework provides us with theoretical tools to better critique cases involving public policy matters both nationally and internationally. Furthermore, this classification is designed to serve as a roadmap for future cases involving issues of public policy as applied to private legal arrangements.

A. Public Interest: Balancing

Public policy is first and foremost perceived as a reflection of the people's will. In a democracy and under social contract theory, public policy is an incarnation of the will of the people. From the eighteenth century onwards, people's rule emerged as the determinant of the public policy of states.¹⁷⁹ Governments should enforce public policies that reflect the interest of all, enacted by the representatives of the people. It ensues from a belief that within government the legislative branch should determine policies that regulate public affairs. All seem to agree with Montesquieu that "the great advantage of representatives is their being capable of discussing affairs."¹⁸⁰ The "affairs," according to Montesquieu, are best served when the people elect representatives from each town.¹⁸¹ The legislative branch is a venue where people from diverse backgrounds shape the public policies of the government. Because of the diversity of opinions, the enacted policies emanate from the will of the people. The "general will" constitutes sovereignty that is indestructible and inalienable.¹⁸² Setting public policies is not only a manifestation of sovereignty but also a critical component of it.

Increasingly enough, the philosophical approach of public interest shifted to economic analysis in the twentieth century.¹⁸³ Along with the triumph of the neo-liberalism paradigm, public interest has been

179. Friedrich Kratochwil, *Sovereignty as Dominion: Is There a Right of Humanitarian Intervention?*, in *BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION* 21, 30 (Gene M. Lyons & Michael Mastanduno eds., 1995) (showing that the Enlightenment moved toward a rational-secular conception of legitimacy, which caused popular participation in setting the public policy); GENEVIEVE NOOTENS, *POPULAR SOVEREIGNTY IN THE WEST: POLITICS, CONTENTION, AND IDEAS* 42 (2013).

180. MONTESQUIEU, *supra* note 156, at 204.

181. *Id.*

182. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 23 (1947).

183. It is fascinating to note that for early theorists of sovereignty, the fact that decisions of a sovereign are dependent on achieving certain interests undermines the very meaning of sovereignty as an "ultimate" decision-maker. Kratochwil, *supra* note 179, at 24; *see also* Richard H. Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 43–46 (1995) (explaining the role of cost-benefit analysis and comparative risk assessment in today's regulatory choices of the US).

interpreted and applied in light of economic analysis. Public policies aim to increase the pie, maximize profits, and increase opportunities for the populace. Policies enacted by legislative branches and enforced by governments should at least wholly or partially conform to some level of economic rationality.¹⁸⁴ The issue of undocumented immigrants serves as a good example. The pros and cons of providing education, health care, and temporary jobs to undocumented immigrants revolve around economic rationales. The focal point of the discussion centers on the method that could result in higher benefits for society while imposing less costs on it.¹⁸⁵ In short, it is the logic of *Homo Economicus*—economic human—that constitutes this order of public policy.¹⁸⁶

Following the discussion in Part III, the balancing (law and economics) approach should be the main method of dealing with matters involving this strand of public policy as they appear in judicial proceedings. Courts should refrain from enforcing private legal acts such as contracts, foreign arbitral awards, and foreign judgments that have been obtained as a result of asymmetry of information between parties or that might prompt negative externalities.¹⁸⁷

A closer look at contracts, let's say in the technology sector, clearly directs us to the perplexing and often conflicting public policies at play. Policies promulgated and pursued by the government and judiciary cover a wide-range of goals: respecting parties' wills by enforcing the contract, promoting innovation through protecting intellectual property rights, safeguarding environmental concerns by prohibiting non-biodegradable materials, maintaining competition through preventing anticompetitive measures, and many other such interests.

Antitrust cases are good examples. In Part III, we looked at the famous case of *US v. Microsoft* to better understand the law and eco-

184. "Indeed, rational choice theory has itself become, if not quite the orthodox of approach to policy analysis, at the very least the dominant yardstick against which to assess explanations of the policy process." Steven Griggs, *Rational Choice in Public Policy: The Theory in Critical Perspective*, in HANDBOOK OF PUBLIC POLICY ANALYSIS: THEORY, POLITICS, AND METHODS 173 (Jack Rabin ed., 2007).

185. See, e.g., HANS JOHNSON & LAURA HILL, PUB. POL'Y INST. OF CAL., ILLEGAL IMMIGRATION 7–10 (2011), archived at <http://perma.unl.edu/J9XT-45FW>; Lisa Peñaloza, *Immigrant Consumers, Marketing and Public Policy Considerations in the Global Economy*, 14 J. PUB. POL'Y & MARKETING 83, 83–94 (1995).

186. WILLIAM DIXON & DAVID J. WILSON, A HISTORY OF HOMO ECONOMICUS: THE NATURE OF THE MORAL IN ECONOMIC THEORY (2012).

187. See *supra* Part III; see also *Freedman Truck Ctr., Inc. v. Gen. Motors Corp.*, 784 F. Supp. 167, 178 (D.N.J. 1992) ("A contract may be set aside where its purpose is contrary to common good or it contains unconscionable terms that are product of unequal bargaining power of parties."); *Shell Oil Co. v. Marinello*, 307 A.2d 598, 601 (N.J. 1973) ("In such a situation courts will not hesitate to declare void as against public policy grossly unfair contractual provisions which clearly tend to the injury of the public in some way.").

nomics approach in public policy, as well as the balancing test method.¹⁸⁸ Let's look at another example in this section, inspired from real cases involving the Intel Corporation¹⁸⁹: Imagine a famous computer chip manufacturer signs a contract with a reputable laptop company to undertake most of their losses as a result of using the manufacturer's chips. The competitor of the computer chip manufacturer has gained momentum and has turned into a nightmare for the manufacturer. Instead of facing the nemesis and improving their products, the manufacturer signs contracts that give out dollar incentives for its laptop company consumers to utilize its chips. Now, things turn sour and a judge has to decide whether this "kickback" contract is enforceable. There is nothing morally reprehensible regarding this contract. The judge, however, has to balance many public policies: respect for the will of parties and their freedom to contract, maintaining healthy competition in the industry, protecting innovation and creativity, and other considerations. It proves to be a taxing task for the judge. That is why I posit it is the parties who should shoulder the brunt of conducting the balancing and the judge should act as an ultimate arbiter.

In summary, this strand of public policy is an a-historical, a-political and a-ethical approach to public policy. The focus rests on the costs involved in employing the executive power of states, as well as the societal cost in bearing the consequences of enforcement of a private legal act or award. These costs should be juxtaposed with the interests of the parties and what society receives from enforcement of the legal act or award. The majority of cases fall under this category. The role of judges in cases involving this strand of public policy should be limited and the parties should carry the burden of producing documents that prove divergent interests from enforcement, partial enforcement, or non-enforcement of contracts or awards.

B. Public Morality: Educating

Protection of public morality was the original idea behind the doctrine of public policy at common law. As we discussed, historically, public policy concerns arose in the context of legal acts that were *en-counter commune ley*.¹⁹⁰ Communal values on which society was established should not be encroached through private acts of two or more parties. A famous Latin maxim best describes this strand of

188. See *supra* section III.B.

189. Ashlee Vance, *State Accuses Intel in an Antitrust Suit*, N.Y. TIMES, Nov. 4, 2009, at B1. For a series of cases involving the Intel Corporation for its alleged anticompetitive measures see, for example, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004); *Intel Corp. v. Advanced Micro Devices, Inc.*, 540 U.S. 1003 (2003); *Advanced Micro Devices, Inc. v. Intel Corp.*, 512 U.S. 1205 (1994).

190. See *supra* Part II.

public policy: *ex turpi causa non oritur actio* (“from dishonorable cause an action does not arise”),¹⁹¹

Courts use various phrases to employ this strand of public policy. Some define public policy as the “most basic notion of morality and justice.”¹⁹² Others have invoked this strand of public policy by using terms such as “common sense,” “common conscience,” “public morals,” and the like.¹⁹³ The theory of pure fountain¹⁹⁴ also emanates from this perspective on public policy. No courts should taint their hands

191. David Plessner, *Public Policy in the Law of Contracts*, 29 CENT. L.J. 306 (1889) (“[T]here is no principle of law better settled, more frequently applied and more preservative of the integrity of the law and the good order and the best interests of society than that embodied in the maxim, *ex turpi causa non oritur actio*.”); see also George Schwarzenberger, *The Conceptual Apparatus of International Law*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 685, 706 (Ronald St., J. Macdonald & Douglas M. Johnson eds., 1983) (discussing maxims derived from English law, Roman law, and international customary law).

192. See *supra* note 22.

193. See, e.g., *Nationwide Mut. Ins. Co. v. Riley*, 352 F.3d 804, 807 (3d Cir. 2003) (noting “only dominant public policy” will “justify the invalidation of a contract as contrary to that policy,” manifested by “long governmental practice or statutory enactments, or [by] violations of obvious ethical or moral standards”); *Application of Whitehaven S.F., LLC v. Spangler*, 45 F. Supp. 3d 333, 345 (S.D.N.Y. 2014) (“If one party wants to show that a certain act violates public policy that is not the law of the state, then it has to establish that such an act would violate ‘some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal expressed in them.’” (quoting *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (N.Y. 1985))); *Deputy v. Lehman Bros. Inc.*, 374 F. Supp. 2d 695 (E.D. Wis. 2005) (“Public policy is a “broad concept embodying the community common sense and common conscience.” (quoting *Eckes v. Keith*, 420 N.W.2d 417 (Wis. Ct. App. 1988))); *Am. Home Assurance Co. v. Cohen*, 815 F. Supp. 365, 370 (W.D. Wash. 1993) (“The term ‘public policy,’ . . . embraces all acts or contracts which tend clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.” (quoting *LaPoint v. Richards*, 402 P.2d 585 (Ariz. Ct. App. 1965))); *In re Cherokee Run Country Club Inc.*, 430 B.R. 281, 284 (Bankr. N.D. Ga. 2009) (“The courts have held that a contract is not contrary to public policy ‘unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law.’” (quoting *Dep’t of Transp. v. Brooks*, 328 S.E. 705 (Ga. 1985))); *U.S. Fid. & Guar. Co. v. Challenge Constr. Corp.*, 704 F. Supp. 2d 73, 78 (D. P.R. 2009) (“Parties may agree to any terms and conditions so long as they are not contrary to the law, moral, or public order.”).

194. This theory is reflected in Lord Chief Justice’s opinion in *Collins v. Blantern*: “[N]o 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.” [1767] 95 Eng. Rep. 852 (K.B.). This theory is employed as a justification for the doctrine of public policy. See, e.g., John W. Wade, *Benefits Obtained Under Illegal Transactions—Reasons for and Against Allowing Restitution*, 25 TEX. L. REV. 31, 35–46 (1946).

by lending help to private acts that are injurious to basic public morality.

The economic interest of the society at large is not of utmost importance in this strand of public policy. Winfield refers to a paradox that partly explains the logic of the public morality category: “[B]ut it leads in practice to the paradox that in many cases what seem to be in contemplation is the interest of one section only of the public, and a small section at that.”¹⁹⁵ He continues that “[m]any questions of public policy are profoundly uninteresting to the whole community.”¹⁹⁶ To understand this paradox we should take into consideration that the public morality aspect of the doctrine of public policy requires a more active and leading role for judges. The interest of the society at large is one consideration among many in this category. In contrast to the public interest, the methodology employed should not be law and economics, specifically not the balancing approach. Judges are agents for transformation in this regard and should adopt a critical, and even natural law approach to the case in front of them. By “critical approach,” I suggest judges employ their personal critical reasoning when analyzing the ethical issue before them. This goes to the heart of judicial activism¹⁹⁷ and the leading role of the doctrine of public policy.¹⁹⁸ In short, this is the strand of public policy—pertaining to *homo ethicus*¹⁹⁹—in which judges have additional discretion.

Public morality has also undergone paradigm shifts. As we discussed in Part II, through time public morality has been interpreted in light of states’ morality rather than through societal norms. Modern philosophy, mainly German idealism, transformed the notion of public morality into a state-centric notion. This metamorphosis could be traced in the ideas of Kant and Hegel. Kant propounded the idea that personal morality can only flourish in a civil society. States promulgate and endorse certain ethical norms such as freedom and justice, thereby creating an environment for private morality to thrive.²⁰⁰ It is in the shadow of a state’s morality that individuals may nourish private morality. This idea is also traceable in Hegel. For him, “[T]o be ethical is to live in accordance with the ethics of one’s country.”²⁰¹ Hegel agrees with Aristotle and Plato that individual morality best

195. Winfield, *supra* note 26, at 92.

196. *Id.*

197. *See supra* note 154.

198. *See supra* Part IV.

199. “Man, as *Homo Sapiens Ethicus*, is distinguished by his newly acquired interest in moral matters and by his attempts to understand the world.” ANTHONY B. KELLY, *THE PROCESS OF THE COSMOS: PHILOSOPHICAL THEOLOGY AND COSMOLOGY* 76 (1999).

200. ROGER J. SULLIVAN, *AN INTRODUCTION TO KANT’S ETHICS*, 24 (1994).

201. ANDREW BUCHWALTER, *DIALECTICS, POLITICS, AND THE CONTEMPORARY VALUE OF HEGEL’S PRACTICAL PHILOSOPHY* 157 (2012).

flourishes when it strives to promote the welfare of the political order.²⁰² Morality is political and can be best attained when it is shaped and achieved through the furtherance of the goals of the political unity. For Hegel the state is the perfect form of human community in which people can fulfill their individuality.²⁰³ Sovereign states are the culmination of the historical development of man's morality and control of himself and his environment.²⁰⁴ Hegel's criticism of Kant's morality stems from his statist-communitarian perspective on ethics: "The state has a primary and absolute entitlement to be sovereign and independent power *in the eyes of others*, i.e., *to be recognized by them*."²⁰⁵

For the purpose of our discussion it is important to note that the concept of public policy has also been affected by this shift from societal morality to a more statist notion. This approach disadvantages courts since it reduces their role in finding societal norms. In other words, as practice shows, courts have not been active in investigating public morality and seem to pay only lip service to safeguarding it.²⁰⁶ The judge's hand in deciding this strand of public policy should not be limited. It is one of the few judicial avenues in which communal values—which are not necessarily propounded by states—are saved. Imagine a contract that directly or indirectly affects the culture of an Indian tribe by establishing a business contrary to their beliefs. Or, imagine a contract for the establishment of a casino in a Muslim neighborhood in Pennsylvania. The contracts clearly do not violate the state's morality. It is the judges, not the parties, who should undertake the hard task of determining whether the contracts are injurious to the communal values. In short, public morality should not be interpreted in light of a state's ethos. As we will see in the next section, the state's interest is accounted for under another rubric, or to be more precise, by *protecting* the logic of public policy.

C. Public Security: Protecting

Public security is one of the negative externalities discussed by law and economics scholars. Yet, the logic of security matters merits a separate category. Negative externalities are normally associated with prejudicial effects of private contracts on third parties. The typical example is a manufacturing contract that brings about negative environmental consequences to a specific region. In simple economics

202. *Id.*

203. RICHARD SHAPCOTT, *INTERNATIONAL ETHICS: A CRITICAL INTRODUCTION* (2010).

204. ANDREW LINKLATER, *BEYOND REALISM AND MARXISM: CRITICAL THEORY AND INTERNATIONAL RELATIONS* 147 (1990).

205. PHENG CHEAH, *INHUMAN CONDITIONS: ON COSMOPOLITANISM AND HUMAN RIGHTS* 157 (2006).

206. *See supra* note 192.

terms, the benefit society receives from the contract is outweighed by its costs.

The logic of security matters is distinct from negative externalities. Security concerns derive from the *leviathan* nature of states, capable of trumping normal politics.²⁰⁷ In this sense, the existence of states rests above all other concerns, even public interest, in the way described above. Security matters could create a state of exception, suspending all aspects of societal lives, including normal politics and law.²⁰⁸ The notion of *homo sacer*²⁰⁹ constitutes this order of public policy.

In this paradigm of public policy, the interest of states is of paramount importance. Among states' interests, survival is the lone interest that could create the state of exception. In the judicial evaluation of public policy matters involving states' survival, balancing is of little help. Let's imagine the following scenario: North Korea is willing to spend a considerable amount of money to import certain auto parts from the United States. These auto parts could be equally utilized in the inter-continental ballistic missile industry. The chance of using the parts in the missile industry is quite meager. Following the balancing approach, with very little chance of using the parts in missile industry, the contract should be enforceable. However, the contract, albeit lucrative, will likely be deemed void. The slight chance of threat to states' survival will suspend the logic of balancing.

207. This prerogative goes to the heart of the notion of sovereignty.

For most legal purposes, the concept of sovereignty should be understood as more performative than normative. It denotes a roster of legal capabilities, privileges, and obligations that attend the recognition of a political entity as a state more than it authorizes a principled account of the criteria by which polities may claim and merit statehood.

STEPHEN D. KRASNER, *PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL RESPONSIBILITY* 27 (2001).

208. It is the result of a basic paradox of sovereignty. Carl Schmitt famously said, "[T]he sovereign stands outside the juridical order and, nevertheless, belongs to it, since it is up to him to decide if the constitution is to be suspended *in toto*." CARL SCHMITT, *POLITISCHE THEOLOGIE* 13 (1922), *reprinted in* GIORGIO AGAMBEN, *HOMOS SACER: SOVEREIGN POWER AND BARE LIFE* 15 (Werner Hamacher & David E. Wellbery eds., Daniel Heller-Roazen trans., 1998).

209. *Homo sacer* is a term proposed by Giorgio Agamben. He uses Roman law as an example to make his case. The sacred man is a man who has committed a crime yet whoever kills him will not be convicted of murder. The sacred man is outside of the law despite being alive. AGAMBEN, *supra* note 208, at 71. Agamben uses this example to show that sovereignty can suspend normal politico-judicial life. The same logic applies to the sovereign body best described by King Charles Albert of Savoy's statute: "[T]he person of the sovereign is sacred and inviolable." Killing both the sacred man and the sovereign body does not result in the crime of homicide. *Id.* at 102. Agamben aims to demonstrate that the logic of sovereignty cannot correspond entirely with the logic of juridico-political order. Following the Schmittian view, sovereignty is both inside and outside of the juridico-political life. *Id.* at 15.

In a real and recent case, President Obama ordered a company named Ralls to “divest all interests” in an Oregon wind farm because the acquisition contract was void *ab initio*.²¹⁰ The reason was that the merger and acquisition would have potentially posed a threat to the national security of the United States.²¹¹ The acquiring company belonged to Chinese investors with alleged ties to the Chinese Government.²¹² This is not an isolated case and the U.S. routinely monitors transactions that might pose any threats to the security of the country.²¹³ The threats can be caused, *inter alia*, by the possibility of foreign access to certain information or by control of foreign entities over critical infrastructure.²¹⁴ As strongly noted in scholarship, this pro-

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210. Order Signed by the President Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 2012 WL 4468511 (Sept. 28, 2012).
211. “There is credible evidence that leads me to believe that Ralls Corporation . . . might take action that threatens to impair the national security of the United States” *Id.*
212. Damian Paletta et al., *Obama Blocks Chinese Firm from Wind-Farm Projects*, WALL ST. J. (Sept. 28, 2012, 7:04 PM), <http://www.wsj.com/articles/SB10000872396390444712904578024590739979984>, archived at <http://perma.unl.edu/CCQ3-Q9FG>. The investors did not back down. For the first time, a company who was denied investment due to foreign investment-related regulations brought a case against the United States in a United States court. The result came in favor of the company: the District of Columbia Circuit reversed and remanded the District Court decision due to, *inter alia*, violation of the Due Process Clause. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 302–03 (D.C. Cir. 2014).
213. Currently, the main entity responsible for reviewing foreign direct investment in the US is the Committee on Foreign Investment in the United States (CFIUS). In 1975, President Gerard Ford established CFIUS. However, it remained a relatively dormant committee due in part to its lack of an enforcement mechanism. In 2007, the CFIUS gained further discretion with the enactment of the Foreign Investment and National Security Act (FINSAs). For a brief history of CFIUS, see Paul Connell & Tian Huang, Note, *An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States*, 39 YALE J. INT’L L. 131, 135–38 (2014). FINSAs provides wide discretion for the U.S. government, especially in foreign investment, in sectors such as critical infrastructure, critical technologies, and foreign government-controlled transactions, which “could result in the control of any person engaged in interstate commerce in the United States by a foreign government or any entity controlled by or acting on behalf of a foreign government.” Foreign Investment and National Security Act of 2007, Pub. L. 110-49, § 2(4), 121 Stat. 246. The law was passed following two controversial foreign investments in the US: China National Offshore Oil Corporation’s (CNOOC) bid for Unocal in 2005 and Dubai Ports World’s (DPW) bid in 2006. David Baroza & Andrew Ross Sorkin, *Chinese Oil Company Offers \$18.5 Billion for Unocal*, USA TODAY (June 22, 2005, 9:06 PM), http://usatoday30.usatoday.com/money/industries/energy/2005-06-22-cnooc-unocal_x.htm, archived at <http://perma.unl.edu/3ALN-QQ6X>; David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES, Mar. 10, 2006.
214. For a list of factors considered by the Committee on Foreign Investment in the United States for national security analysis of foreign investments, see David N. Fagan, *The US Regulatory and Institutional Framework for FDI*, in INVESTING IN

tectionist practice of the U.S. does not correspond with economic efficiency.²¹⁵ As a result, some scholars have suggested balancing national economic benefits and national security interests.²¹⁶ However, the logic of public security evades balancing, as a remote possibility of danger trumps potential economic benefits of the society at large. These transactions were deemed void because of congressional acts and presidential orders related to foreign investment. However, the discussion helps us understand the logic of public security at the enforcement stage of contracts or arbitral awards. In this strand of public policy the role of the parties is more restricted and the courts should play a more active role. Yet, the focal point is the interest of the state and whether contracts, transactions, or arbitral awards might endanger this interest.

Notwithstanding the state-centric logic of public policy in regards to public security, courts should not be deferential to states' decisions on this matter.²¹⁷ State officials tend to portray any threats to their state's existence as highly critical. The electoral system contributes to these hyperbolic gestures. Incumbent officials would like to demonstrate that they have saved the states from an important external threat. Therefore, it is the courts' duty to investigate matters based on the documents provided. However, this area is beyond the discussion of this Article.

Public security is a strand of the public policy doctrine that bars private legal arrangements from yielding their ordinary results. The

THE UNITED STATES: IS THE US READY FOR FDI FROM CHINA? 45, 61 (Karl P. Sauvant ed., 2009).

215. Connell & Huang, *supra* note 213, at 147 ("We can extrapolate three main points from the result of our event study. First, the CFIUS actions resulted in a wealth transfer to American companies. Second, this wealth transfer resulted in a corresponding deadweight (or efficiency) loss. Third, in the long run, these CFIUS actions may have a deterrent effect on foreign firms considering future acquisitions.").
216. *See, e.g.*, Joanna Rubin Travalini, *Foreign Direct Investment in the United States: Achieving A Balance Between National Economy Benefits and National Security Interests*, 29 NW. J. INT'L L. & BUS. 779 (2009); Matthew R. Byrne, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849 (2006); George Stephanov Georgiev, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 YALE J. ON REG. 125 (2008); Jonathan C. Stagg, *Scrutinizing Foreign Investment: How Much Congressional Involvement Is too Much?*, 93 IOWA L. REV. 325 (2007); Gaurav Sud, Note, *From Fretting Takeovers to Vetting CFIUS: Finding a Balance in U.S. Policy Regarding Foreign Acquisitions of Domestic Assets*, 39 VAND. J. TRANSNAT'L L. 1303 (2006).
217. The discussion on courts' deference to the Executive is a broad topic. It often comes up regarding the emergency powers of the U.S. government and the extent to which courts can exercise their judicial review, given the political question doctrine. *See generally* ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007); US NATIONAL SECURITY, INTELLIGENCE AND DEMOCRACY (Russell A. Miller ed., 2008).

logic of public security, however, is distinct from the public interest and public morality categories. It is state-centric and allows a limited role for adjudicators and litigators.²¹⁸ Due to its state-of-exception nature,²¹⁹ the balancing approach does not suffice to explicate it. Strong laws and regulations in this area,²²⁰ coupled with its political nature, have prevented a well-developed legal method from emerging in this strand of public policy. However, understanding the logic would help us spot cases of public security in the wide-range of public policy exception cases.

D. Epilogue

A summary of the three strands of public policy is shown here in the form of a table:

Strand	Logic	Method	Judges' Role	Parties' Role
Public Interest	Balancing	Law & Econ.	Passive	Active
Public Morality	Educating	Critical/ Natural Law	Highly Active	Passive
Public Security	Protecting	Positivism	Active	Passive

This Part aimed to argue that the doctrine of public policy does not constitute a single monolithic concept. As John Bell points out, “[P]ublic policy does not denote any one rule or principle, but is, rather an umbrella covering a variety of considerations which may have a bearing on the issue before the court”²²¹ Embedded in this doctrine, I argue, are at least three distinct notions, accumulating as a

218. John Locke’s theory of prerogative clarifies the Janus-faced nature of public security. While public security is a legal prerogative for governments aimed to promote public good, it is designed to act according to the discretion of the government “without prescription of law, sometimes even against it.” JOHN LOCKE, *SECOND TREATISES OF GOVERNMENT* 84 (C.B. Macpherson ed., 1980) (1689). He keenly observes the exceptional nature of this prerogative: “This power, whilst employed for the benefit of the community, and arguably to the trust and ends of the government, is *undoubted prerogative*, and never is questioned.” *Id.*

219. Carl Schmitt famously stated that in liberalism, law can bestow the authority of determining the emergency and state of exception, but law cannot determine the procedures and substance of this state of exception. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 *HARV. L. REV.* 1095, 1100–01 (2009).

220. See, e.g., International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977); Defense Production Act, Pub. L. No. 81-774, 59 Stat. 1081 (1950); Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246; Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917).

221. BELL, *supra* note 163, at 156.

result of a long history of the doctrine of public policy and the development of political and legal theories.

Public interest logic emerged out of the economic turn in the legal culture and the emergence of the regulatory state. This strand aims to assess various stakes in enforcing a contract by employing the cost-benefit balancing test. The role of the adjudicator can be minimal because parties can argue whether the benefits gained out of enforcing the contract outweigh its costs. Judges, however, have a more leading role when cases against public policy involve matters of public morality. Leaving the economical analysis aside, adjudicators should focus on community-based morals rather than on governmental interests. Mandates by security increasingly play a more important role in the realm of public policy. Under this strand, judges have to consider states' interest in survival and security versus the benefits of enforcing a private legal arrangement.

The existing theories and practice lump all these three strands under the rubric of a public policy exception without paying due consideration to its nature. This has resulted in the convoluted doctrine of public policy present today that has instigated much skepticism among scholars and practitioners. A look at the *Restatement (Second) of Contracts* illustrates how the multi-logical nature of public policy has been neglected. Section 178 of the *Restatement* deals with contractual terms that are against 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, and
 - (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 that misconduct and the term.²²²

The *Restatement's* recipe is only applicable in a limited number of cases—where public policies and interests are clearly declared and delineated. It also rests on a few implicit assumptions, which this Article aimed to challenge. First and foremost, it assumes that setting public policy is principally a legislative task. This view is problematic because of the importance of judicial review in the form of statutory interpretation or reconciling different public policies.²²³ Secondly, the statement portrays the concept of public policy as an ungraded notion, providing a single recipe for all cases: balancing.

Various courts have merely called for weighing the interests of enforcement against the public policy interest. Yet, as shown by studies, courts rarely proceed to actually balance the interests, rather they merely pay lip service to the language of the *Restatement*.²²⁴ I attribute this to the equivocal approach of the *Restatement* towards the notion of public policy.

VI. CONCLUSION

The public policy doctrine is an avenue through which *res publica*, or public affairs, collides with private legal arrangements and bars them from yielding ordinary results. It might be the fifty-third card in the deck, yet it is a trump card capable of freezing contracts, foreign judgments, or arbitral awards. Originally, public policy aimed to protect acts that were *encounter commune ley*, or communal norms. With the birth of modern states, the notion of public policy has shifted to protect harms against the very essence of states among other things. This resulted in a complicated theory of public policy, stirring controversy in the judicial system concerning its own role. In addition, following the establishment of the regulatory state and new legal theories, public policy also turned from a judicially crafted theory to a legislatively imposed notion, dictating an increasingly passive role on the judicial body.

This Article opens the black box of public policy. It argues that the doctrine of public policy consists of three distinct strands, each with a separate logic requiring a separate method for its analysis. The Article identified these three strands—public interest, public morality, and public security. Each has a distinct constitutive grammar of its own. Public interest is structured around economic calculation related to costs and benefits of enforcing certain arbitral awards or con-

222. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

223. See section IV.B.

224. Friedman, *supra* note 23, at 572 (“I found in my examination of the cases that courts rarely put the Willistonian ‘weighing/balancing’ approach into practice.”).

tracts. Public morality aims to protect communal values that might be endangered by enforcement through the apparatus of the judicial branch. Lastly, public security speaks to the exceptionalist logic of statehood and protecting states' survival interest.

Justice Burrough called the doctrine of public policy an "unruly horse" in 1824. After almost 200 years, the specter of this statement hovers around arguments related to public policy at the enforcement stage of private legal acts or arbitral proceedings. I can assure you that, even as you read these words, there are lawyers in domestic or international cases that are fervently arguing to set aside a private legal arrangement based on public policy grounds or, conversely, trying to defend enforcement against a public policy defense. Simply, and following common sense, a definition put forward two centuries ago and the paradigm that has ensued do not suffice to illuminate the matter in the complex domestic and international matters of today's world. Scholarly ventures in the area of public policy in law have always been intimidating, as it involves a protean concept with a long legal tradition. Yet, we should echo what Percy Winfield said almost a century ago: "But none, at any rate at the present day, has looked upon [public policy] as a Pegasus that might soar beyond the momentary needs of the community."²²⁵ This Article shows how this Pegasus can soar beyond the needs of the community.

225. Winfield, *supra* note 26, at 91.