Contracts 'Not for the Public Good' and the Classical Law of Contract

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ABSTRACT: During the nineteenth century, legal writers began to put the law of contract into a more rationale and ordered framework. This approach reached its apotheosis in the classical law of contract, which retains some influence in modern times. At its core was the belief that contracts were formed by a meeting of wills – that is, contracts were based on consent. Historically, however, there are instances where the law refused to enforce a contract even if the parties had seemingly freely consented to it. Two major examples were contracts that were against morality or public policy. Both of these categories evolved in the nineteenth century. They came to be seen as increasingly anomalous and restricted. They did not however, disappear altogether.

KEYWORDS: Contract law, public policy, morality, nineteenth century.

I. Introduction

> But governments do not limit their concern with contracts to simple enforcement. They take upon themselves to determine what contracts are fit to be enforced. It is not enough that one person, not being either cheated or compelled, makes a promise to another. There are promises by which it is not for the public good that persons should have the power of binding themselves. To say nothing of engagements to do something contrary to the law, there are engagements which the law refuses to enforce for reasons connected with the interests of the promiser, or with the general policy of the state.[1]

[1] J.S. Mill, *Principles of Political Economy, with Some of their Applications to Social Philosophy*, 5 vols., 3rd ed., London, 1852, vol.2, 359.

JS Mill was quite prepared to oppose the intervention of the state into contract law. He especially disliked the laws on usury, believing that interest rates should be set by the market, pointing out that restrictions on interest could be easily evaded.[2] He was hostile to intervention in contracts for other reasons as well: 'A person of sane mind, and of age at which persons are legally competent to conduct their own concerns, must be presumed to be a sufficient guardian of his pecuniary interests'.[3] Mill's position partially fitted with his broader philosophy set out in *On Liberty*,[4] according to which an adult of sound mind ought to be permitted any course of conduct which does not harm others. According to Mill individuals should be allowed, 'to regulate by mutual agreement such things as regard them jointly, and regard no persons but themselves'.[5] Mill was pragmatic enough to accept that there might even be situations where we 'should consent' to limit our freedoms.[6] Mill was not committed to unrestricted freedom of contract.[7] He was prepared to justify intervention beyond some sort of vitiating factor (cheated or compelled), nor did the contract even need to be illegal. According to Mill, there were other reasons not to enforce a contract even if it had been freely entered into on the grounds of 'the general policy of the state'. Mill provided some examples of contracts of this sort which ought

[2] Ibid., 509-512.

[3] Ibid., 511.

[4] J.S. Mill, *'On Liberty' and Other Writings*, Stefan Collini, ed., Cambridge, 1989, henceforth, '*On Liberty'*.

[5] Ibid., 102.

[6] Mill, *'On Liberty'*, 103.

[7] Just as it is not true to say that he was committed to laissez-faire economics without any qualification: Richard A. Posner, 'On Liberty: A Revaluation', in J.S. Mill, *On Liberty*, David Bromwich, ed., New Haven, 2003, 197, at 200.

not be enforced, which included slavery, prostitution and contracts that varied the general law on marriage.[8] Some of these examples could be justified on the basis of a need to protect liberty. As Mill explained in the context of contracts to enter into slavery, 'The principle of freedom cannot require that he should be free not to be free'.[9] There were limits on the freedom to decide not to be free. At the same time there were other explanations for the state to intervene which did not necessarily depend on the protection of liberty.[10]

Mill was not alone in seeing that there should be limits to what the parties to a contract could agree. Adam Smith, despite putting self-interest at the heart of his work did not believe that self-interest should be unrestricted.[11] The point here is a simple one: that some of those writers most closely associated with the idea of contractual laissez faire thought that there were legitimate limits on what might be agreed.[12] Even with these caveats the role that these writers may have had in promoting the idea of freedom of contract might have been exaggerated

[8] Contracts relating to slavery especially was a subject in which Mill was very interested: John Kleinig, 'John Stuart Mill and Voluntary Slavery Contracts' 18 *Politics* (1983), 76; David Archard, 'Freedom Not to be Free: The Case of the Slavery Contract in J. S. Mill's On Liberty', 40 *The Philosophical Quarterly* (1990), 453.

[9] Mill, *'On Liberty'*, 103.

[10] Ibid., 95-96.

[11] For a discussion of the limits of self-interest in Smith's work, see David Campbell, 'Adam Smith and the Social Foundation of Agreement: Walford v. Miles as a Relational Contract', 21 *Edinburgh Law Review* (2017), 376, at 380-394.

[12] For a more general summary of these writers and others, see P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford, 1979, 292-323.

anyway.[13] The Victorians were not as attracted by unlimited laissez-faire ideas as sometimes assumed.[14] The whole notion of unhindered freedom of contract whilst attractive to some modern writers may have had a limited influence on nineteenth century contract law.[15] Most judges of the era did not come from commercial backgrounds and it seems unlikely that they disregarded paternalistic ideas altogether.[16] Even someone like Baron Bramwell who had worked in his father's bank and has been associated with the promotion of freedom of contract appears on closer inspection to have a more complicated relationship with these ideas than is sometimes supposed.[17]

Mill showed that public policy could to an extent be reconciled with his broader theory of liberty. Fitting public policy within a legal framework was both easier and more difficult. It was easier because there was an established body of precedents which said that a court could

[13] David Lieberman, 'Contract before Freedom of Contract', in Harry Scheiber, ed., *The State and Freedom of Contract*, Stanford, 1998, at 89-121.

[14] G.R. Seale, *Morality and the Market in Victorian Britain*, Oxford, 1998, 254-274. The same ambivalence is reflected in the literature of the period: Anat Rosenberg, *Liberalizing Contracts: Nineteenth Century Promises Through Literature, Law and History*, London, 2018, 127-168.

[15] For a sceptical view on the influence of freedom of contract ideas on legal development see, William Cornish et al, *The Oxford History of the Laws of England Volume XII*, Oxford, 2010, 297-300.

[16] Daniel Duman, *The Judicial Bench in England 1727-1857*, London, 1982, 51.

[17] Anita Ramasastry, 'The Parameters, Progressions, and Paradoxes of Baron Bramwell', 38 *American Journal of Legal History* (1994), 288. On Bramwell also see Atiyah, *Rise and Fall*, 374-380.

for various reasons refuse to enforce a contract. At the same time it was more difficult for lawyers because of the very real tension between this approach and a central tenet of classical contract law that emerged in the nineteenth century, and that has remained influential ever since. This was the idea that contracts were a product of individual autonomy or as it was put then, that contracts were the product of a meeting of wills. It is fair to say that whilst some judges had no doubt read Mill, the will theory had a more concrete legacy on the shaping of nineteenth century contract law.[18] Morality and public policy are problematic because they are essentially used to prevent a valid contract despite a meeting of wills. Both concepts also make it more difficult to present contract law as coherent and principled in a way that legal writers of the period strove for. In the end the forces of pragmatism overcame such intellectual niceties.

II. Contract Law and Morality

In a frequently quoted passage in *Jones* v *Randall*,[19] Lord Mansfield said that the law would not enforce contracts that are contrary to morality. He gave no concrete examples, but he did seem to suggest that morality as a ground for intervention was separate and narrower than public policy: 'for many contracts which are not against morality, are still void as being against the maxims of sound policy'.[20] Lord Mansfield referred to morality explicitly, but morality's influence in contract litigation need not always be explicit. Assumpsit, the standard action for informal contracts from the seventeenth century, was tried before a jury, whose

[18] Pothier was widely cited by judges: B. Rudden, 'Pothier et la common law', in J. Monéger, ed., *Robert-Joseph Pothier, d'hier à aujourd'hui,* Paris, 2001, at 91-101.

[19] (1774) 1 Cowp. 37.

[20] Ibid., 39.

role was to determine whether an agreement had been entered into.[21] Jury deliberations potentially covered a range of matters which were not recorded, laying the way open for morality to be considered. The extent to which this actually happened can only be a matter of speculation. Still, there is certainly some evidence that juries may have been swayed by questions of commercial morality if not morality of other kinds.[22]

For nineteenth-century writers in the classical contract tradition, morality was something of an embarrassment, and they were at pains to stress how rarely it was relevant. Sir William Anson wrote that 'The only aspect of immorality with which Courts of Law have dealt is sexually immorality'.[23] He then went on to cover the subject in a few lines. Sir Frederick Pollock was equally ill at ease with the subject. A marginal note to the text on immoral contracts simply states that 'Practically this means only sexual immorality'.[24] In the main text, Pollock stated that there are two grounds on which contracts are regarded as immoral: those 'providing for or tending to elicit cohabitation' or 'tending to disturb or prejudice the status of lawful

[21] On the role of the jury, see W. Swain, *The Law of Contract 1670-1870*, Cambridge, 2015, 23-29.

[22] For example, in contracts for the sale of horses, juries were not inclined to find in favour of the seller. Horse dealers were notorious in their attempts to pass of shoddy goods and exclude liability: W. Swain, 'Horse Sales: the Problem of Consumer Contracts from a Historical Perspective', in J. Devenney and M. Kenny, eds., *European Consumer Protection Theory and Practice*, Cambridge, 2012, at 282-299.

[23] William Anson, *Principles of the English Law of Contract*, Oxford, 1879, 178.

[24] Frederick Pollock, *Principles of Contract at Law and in Equity*, London, 1876, 242.

marriage'.[25] His whole treatment of the subject was uncharacteristically hesitant.[26] The previous generation of writers tended to pass over immoral contracts very quickly, an approach that was best summed up in by the terse comment of Stephen Leake that, 'Agreements concerning certain matters have been held void, as being contrary to the rules of morality'.[27] The 'certain matters' mentioned by Leake do not comprise a very long list. Whilst immorality as a vitiating factor was not confined to sexual immorality, cohabitation agreements were the standard example of an immoral contract. In *Walker* v *Perkins*,[28] a testator entered into a bond to live with and provide for a woman, or their child if one was born, and to pay her an annuity of sixty pounds in the event of his death or him otherwise leaving her. His estate argued that the bond was unenforceable. For the plaintiff, William Blackstone responded that 'the setting aside such bonds was as much an encouragement to seduction in one sex, as establishing them would be to incontinence in the other'. The King's Bench nevertheless rejected the claim. According to one report, Lord Mansfield explained: 'It is the price of prostitution… for if she becomes virtuous, she is to lose the annuity. It appears clearly, upon the condition, that the bond is illegal and void'.[29]

In the eighteenth century, other annuities of this kind were treated as unenforceable. The Marquess of Annandale and Anne Harris produced a child, and he entered into an agreement to pay her and the child two thousand pounds by way of an annuity on his death.

[25] Ibid., 243.

[26] For example, Pollock, *Principles of Contract*, 243.

[27] Stephen Martin Leake, *The Elements of the Law of Contracts*, London, 1867, 399; Joseph Chitty, *A Practical Treatise on the Law of Contracts not under Seal*, London, 1826, 215-217.

[28] (1764) 3 Burr. 1568, 1 Wm Bla. 517.

[29] Ibid., 1569.

The Court of Chancery held that the bond was valid.[30] The Lord Chancellor emphasized that the child was not the only innocent party. Anne Harris was an 'innocent woman' seduced by the Marquess. The same court took a different view of a note for one thousand pounds payable on a man's death to a woman who, in Lord Hardwicke's words, had 'no other visible methods of living but by entertaining gentlemen' and was a 'whore'.[31] There was scarcely less moral censure in a third case where a young woman having arrived in a household as a companion to a married man's sister became his lover and brought about a separation from his wife. The man then created an annuity for her in a bond. Refusing to enforce the bond, it was held that '[W]hen a man takes and keeps a mistress under the nose of his wife, who thereupon leaves her husband, that is such a crime as stares every one in the face: and that is, this case. She knew of it, and lived in the very family, where she saw all this'.[32] Lord Harwicke was at pains to distinguish this case from one where a single man seduced a single woman who might reasonably be inclined to suppose that after the seduction they will be married. The decision is one example of how a judge's perception of the character of both the man and woman in these relationships were potentially relevant to the outcome.[33] In *Whaley* v *Norton*, the Master of the Rolls made this point with a biblical reference, 'we know that Adam was punished, though tempted by

[30] *Marchioness of Annandale* v *Harris* (1727) 2 P Wms 432.

[31] *Robinson* v *Cox* (1741) 9 Mod. 263, 264-265. For other dicta to this effect see, *Bainham* v *Manning* (1691) 2 Vern. 242.

[32] *Priest* v *Parrot* (1750) 2 Ves. Sen. 160, 161.

[33] This still left the issues about the appropriateness of raising this kind of evidence given its scandalous nature: *Clarke* v *Periam* (1741) 2 Atk. 33; *Franco* v *Bolton* (1797) 3 Ves. Jun. 369 (on introducing this evidence in Chancery).

Eve; because he would be tempted'.[34] Beyond questions of sexual morality, the entire context of the transaction might be opened up to scrutiny, particularly where the plaintiff was the estate.[35] Concerns of this sort about the preservation of estates from imprudent behaviour and the need to protect the landed interest were also voiced in other contexts completely outside immoral contracts.[36]

Judges of the eighteenth and early nineteenth centuries were quite prepared to openly express moral opinions. In the different context of a false representation, Lord Kenyon reportedly said: 'I had learned that laws were never so well directed as when they were made to enforce religious, moral, and social duties between man and man'.[37] Lord Kenyon appeared to give religious and moral considerations equal weight to public policy. Admittedly he had a reputation for moralizing,[38] but this sort of comment was, if not frequent, then not unknown in the context of an immoral contract. When a man had several children with his wife's sister and then refused to pay on a bond making provision for them, the Lord Keeper ordered that payment

[34] (1687) 1 Vern. 482.

[35] *Matthew* v *Hanbury* (1690) 2 Vern. 188 (bonds given by testator to 'a common harlot').

[36] The same idea was present in the idea of young heirs selling their interests in their estate: W. Swain, 'Reshaping Contractual Unfairness in Eighteenth and Nineteenth Century England', 35 *Journal of Legal History* (2014), 131, at 125-126.

[37] *Haycraft* v *Creasy* (1801) 2 East. 92, 103.

[38] Douglas Hay, 'Kenyon, Lloyd, First Baron Kenyon (1732-1802)', online edn. of the *Oxford Dictionary of National Biography*, 2006. Available online at: https://doi.org/10.1093/ref:odnb/15431.

be made and added that 'it was a pity he could do no more'.[39] Moral opprobrium might be combined with comments on the need to protect the institution of marriage.[40]

Alongside the decisions setting aside contracts, others deny the existence of a special category of agreement that was unenforceable. In *Hill* v *Spencer*, Lord Camden suggested that a bond for a past cohabitation was valid on the basis that a man could enter into a voluntary bond with a prostitute as much as with anyone else.[41] In *Gibson* v *Dickie*, a couple had cohabited and subsequently separated. The man's undertaking to pay an annuity for her life provided that she remained single was treated as valid.[42] Many of these decisions were in Chancery because plaintiffs were bringing bills to enforce an annuity in a bond or were involved in a dispute with an estate. The case law began to take on a more coherent form in much the same manner that other areas in which Equity intersected with the law of contract gradually became more structured.[43] Around the turn of the nineteenth century, the courts began to draw a clear distinction between an agreement to pay for past cohabitation and one to support future cohabitation, which earlier authorities hinted at.[44] The point can be illustrated by *Gray* v *Mathias*[45] in which there were two bonds covering past and future cohabitation. The

[39] *Spicer* v *Hayward* (1700) Prec. Ch. 113.

[40] *Priest* v *Parrot* (1750) 2 Ves. Sen. 160, 161.

[41] (1767) Amb. 641.

[42] (1815) 3 M & S 463. It is slightly surprising that this was not treated as an agreement in restraint of marriage and therefore contrary to public policy. This point was raised in argument but not commented in in the judgment.

[43] Swain, 'Reshaping Contractual Unfairness'.

[44] *Hill* v *Spencer* (1767) Amb. 642, 643.

[45] (1800) 5 Ves. Jun. 286. For another example, see: *Franco* v *Bolton* (1797) 3 Ves. Jun. 369.

former was valid, and the latter was not. Chief Baron Macdonald explained: 'it cannot be countenanced in a Court of Equity; to set aside all considerations of religion and morality, for obvious reasons of public policy: all proper connexion can arise only in the honourable state of marriage'.[46]

Judges of the mid-nineteenth century generally adopted a harsher attitude towards cohabitation agreements than their eighteenth century counterparts.[47] At least for those wealthy enough to afford the option, a secret trust was a possible way of avoiding this restriction.[48] Judicial hostility sometimes extended to immoral contracts more generally. In *Pearce* v *Brooks*[49] the plaintiff agreed to build and supply a miniature brougham (a type of coach) for the defendant to be paid for in a hire charge with an option to purchase. If the coach was returned before the second payment of hire, a forfeiture of fifteen guineas was to be paid. The defendant returned the coach damaged and refused to pay the fifteen guineas. This would normally be a straightforward claim. On the facts, however, the claim failed. The defendant was a prostitute. A jury at the trial found that the plaintiff knew about her occupation and also the purposes for which the coach was to be used. It was held that they were unable to claim on the contract. Baron Bramwell, who is often seen as an advocate of freedom of contract, was the trial judge.[50] He also sat in the Exchequer Chamber when it held that the contract could not

[46] (1800) 5 Ves. Jun. 286, 294.

[47] For a summary of the settled position, see *Ayerst* v *Jenkins* (1873) 16 Eq. Cas. 275, 282 (Lord Selborne LC).

[48] Although secret trusts were more commonly used for other purposes: Cornish et al., *The Oxford History*, 4.

[49] (1866) LR 1 Exch. 213.

[50] See the references at n 17.

be enforced. The Exchequer Chamber elided an illegal and immoral purpose.[51] Chief Baron Pollock was quite explicit that he saw no distinction between a contract for an illegal or an immoral purpose.[52] Some earlier judges had been more willing to enforce this sort of contract. In *Bowry* v *Bennet*,[53] clothes were sold to a prostitute. Lord Ellenborough held the fact that the plaintiff knew that the defendant was a prostitute was insufficient. It was also necessary that 'he expected to be paid from the profits of the defendant's prostitution'. A few years before, Buller LJ had held that a washerwoman could recover in an action for work and labour for washing the clothes of a prostitute even though she knew that the clothes were being used for the purposes of her work.[54] At the same time it could not be said that the earlier authorities were totally consistent.[55]

Aside from sexual morality, there were relatively few examples in which a contract was held to be unenforceable on the grounds of immorality alone. Some immoral behaviour was also illegal and so resorting to morality was unnecessary.[56] It was not just that the boundary between immorality and illegality was not a hard one. The same *ex turpi causa* maxim was

[51] The court also relied on authority concerned with an illegal contract: *Cannan* v *Bryce* (1819) 3 B & Ald. 179.

[52] (1866) LR 1 Exch. 213, 218.

[53] (1808) 1 Camp. 348.

[54] *Lloyd* v *Johnson* (1798) 1 B & P 340.

[55] *Girarday* v *Richardson* (1793) 1 Esp. 13 (Contract to rent a room to a prostitute not enforceable).

[56] For example, contracts relating to a blasphemous, seditious or criminally libel publications discussed by Pollock, *Principles of Contract*, 250-251. See *Poplett* v *Stockdale* (1825) Ry. and Mood. 337 (No action for work and labour for an immoral and libellous memoir of a prostitute).

used to prevent the recovery of money paid on illegal and immoral contracts.[57] Some types of immorality also overlap with the broader ground of public policy. Immorality itself has always been anomalous and kept within narrow limits. What changed in the nineteenth century is that courts became more hostile to immoral contracts within these limited parameters. Judges did not always temper the language that they used.[58] These cases also fit into a broader desire to rationalize the vitiating factors along more coherent lines. There was unease amongst lawyers about contract doctrines that were not clearly defined and anxiety about undermining agreements. The same concerns were evident in a more extravagant form in the application of broader public policy considerations in contract litigation.

III. Public policy in Contract Law Articulated

Nineteenth-century writers were prepared to accept that immorality might provide grounds for not enforcing a contract. Immorality in contract law was narrowly defined and therefore posed no major threat to the idea that parties should be able to enforce a valid agreement. Illegal contracts were, by definition, restricted by what the law at any point declared to be illegal. In *R* v *Waddington*,[59] Lord Kenyon referred to Adam Smith and noted that the political economists differed on whether there should be offences against forestalling, regrating and engrossing, but

[57] I am grateful to the anonymous reviewer for this point, see Cornish et al., *The Oxford History*, 591-595. For dicta which suggest that the maxim applied to both see Lord Mansfield in *Smith* v *Bromley* (1760) 2 Doug. 696 note.

[58] *Benyon* v *Nettlefold* (1850) 3 Mac. & G 94, 102 ('It is very easy to see the evil which would arise from allowing bonds in cases similar to the present').

[59] (1800) 1 East. 143, 157.

at the same time explained that such transactions were clearly illegal and therefore the contracts were not enforceable.[60]

In theory, public policy presented a more significant threat to the principles of freedom of contract than immorality and illegality. Both of those categories were largely fixed, albeit that they might still evolve. Public policy, by definition, was much more open-ended. There is little discussion of the scope of public policy as a general concept in contract law before the nineteenth century. Decisions in which judges were prepared to admit that they were motivated by concerns about public policy are not very much easier to find but there are some examples. Given the central importance of dynastic land holding to English society before the nineteenth century it is hardly surprising to find that Chancery judges were anxious to protect young heirs and this was a well-established example of public policy governing enforcement.[61] There was a more unexpected example of paternalism too in the way that judges recognized that sailors who sold their share in prize money in exchange for ready cash also deserved to be protected.[62] Young heirs and sailors provide isolated examples in which public policy was used to justify departing from the idea of freedom of contract, but these authorities in themselves say very little about the place of public policy in contract law more generally. There may have been other situations in which the application of legal doctrine was influenced by public policy concerns even if this is no more than hinted at in the judgments themselves.[63] At the same time,

[60] These offences were finally abolished in 1844 (7 & 8 Vict. c 24).

[61] Swain, 'Reshaping Contractual Unfairness'.

[62] *Baldwin* v *Rochford* (1748) 1 Wils. 229; *Taylour* v *Rochford* (1751) 2 Ves. Sen. 281; *How* v *Weldon* (1754) 2 Ves. Sen. 516, 518.

[63] The reluctance to allow sailors to renegotiate their contracts part way through a voyage or claim on a quantum meruit was cast in doctrinal terms in cases like *Cutter* v *Powell* (1795) 6

there were already signs in the eighteenth century that judges were ill at ease with more explicit references to public policy. In *Earl of Chesterfield* v *Janssen*, Lord Hardwicke included marriage brocage bonds in his definition of fraudulent agreements.[64] It was long accepted that contracts procuring a marriage were unenforceable. But it may be significant that Lord Hardwicke felt the need to avoid mentioning public policy and to shoehorn these contracts into his definition of fraud instead, especially, as unlike the other categories of fraud, he saw these contracts as a fraud on third parties.[65]

Some of the tensions around public policy were laid bare in the context of gaming transactions.[66] In *Jones* v *Randall*,[67] Lord Mansfield accepted as a matter of principle that contracts against 'sound policy' might be void but held that the wager in question, which concerned the outcome of litigation, was valid. In *Da Costa* v *Jones*, the same judge took a different view of a wager on the gender of the French ambassador, on the grounds that it was

TR 320; *Stilk* v *Myrick* (1809) 2 Camp. 317. It was underpinned by public policy concerns in an era where there was a shortage of sailors see, Martin Dockray, 'Cutter v. Powell: A Trip Outside the Text', 117 *Law Quarterly Review* (2001), 664, at 671-673.

[64] *Earl of Chesterfield* v *Janssen* (1750) 2 Ves. Sen. 125, 156.

[65] R. Powell, 'Marriage Brocage Agreements', 6 *Current Legal Problems* (1953), 254; *Drury* v *Hooke* (1686) 1 Vern. 412; *Hall* v *Potter* (1695) 1 Show. PC 76; *Stribblehill* v *Brett* (1703) 2 Vern. 445; *Cole* v *Gibson* (1750) 1 Ves. Sen. 503.

[66] For a detailed discussion of this topic see, W. Swain, 'Da Costa v. Jones (1778)', in C. Mitchell and P. Mitchell, eds., *Landmark Cases in the Law of Contract*, Oxford, 2008, at 119-134.

[67] (1774) 1 Cowp. 37.

'manifestly a gross injury to a third person'.[68] Lord Mansfield expressed the general principle in these cases with some care: 'Indifferent wagers upon indifferent matters, without interest to either of the parties, are certainly allowable by the law of this country, in so far as they have not been restrained by particular Acts of Parliament'.[69] Whilst wagering was attacked by some moralists, judges were often reluctant to intervene. Lord Kenyon was careful to note that although he disliked wagers, it was not the place for a judge as opposed to the legislature to prohibit wagers that were otherwise valid.[70] Some judges saw litigation over wagers as a waste of court time.[71] Lord Ellenborough observed that: 'Wherever the tolerating of any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held to be void'.[72] Yet like earlier judges, Lord Ellenborough recognized a prohibition in a narrow category of wagers rather than all wagers. In the early nineteenth century, the role of public policy came to be more squarely addressed for the first time.

In *Richardson* v *Mellish,* Best CJ put the proposition that public policy was not something that the courts were well equipped to deal with:

> I am not much disposed to yield to the arguments of public policy: I think the courts of Westminster-Hall …have gone much further than they were warranted in going into questions of policy: they have taken on themselves, sometimes, to decide doubtful questions of policy and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all

[68] (1778) 2 Cowp. 729, 736.

[69] (1778) 2 Cowp. 729, 734.

[70] *Good* v *Elliot* (1790) 3 TR 693, 704.

[71] *Gibert* v *Sykes* (1812) 16 East. 150, 162.

[72] Ibid., 156-157.

> those considerations which ought to enter into the judgment of those who decide on questions of policy.[73]

In a statement that has come to be cited many times over the years, Burrough J said: 'I for one, protest as my Lord has done, against arguing too strongly upon public policy - it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail'.[74]

The defendant had purchased a share in a ship that was chartered to the East India Company and was captained by the plaintiff. The plaintiff agreed to relinquish command and was given another ship so that a nephew of the defendant could replace him. It was also agreed that if the nephew should die, then the plaintiff would resume command. The East India Company approved the arrangement. Both ships sailed, and the second ship proved to be much less lucrative. The nephew died, and the defendant refused to allow the plaintiff to return to the first ship despite their agreement. There was held to be good consideration. The only issue then was whether the agreement was illegal. It was argued that this arrangement was akin to the illegal sale of a public office. The Common Pleas saw nothing corrupt in this arrangement. All the parties were involved in the agreement, and this was not equivalent to the sale of a public office as opposed to a legitimate private contract. It was stressed that there was no 'personal corruption, pecuniary advantage, or something in the nature of it'.[75]

The language used by the Common Pleas in *Richardson* v *Mellish* was unambiguous. Some of the hostility towards public policy in the case seems to come from how it was used as an argument of last resort, the defendant having failed to establish that the contract was

[73] (1824) 2 Bing. 229, 242.

[74] Ibid., 252.

[75] (1824) 2 Bing. 229, 247.

illegal.[76] Despite statements warning of the danger of public policy, it did not simply disappear from the law altogether. For example, it is impossible to exclude considerations of public policy from the development of the law of tort in the nineteenth century.[77] The position of public policy in contract law was more complex because it was neither embraced nor entirely excluded.

IV. Public Policy in Contract Law Restricted

In 1807 Samuel Comyn referred to *Jones* v *Randall* and observed that 'all contracts and agreements which have as their object any thing contrary to principles of sound policy are void by the common law'.[78] This statement was retained in the second edition of his treatise which appeared in the same year as *Richardson* v *Mellish*. Not long afterwards, Henry Colebrooke expressed himself with equal brevity: 'When the object of an agreement is in any respect inconsistent with the rules of public policy, the contract will not be enforced'.[79] He gave the example of sailors dealing with prize money. Joseph Chitty's treatise appeared post-*Richardson* v *Mellish* and was noticeably more reticent about public policy. In his introduction to the topic, he wrote that: 'A doubtful matter of public policy is not sufficient to invalidate a contract. An agreement is not void on this ground, unless it expressly and unquestionably contravenes public policy and be manifestly injurious to the interests of the state'.[80]

[76] Ibid., 252.

[77] Cornish et al., *The Oxford History*, 886.

[78] Samuel Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not under Seal*, 2 vols., London, 1807, vol.1, 32.

[79] H.T. Colebrooke, *Treatise on Obligations and Contracts*, London, 1818, 63.

[80] Chitty, *A Practical Treatise*, 217.

Rather than referring to *Jones* v *Randall*, quite understandably, Chitty cited *Richardson* v *Mellish*. Chitty nevertheless still included a section on agreements that were unenforceable because of public policy.[81] An increased lack of confidence in the idea that public policy was relevant to contracts was perhaps what prompted Addison to abandon any attempt to group cases under a heading of public policy in favour of distributing these authorities throughout his textbook.[82] Stephen Leake solved the difficulty of what to do with public policy by subsuming public policy into the section of his treatise that dealt with illegal contracts.[83] This approach was not entirely successful, and Leake was forced to concede that restraint of trade was a matter of public policy rather than illegality per se.[84]

The mid-nineteenth century decision of the House of Lords in *Egerton* v *Earl Brownlow*[85] was not about contract law, but it came to be seen as having broader relevance.[86] Some of the speeches expressed great judicial unease with public policy. Public policy was regarded as a matter for the legislature, and not something that the courts ought to use to justify creating new law instead of interpreting existing legislation.[87] Yet, some contract cases of this

[81] Ibid., 217-222.

[82] C.G. Addison, *Treatise on the Law of Contracts and Rights andLliabilities ex Contractu*, London, 1847.

[83] Leake, *The Elements*, 376-412.

[84] Ibid., 387.

[85] (1853) 4 HLC 1; P. Winfield, 'Public Policy and the English Common Law', 42 *Harvard Law Review* (1928), 76, at 88-90.

[86] Pollock, *Principles of Contract*, 253: 'The leading modern authority on "public policy"'.

[87] (1853) 4 HLC 1, 123-124 (Parke B); 100 (Wightman J, Earle J); 106 (Anderson B).

era were still determined on the basis of public policy. In *Hilton* v *Eckersley*,[88] owners of several cotton mills entered into an agreement about how they would conduct their business in the form of a trade association. Lord Campbell highlighted some of the dangers as he saw it with resorting to public policy:

> I enter upon such considerations with much reluctance, and with great apprehension, when I think how different generations of Judges, and different Judges of the same generation, have differed in opinion upon questions of political economy and other topics connected with the adjudication of such cases. And I cannot help thinking that, where there is no illegality in bonds and other instruments at common law, it would have been better that our Courts of Justice had been required to give effect to them unless where they are avoided by Act of Parliament. By following a different course, the boundary between Judge made law and statute made law is very difficult to be discovered.[89]

Despite these misgivings, Lord Campbell nevertheless recognized that agreements in restraint of trade were one category where public policy might be considered. In *Mallan* v *May*, Baron Parke explained that in such cases, 'the test appears to be, whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided'.[90] In *Egerton* v *Earl Brownlow*, the same judge, who was otherwise cautious about public policy, admitted that it was important in those contracts where one party was seeking to restrict the economic activities of another.[91]

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[88] (1856) 6 E & B 47, affirmed (1856) 6 E & B 66.

[89] Ibid., 64.

[90] (1843) 11 M & W 653, 665.

[91] (1853) 4 HLC 1, 122-124.

Several decisions of the 1820s also suggest that public policy had a role to play beyond contracts seeking to limit economic activity. For example, it was said that public policy could be taken into consideration, as 'if there be any doubts what is the law, judges solve such doubts by considering what will be the good or bad effects of their decision'[92] or as a means of justifying a long-held custom.[93] Some of the other judges in *Egerton* v *Earl Brownlow* were markedly less hostile towards public policy than Baron Parke. Lord Chief Baron Pollock observed that an 'unlimited number of cases may be cited as directly and distinctly deciding upon contracts and covenants as the avowed broad ground of the public good and on that alone'.[94] One of the examples he gives are wagering contracts.[95] He continued: 'My Lords, it may be that Judges are no better able to discern what is for the public good thother experienced and enlightened members of the community but that is no reason for their refusing to entertain the question, and declining to decide upon it'.[96] Public policy, he said, was particularly relevant in 'a new and unprecedented case'.[97] In novel cases, public policy could be seen as part of the search for legal principles on which the outcome in such cases turned.[98]

[92] *Fletcher* v *Lord Sondes* (1826) 3 Bing. 501, 590 (Best CJ).

[93] *Gifford* v *Lord Yarborough* (1828) 5 Bing. 163, 166.

[94] (1853) 4 HLC 1, 144-145.

[95] Ibid., 147.

[96] Ibid., 151.

[97] Ibid.

[98] On this point see, Stephen Waddams, *Principle and Policy in Contract Law Competing or Complementary Concepts?*, Cambridge, 2011, 155-156.

By the end of the nineteenth century, even this approach was seen as going too far.[99] Sir William Anson wrote that 'the policy of the law, or public policy, is a phrase of frequent occurrence and somewhat attractive sound, but it is very easily capable of introducing an unsatisfactory vagueness into the law'.[100] However, he left little scope for public policy as a dynamic force in contract law that could be used to develop new contract doctrine. Anson distinguished between two different applications of public policy. Public policy was sometimes used as a general principle or what he termed, 'the duty of the Courts to consider the public advantage'.[101] This use of public policy, Anson noted, had in recent decades tended to be limited. The second use of public policy occurred in a list of well-established categories of cases in which the law had set aside contracts. Anson went on to give some examples, some of which were cases of illegality or morality rather than public policy properly so-called. Practically speaking, the most important category on this list were contracts concerning restraint of trade.

Anson was clearly uneasy about the first category of public policy, which he took as referring to a general principle, but he could not dismiss it entirely. He mentioned some remarks of Jessel MR in *Printing and Numerical Registering Co.* v *Sampson*[102] where he stated that '[Y]ou have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract'.[103] The contract at issue was an agreement to assign patent rights in a printing machine as well as future patent rights in subsequent inventions. The contract was

[99] Ibid., 156-158.

[100] Anson, *Principles of the English Law*, 174.

[101] Ibid., 175.

[102] (1875) LR 19 Eq. 462.

[103] Ibid., 465.

held to be valid. Whilst Jessel MR recognized the importance of freedom of contract, he was also anxious to stress the limits of public policy. Having discussed illegality and immoral contracts, he continued, 'I should be sorry to extend the doctrine much further. I do not say there are no other cases to which it does apply; but I should be sorry to extend it much further'.[104] Jessel MR stressed the economic value of the contract having drawn an analogy with an artist who sells a painting in advance. He explained, 'It encourages the poor, needy, and struggling author or artist. It enables him to pursue his avocations, because people rely upon his honour and good faith, and the ordinary practice of mankind; and it will provide for him the means beforehand which, if the law prohibited such a contract, he could not otherwise obtain'.[105] Freedom of contract was clearly not an absolute value that trumped all others.[106] There might be situations where different public policies conflict. For example, contractual parties were not always allowed to exercise freedom in order to impose restraints on themselves.

V. Public Policy and Restraint of Trade

A doctrine of restraint of trade emerged in the fifteenth century, but the foundations of the modern law can be traced to the eighteenth century.[107] The first detailed analysis of the law of

[104] Ibid.

[105] Ibid., 466.

[106] See also Jessel MR in the context of a penalty clause in *Wallis* v *Smith* (1882) 21 Ch. D 243, 266, where he emphasized the need to respect the 'clearly expressed intentions' of the parties.

[107] Michael Trebilcock, *The Common Law of Restraint of Trade*, Toronto, 1986, 1-59; J.D. Heydon, *The Restraint of Trade Doctrine*, 4th ed., Sydney, 2018, 1-33.

restraint of trade is found in the judgment of Parker CJ in *Mitchell* v *Reynolds*.[108] Having discussed various sorts of restraint of trade, he set out the parameters of what he termed 'voluntary restraints'. A general restraint which applied to the whole country was void. A 'particular restraint' which applied to a smaller area could be enforced if 'made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good'.[109] He gave a justification for allowing particular restraints on good consideration to be enforced: 'Volenti non fit injuria; a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place'.[110] When Parker CJ then went on to make some more general observations, he was perfectly candid that the public policy underpinning the legal doctrine was the need to prevent a monopoly that applied when the restraint covered the whole country but did not apply in the same way to a local restraint.[111] He observed that there might in fact, be situations where a particular restraint is beneficial:

> [A]s to prevent a town from being overstocked with any particular trade; or in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer.[112]

[108] (1711) 1 P Wms 181, Fort. 295, 10 Mod. 130.

[109] (1711) 1 P Wms 181, 186.

[110] Ibid.

[111] Ibid., 187.

[112] Ibid., 191.

Parker CJ's approach shows that when it came to contracts in restraint of trade, there were many obvious public policy factors relevant in determining whether these contracts could be enforced. On the one hand, there was the benefit of 'trade and honest industry' and the undesirability of monopolies. On the other hand, there was a recognition that anyone could agree to limit their commercial activities in exchange for a payment. Another way of looking at this was to see public policy as mediating the interests of the parties who agreed to the restraint, and the public. Parker CJ suggested that earlier cases on voluntary restraints could be explained by 'the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2dly, to the publick, by depriving it of an useful member'.[113] In this formula, public policy sat alongside the interests of the parties. Eighty years later, Lord Kenyon emphasized the benefit, in learning the trade, to a man who became the assistant to a surgeon and undertook not to practise in the same area for fourteen years.[114] He also saw no detriment to the public because 'every other person is at liberty to practice as a surgeon in this town'.[115] Lord Kenyon also attempted to address whether the restraint was reasonable, but this only led him to conclude, 'I do not think the limits are necessarily unreasonable nor do I know how to draw the line'.[116]

Lord Ellenborough in *Gale* v *Reed* chose to focus more on the balance between the interests of both parties rather than wider issues of public policy: 'the restraint on one side meant to be enforced should in reason be coextensive only with the benefits meant to be

[113] Ibid.

[114] *Davis* v *Mason* (1793) 5 TR 119, 120.

[115] Ibid.

[116] Ibid.

enjoyed on the other'.[117] But as well as the interests of the parties, public policy continued to be emphasized, and in 1825 Best CJ claimed that 'the first object of the law is to promote the public interest; the second to preserve the rights of individuals'.[118] As late as 1831, Baron Bayley stressed that 'The restraint is prejudicial to the individual restrained, and to the rights of the public; for every man has a right to the fruits of his own unrestricted exertions, and the public have a right to the benefit -which they may derive from such exertions'.[119] One factor in determining the interests of the parties was an assessment of whether consideration was adequate, which was not the kind of inquiry that was generally permitted.[120] By the 1830s, two things then began to happen. Firstly, public policy began to have a different and narrower meaning than contemplated by Parker CJ. Secondly, judges became much less willing to consider whether the bargain was equal between the parties.

In *Horner* v *Graves*[121] in the 1830s Tindal CJ was still discussing public policy, but it was part of a much narrower inquiry than before. The emphasis now was on whether the restraint was reasonable:

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[117] (1806) 8 East. 80, 86-87.

[118] *Homer* v *Ashford* (1825) 3 Bing. 322, 326.

[119] *Young* v *Timmins* (1831) 1 C & J 331, 340.

[120] If consideration was sufficient (or valid consideration) courts were not usually allowed to consider whether it was also adequate, see *Sturlyn* v *Albany* (1587) Cro. Eliz. 67. Although this rule was never quite absolute: David J. Ibbetson, 'Consideration and the Theory of Contract in Sixteenth Century Common Law' in John Barton, ed., *Towards a General Law of Contract*, Berlin, 1990, 67, at 72-74.

[121] (1831) 7 Bing. 735.

> And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.[122]

If a restraint was reasonable, the contract could be enforced. It was no longer the courts' role to consider whether there was adequate consideration when faced with a restraint of trade. Six years later in *Hitchcock* v *Coker*,[123] the same judge was even more reticent about using the public interest in the context of a restraint of trade, warning that 'great difficulty may attend the application of that test from the variety of opinions that may exist on the question of interferences with the public interest which the law ought to permit'.[124] He also said that it was 'impossible for the court…to say whether, in any particular case, the party restrained has made an improvident bargain or not'.[125] Instead, he preferred to consider whether the agreement was necessary for the protection of the promisee. On the facts before him, the defendant had worked as the plaintiff's assistant and promised not to operate as a chemist in the same town for the rest of the plaintiff's life. Despite the potential length of time over which the restraint could operate, it was upheld.

[122] Ibid., 743.

[123] (1837) 6 Ad. & El. 438.

[124] Ibid., 445.

[125] Ibid., 457.

Public policy continued to persist in restraint of trade cases until the 1840s[126] but, perhaps inevitably, as reasonableness of the restraint came to be seen as the critical factor, the courts began to behave as though they could operate some kind of objective test divorced from public policy. This new position comes across most vividly in Pollock's textbook: 'at all events the restriction must in the particular case be reasonable, and this is a question not of fact but of law'.[127] As if to stress his argument, the factors relevant to reasonableness, namely the extent of the restriction in space and time and the nature of the trade, were set out by Pollock in a table.[128]

VI. Public Policy in Contract Law at the Dawn of the Twentieth Century

Public policy continued to be discussed at some length in the leading modern authority on restraint of trade, *Nordenfelt* v *Maxim Nordenfelt Guns and Ammunition Co.*[129] According to Lord Watson, public policy was quite distinct from legal principle: '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'.[130] Public policy was not invoked with much precision on this occasion. It was expressed in broad generalities by Lord Watson himself who drew a distinction between a restriction on an individual and a restriction on commercial activity following the sale of a business:

[126] *Sainter* v *Ferguson* (1849) 7 CB 716, 729 (Cresswell J); 730 (Vaughan Williams J).

[127] Pollock, *Principles of Contract*, 289.

[128] Ibid., 290-291.

[129] [1894] AC 535.

[130] Ibid., 553.

> It does not seem to admit of doubt that the general policy of the law is opposed to all restraints upon liberty of individual action which are injurious to the interests of the State or community. Nor is it doubtful that Courts will rightly refuse to enforce any compact by which an individual binds himself not to use his time and talents in prosecuting a particular profession or trade, when its enforcement would obviously or probably be attended with these injurious consequences….I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold.[131]

Lord Macnaughten explained that there was a difference between someone who is an employee or apprentice agreeing to a restraint on their future activities and the case of the sale of a business, which reflects a reluctance to allow self-enslavement through contract.[132] He took as his starting point that 'The public have an interest in every person's carrying on his trade freely: so has the individual' before conceding that there are cases when a restraint is justified, 'It is sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public'.[133] Lord Macnaughten stressed the value of free trade, but there is no real suggestion that he thought that it should necessarily trump the freedom of

[131] [1894] AC 535, 552.

[132] Ibid., 566; Prince Saprai, 'The Principle Against Self-Enslavement in Contract Law', 26 *Journal of Contract Law* (2007), 25.

[133] [1894] AC 535, 565.

contract to agree to a restraint. Indeed, he was critical of earlier attempts to prevent parties from entering into restraint of trade agreements.[134]

Writing the year before *Nordenfelt* , Joseph Matthews had suggested that, 'Perhaps no subject better illustrates the flexibility and expansiveness of the Common Law than that of covenants in restraint of trade'.[135] Matthews saw this state of affairs as a consequence of how public policy could evolve over time. Whilst the House of Lords accepted that restraint of trade had evolved and saw this as a good thing, Matthews overstates the flexibility of the restraint of trade doctrine. The key test – whether the restrain was 'reasonable' – was a question of law.[136] Instead of being used to determine individual cases, public policy is a backdrop against which restraint of trade operated, rather than a basis for whether the restraint should be enforced. This was why public policy was used to explain why the older decisions, which were very hostile to restraint of trade agreements, were no longer valid.

The law has continued to evolve in relation to onus of proof[137] and the relevance of inequality of bargaining power.[138] The focus on the reasonableness of the restraint still allowed a court to consider the wider public interest. Despite the reluctance of some judges to engage in wider speculation about public policy as part of this inquiry,[139] others have continued to see

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[134] Ibid., 564-566.

[135] Joseph Matthews, *The Law Relating to Covenants in Restraint of Trade*, London, 1893, 1.

[136] *Mallan* v *May* (1843) 11 M & W 653; *Dowden & Pook Ltd* v *Pook* [1904] 1 KB 45.

[137] *Mason* v *Provident Clothing and Supply Co*. [1913] AC 724, 733; *Herbert Morris Ltd* v *Saxelby* [1916] 1 AC 688, 700, 706-707, 715.

[138] *Schroeder Music Publishing Co.* v *Macaulay* [1974] 1 WLR 1308, 1315-16.

[139] *Dickson* v *Pharmaceutical Society of Great Britain* [1970] AC 403, 441; *Texaco Ltd* v *Mulberry Filling Station Ltd* [1972] 1 WLR 814, 828-829.

it as central. In *Esso Petroleum* v *Harper's Garage (Stourport) Ltd*,[140] Lord Pearce went as far as saying that:

> Public policy, like other unruly horses, is apt to change its stance, and public policy is the ultimate basis of the courts' reluctance to enforce restraints. Although the decided cases are almost invariably based on unreasonableness between the parties, it is *ultimately* on the ground of public policy that the court will decline to enforce a restraint as being unreasonable between the parties.[141]

Public policy then never entirely went away in restraint of trade cases, even if public policy was mediated through the prism of whether a restraint was reasonable. In other contexts, public policy also became something of a second-order consideration. Rather than determining whether the contract could be enforced, public policy provided the context in which a particular legal doctrine was applied. It was the doctrine which determined the outcome rather than vaguer considerations of public policy. A good illustration is provided by *Allcard* v *Skinner*.[142] The reason that a gift and will between a nun and the mother superior might potentially be set aside was that there was undue influence.[143] But the legal doctrine of undue influence reflected a public policy. As Cotton LJ explained: 'the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom

[140] [1968] AC 269.

[141] Ibid., 324.

[142] (1887) 36 Ch. D 145.

[143] The passage of time since the plaintiff left the sisterhood and tried to get the gift and will set aside was six years and as a result the majority of the Court of Appeal denied the action.

being abused'.[144] At the time of *Allcard* v *Skinner* there were fears about the way that religious bodies exercised influence over their adherents.[145] In this way, public policy was relevant as a factor in the decision because it bolstered the application of legal doctrine. At the same time, all of the judges were careful to base their reasoning in doctrine and earlier authority. Cotton LJ asked, 'Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside?'.[146] Lindley LJ made the point that 'It is to the doctrines of equity, then, that recourse must be had to invalidate such gifts, if they are to be invalidated'.[147] It is not so much that public policy was completely sidelined but rather it was no longer expressed in broad generalities divorced from earlier precedents.

A second landmark case on contractual unfairness, *Earl of Aylesford* v *Morris*,[148] can be analysed in the same way. A loan transaction was set aside on the basis that it was an unconscionable bargain. This was grounded in the old cases in Equity about expectant heirs. From this line of authority, Lord Selborne LC extracted two characteristics: weakness on one side and exploitation of that weakness by the other.[149] Like *Allcard* v *Skinner*, the decision

[144] (1887) 36 Ch. D 145, 172.

[145] For a wealth of detail on the context see, Charlotte Smith, 'Allcard v Skinner (1887)' in Charles Mitchell and Paul Mitchell, eds., *Landmark Cases in the Law of Restitution*, Oxford, 2006, at 183-211.

[146] (1887) 36 Ch. D 145, 171.

[147] Ibid., 181.

[148] (1872) LR 8 Ch. App 484.

[149] Ibid., 491.

rested on the application of legal doctrine traceable through older Chancery authority but in common with it, was applied against a long-standing concern around the exploitation of heirs and the damage that such transactions might cause to landed estates. Once more, public policy was a secondary or what Lord Selborne LC termed a 'collateral consideration'.[150] This meant that if public policy was not entirely irrelevant, it was largely deprived of creative force.[151]

VII. Conclusions: Public Policy and Contract Doctrine in the Nineteenth Century

Stephen Waddams has observed that:

> English contract law has not, during the past 250 years, been perfectly ordered, stable and coherent; but neither has it been wholly chaotic and unpredictable. The concept of principle has enabled courts to accommodate legal change and to give effect to general ideas of common sense, convenience and justice, whilst at the same time imposing restraint in practice, on the unmediated invocation of policy.[152]

This analysis holds good for the eighteenth and nineteenth centuries. But it is important to note that neither public policy nor morality were static. Both came under increasing pressure in the nineteenth century. Concepts like these were exceptionally difficult to fit within a model of contract based on the idea of a meeting of wills.[153] Nor did either public policy or morality sit

[150] (1872) LR 8 Ch. App 484, 492.

[151] For a strong statement to that end see, *Janson* v *Driefontein Consolidated Mines Ltd* [1902] AC 484, 491-492.

[152] Waddams, *Principle and Policy*, 223.

[153] Some of the material discussed here is considered more generally in relation to will theory in Swain, *Law of Contract*, 245-249.

very easily with the idea that the law could be presented clearly and coherently. They were also still deeply engrained ideas. The Indian Contract Act 1872 was the clearest statement of the will theory of contract outside the pages of a legal treatise. And yet, both morality and public policy remained prominent even if they were difficult to reconcile with the Act's central claim that contracts are formed by consent.[154] Section 23 of that Act states that where an agreement is against public policy or immoral, it is void on the grounds that the consideration is illegal. Contracts in restraint of trade or marriage were subject to separate provisions.[155] Pollock and Mulla in their commentary on the Act, beyond noting that morality is different in India, treat these provisions as uncontroversial.[156] Perhaps this was because by this time, it was safe to assume that both immorality and public policy were fixed in their application.[157]

Morality seems never to have been a very broad concept. Certainly, by the time the nineteenth-century writers began putting the law in some sort of order, any chance it might have had to develop into something more free-ranging was lost. Simultaneously, in those cases, morality was still used to justify setting contracts aside. Morality was, if anything, applied more strictly than before. Shifting notions of sexual morality may have been a factor. But this factor

[154] Ibid., ch. 10.

[155] Ibid., ch. 26-27.

[156] F. Pollock and D. Mulla, *The Indian Contract Act with a Commentary, Critical and Explanatory*, 2nd ed., Oxford, 1909, 117.

[157] Ibid., 129.

should probably not be exaggerated.[158] The fact that the doctrine's outer limits had become clear and fixed no doubt made it easier to apply it more strictly when it did apply.

Public policy sat awkwardly not just with classical contract law but with nineteenth-century perceptions of the proper role of the judge. At a time where there was a growing body of legislation, Parliament was increasingly seen as the proper forum for considerations of public policy. This cannot be accounted for simply by judicial recognition of the importance of the principle of the separation of powers which even in modern times is not a central part of judicial discourse.[159] It was hardly a novel idea in the nineteenth century.[160] Yet the relevance of a well-defined theoretically cogent principle of the separation of powers, as opposed to a well-established convention relating to the rule of law,[161] should not be overstated. The requirement of a separation of powers was not, after all, something that Dicey as the leading

[158] The notion that the Victorians were necessarily puritanical on questions of sexual morality may over-simplify matters even if it reflects one significant strand of opinion: Michael Mason, *The Making of Victorian Sexuality*, Oxford, 1995.

[159] Eric Barendt, 'Separation of Powers and Constitutional Government', *Public Law* [1995], 599, at 616-617.

[160] A wide variety of otherwise disparate writers had advocated the idea: John Locke, *Two Treatises of Government*, Peter Laslett, ed., Cambridge, 1988, 366-370; Cf Thomas Hobbes, *Leviathan*, Richard Tuck, ed., Cambridge, 1991, 156; C Montesquieu, *The Spirit of the Laws*, A. Cohler, B. Miller, H. Stone, eds., 1748, Cambridge, 1989, XI Ch. 6, 156-166.

[161] On the importance of the convention, see T.R.S. Allan, *Law, Liberty, and Justice*, Oxford, 1993, 49-53.

constitutional theorist of the age paid much attention to.[162] Judicial reticence about public policy is likely to reflect more practical and pragmatic motives than the principles of political theory. The period marked the beginning of a process by which judges consciously sought to distance themselves from politics.[163] Whilst individual judges of the era might have had strong political opinions it should not be assumed that these shaped the direction of the law.[164] The retreat from reasoning based on public policy was perhaps another element in the same story of judicial self-restraint in relation to the political process. Once this settlement was accepted, it was always going to be difficult for a judge to use public policy too expansively. Public policy was a concept that it was easier to exclude in contract law than, for example, tort. Contract was rationalized as formed by agreement and its principles were presented as well settled. Tort law remained much more fluid. In contract law public policy was either closely tied to illegality or largely operated in the background. But in some situations where authority was absent, inconvenient, or uncertain, public policy continued to play a part even here– albeit in a muted fashion. When Bowen LJ said in *Allcard* v *Skinner* that in the absence of earlier

[162] A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, J.W.F. Allison, ed., Oxford, 2014, 104: where his discussion of the separation of powers focused on France. Dicey was nevertheless interested in the broader subject as is evident in the notes to a work that was never published: A.V. Dicey, *Lectures on Comparative Constitutionalism*, J.W.F. Allison, ed., Oxford, 2013, xxxix-xl, 230-231.

[163] For this process in the context of the judicial House of Lords see Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800-1976*, Chapel Hill, 1978.

[164] Michael Lobban, 'The Politics of English law in the Nineteenth Century', in Paul Brand and Joshua Getzler, eds., *Judges and Judging in the History of the Common Law and Civil Law*, Cambridge, 2012, at 106-112.

authority, the case must be 'decided upon broad principles',[165] it was policy that helped to focus attention on the importance of undue influence. But by this point in contract law, public policy broadly understood, and especially morality, were little more than exotic relics of an earlier time. They had ceased to be dynamic instruments of doctrinal development. This meant that the English cases did not map very precisely onto Mill's treatment of the subject either, or at the very least, in doctrinal terms the 'general policy of the state' in so far as it justified an intervention into the contract relationship, was, by the end of the nineteenth century a particularly limited idea. Policy was confined to well defined categories, as far as the law of contract was concerned.

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[165] (1887) 36 Ch. D 145,189.