Illegal Agreements and The Lesser Evil Principle

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Abstract

Illegal agreement disputes force U.S. courts to wrestle with multiple competing interests. The courts’ approach has been generally explained and understood in terms of the general rule of non-enforcement of illegal agreements with numerous exceptions. The case law on this topic has been described as “a vast, confusing and rather mysterious area of the law.” This article offers the insight that, contrary to common belief, courts’ approach to illegal agreements shows a consistent pattern. A review of randomly selected cases shows that the courts have by and large consistently (albeit implicitly) applied the lesser evil principle in resolving the disputes. Based on this insight, the article advocates for a more explicit adoption of the lesser evil principle. This article is the first to advocate an explicit recognition of the lesser evil principle in contract law, drawing on explicit adoption of the principle in criminal and tort law and implicit adoption of the principle by some courts when resolving illegal agreements dispute. This article argues that explicit adoption of the lesser evil principle will help courts focus their analyses and will eventually lead to more certainty and predictability in the market place.
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Introduction

When parties enter into an agreement to engage in illegal transactions and bring their dispute to a U.S. court, they put the court in the proverbial position of between a rock and a hard place. Enforcing the agreement is universally considered a bad idea. It is antithetical to the courts’ role to uphold

2 Courts and authors have often referred to these types of agreements as “illegal contracts”, but as Professor Corbin pointed out, an ‘illegal contract’ is a ‘self-contradictory’ term. G.A.A. CORBIN, CORBIN ON CONTRACTS § 1373, at 1 (1962). The word “contract” suggests legal enforceability. Therefore, if an agreement is illegal, it will not amount to a “contract” in the legal sense. This article follows Professor Corbin’s preference and uses the words “agreement,” “promise” or “bargain” to avoid conceptual confusion.

3 This article’s reference to illegal transactions include both transactions that violate an explicit statute or regulation and those that are declared illegal and unenforceable due to violation of a more general notion of public policy as ascertained by the courts. See Id. at 5-6. Some authors have used the phrase “contracts against public policy” to describe all agreements that are declared unenforceable. See, e.g. David Adam Friedman, Bringing Order to Contracts Against Public Policy, 39 FLA. ST. U. L. REV. 563 (Spring 2012). Professor Williston uses the terms "illegal bargain" or "illegal agreement." 5 WILLISTON ON CONTRACTS § 12:1 (4th ed. Westlaw database updated May 2014). To avoid confusion with the broader public policy doctrine applied in non-contractual context, this article uses the phrase “illegal agreements” or “illegal transactions” to cover all agreements that are illegal either because of violation of an explicit legislation or violation of a particular public policy not explicitly articulated by the legislature.

4 This article focuses on the issue of illegality related to transactions between private individuals. It does not address any issues related to the broader public policy doctrine in non-contractual contexts, for example policy regarding tax or federal spending issues. See Johnny Rex Buckles, Reforming the Public Policy Doctrine, 53 U. Kan. L. Rev. 397 (January 2005) (discussing the application of the public policy doctrine in areas such as federal income tax exemption or eligibility for federal funding, etc.).

5 Bank of U.S. v. Owens, 27 U.S. 527, 538-39 (1829) (commenting that “no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country, how can they then become auxiliary to the consummation of violations of law?”).
the law. It undermines the legitimacy and dignity of the law. The non-enforcement rule is deemed necessary to deter illegal agreements.

Non-enforcement, however, has its problems. Refusal to enforce a bargain struck by two private parties offends the fundamental principle of parties’ freedom to contract and party autonomy. It undermines contract law’s goal of maintaining certainty of contracts. Worse yet, non-enforcement may create incentives to enter into more illegal agreements in certain cases when non-enforcement allows a party to retain a windfall and creates incentives to engage in more illegal activities, undermining the very purpose for the non-enforcement rule.

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8 McMullen v. Hoffman, 174 U.S. 639, 669-70 (1899) (commenting that “to 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 a minimum.”).
9 Note: Validity of Contracts Which Violate Regulatory Statutes, 50 YALE L. J. 1108 (April 1941) (herein after “Yale Note”) (pointing out that the non-enforcement rule “conflict[s] with the more basic policy of preserving the inviolability of contracts”); See also, e.g., Eldridge v. Johnston, 245 P.2d 239, 251 (1952) (noting that “public policy requires that persons of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice; and it is only when some other overpowering rule of public policy intervenes, rendering such agreements unfair or illegal, that they will not be enforced.”).
Illegal agreement disputes put U.S. courts in the crossfire of multiple conflicting interests that go to the essence of what kind of a society we have or would like to have. It implicates issues related to the proper scope of government regulations of private market behavior and the limits of private individuals to manage their own affairs. It forces a court to confront issues related to its own role in a system based on separation of powers.

\[\text{11} \text{ Armstrong v. Toler, 24 U.S. 258, 260 (1826) (suggesting that an expansion of the non-enforcement rule “would lead to the most inconvenient consequences; carried out to such an extent, it would deserve to be entitled a rule to encourage and protect fraud.”); John W. Wade, Benefits Obtained Under Illegal Transactions, 25 TEX. L. REV. 31, 55 (November 1946) (pointing out that “[t]o a defrauder, the knowledge that the law will permit him to keep ill-gotten gains will be an incentive to induce another to participate in an illegal contract.”); M.P. Furmston, The Analysis of Illegal Contracts, 16 U. TORONTO L. J. 267, 284 (1966) (noting that “it is notorious that the effect of declaring a contract illegal is often to confer an undeserved reward on one party.”).} \]

\[\text{12} \text{ In deciding whether a plaintiff could recover money paid under an illegal agreement, one court described the dilemma faced by courts, noting that “[t]he courts have struggled with conflicting considerations of policy for hundreds of years in situations akin to the one here now. On the one hand, the courts are bent upon discouraging fraud and deceit by permitting such a recovery against defendants as this to the plaintiff here; on the other hand, if in the process of being defrauded, the plaintiff was knowingly participating in an illegal scheme, the courts have sometimes denied recovery to the plaintiff in order to discourage the illegality involved even though the fraud of defendants would remain unremedied.”) Fellner v. Marino, 158 N.Y.S.2d 24, 26-27 (1956).} \]

\[\text{13} \text{ G. Richard Shell, Contracts in the Modern Supreme Court, 81 CAL. L. REV. 433, 446 (March 1993).} \]

\[\text{14} \text{ Shell, supra note _____, at 437-38 ; F. H. Buckley, Perfectionism, 13 SUP. CT. ECON. REV. 133, 139 (noting that the doctrine of illegality sits at the border between public and private ordering) This article does not intend to join the debate about whether contracts are public or private.} \]

\[\text{15} \text{ U.S. Constitution Article I (vesting all legislative powers in Congress) and Article III (vesting all judicial power in one supreme court).} \]
Understandably, courts struggle to balance the multiple competing interests.\textsuperscript{16}

The resulting body of case law, sometimes referred as the doctrine of illegality or void for public policy doctrine, has been described as “a mess”\textsuperscript{17} or “rather confusing.”\textsuperscript{18} One author describes the case law as “a vast, confusing and rather mysterious area of the law.”\textsuperscript{19} Some pointed out that courts’ treatment of illegal agreements lacks a comprehensive theory or framework to explain the

\textsuperscript{16}This balancing approach is reflected in the Restatement (Second) of Contracts (1981) 178 which states as follows:

“(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.”

\textsuperscript{17}Peter Birks, \textit{Recovering Value Transferred Under An Illegal Contract}, 1 THEORETICAL INQUIRIES L. 155, 156 (January 2000). According to Professor Birks, this confusing state of affairs does not seem to be unique to the US courts. He described the English approach as “riddled with contradictions and evasions.” \textit{Id.} at 158.


\textsuperscript{19}George A. Strong, \textit{The Enforceability of Illegal Contracts}, 12 HASTINGS L. J. 347, 348 (1960-61) (noting that unenforceable contracts may become so in a changing socio-economic environment).
rules and various exceptions.20

Legal scholars have been searching for a coherent theory to explain or streamline the courts’ treatment of illegal agreements.21 One author proposed to explain the doctrine of illegality with a “unified efficient deterrence theory.”22 Another advocated an approach that would allow remedy on a showing of harm instead of a presumption of non enforcement as a remedy.”23 A third author suggests that, even if an agreement is unenforceable due to illegality, recovery be allowed if allowing recovery would not make nonsense of the law rendering it illegal, in his words, “stultify the law.”24

This article builds on the existing scholarship and joins the search for “consistency and rationality.”25 This article offers the insight that, contrary to common belief, courts’ approach to illegal agreements shows a consistent pattern. A review of randomly selected cases26 shows that the courts have by and large

25 Id. at 203.
26 Due to the enormous volume of cases addressing this issue, this article relies only on selected random review of cases. For example, the search term: contract or agreement /5 illegal or “public policy” yielded 486 cases total in the Westlaw U.S. Supreme Court cases database alone on September 10, 2014. The same search for cases after 01/01/2000 in the All State and Federal database on Westlaw yielded over 10,000 results. The case review focused on only those cases involving contract disputes between private parties and where illegality was raised as a defense.

20 Kostritsky, supra note ___ at 120-21; Harvard Notes, supra note ___ at 1445.
21 Harvard Notes, supra note ___ (offering a law and economics approach with regard to the non enforcement remedies); Kostritsky, supra note ___ at 120-21 (offering a unified efficient deterrence theory with regard to the judicial relief provided upon finding of illegality); Adam B. Badawi, Harm, Ambiguity and the Regulation of Illegal Contracts, 17 GEO. MASON L. REV. 483, 487 (Winter 2010). Birks, supra note ______, at 156. Friedman, supra note ______.
22 Kostritsky, supra note ___ at 121-22.
23 Badawi, supra note ___ at 487.
24 Birks, supra note ___ at 160, 191.
25 Id. at 203.
26 Due to the enormous volume of cases addressing this issue, this article relies only on selected random review of cases. For example, the search term: contract or agreement /5 illegal or “public policy” yielded 486 cases total in the Westlaw U.S. Supreme Court cases database alone on September 10, 2014. The same search for cases after 01/01/2000 in the All State and Federal database on Westlaw yielded over 10,000 results. The case review focused on only those cases involving contract disputes between private parties and where illegality was raised as a defense.
consistently (albeit implicitly) applied the lesser evil principle\textsuperscript{27} in adjudicating the disputes.\textsuperscript{28}

Based on this insight, the article advocates for a more explicit adoption of the lesser evil principle when courts are called upon to resolve disputes involving illegal agreements. This article is the first to advocate an explicit recognition of the lesser evil principle in private law, drawing on the explicit adoption of the principle in criminal and tort law and courts’ implicit adoption of the principle when resolving illegal agreement disputes.

One could argue that the lesser evil principle is not a satisfactory standard to apply to illegal agreement disputes. The principle itself does not provide a substantive standard.\textsuperscript{29} It does not readily provide the clarity and certainty that we

\textsuperscript{27} The word “evil” as used in this article does not refer to an event or consequence that is deemed morally wrong, as used in a typical moralist debate. Examples of such events are mercy killings or the atomic bombings of Hiroshima and Nagasaki in August 1945. See Gariella Blum, \textit{The Laws of War and the Lesser Evil}, 35 \textit{Yale J. Int’l L.} 1 (Winter 2010). In this article, the word “evil” is used in a broader generic sense, to refer to any harm, injury or compromise of an important principle, as used by courts or some other scholars. See, e.g., Antonin Scalia, \textit{Originalism: The Lesser Evil}, 57 \textit{U. Cin. L. Rev.} 849, 862 (1989); \textit{Oregon Steam Nav. Co. v. Winsor}, 87 U.S. 64, 68 (1873) (using the word “evils” to describe the injuries to the public resulting from contracts in restraint of trade.).

\textsuperscript{28} No court seems to have explicitly acknowledged the lesser evil principle in resolving the illegality dispute based randomly selected case review and a targeted search in All State and Federal database on Westlaw, using key words search terms “contract or agreement /s illegal! and “lesser evil”) on September 10, 2014. Some U.S. Supreme Court cases have described the consequences in terms of evils. See, e.g., \textit{Oregon Steam Nav. Co.}, 87 U.S. at 68. Some lower courts have also expressed the same sentiment. 2 Ky.L.Rptr. 20 (Pa. S. Ct. 1879) (allowing an illegality defense where the plaintiff obtained a judgment on a note given by the defendant so that the defendant would not be prosecuted for forgery to “prevent the evil which would be produced by enforcing the contract or allowing it to stand.”) See also, e.g., \textit{Gaspard v. Offshore Crane & Equipment, Inc., et al.}, 1998 WL 388597 , *5 (E.D. Louisiana July 8, 1998) (using the word “evil” to describe actions that are deemed to be against public policy of a state.).

\textsuperscript{29} The lesser evil principle is similar to a closely related concept, the
human beings desire because it does not answer some burning questions such as what the evils are, and more importantly, which of the evils is deemed the lesser.\(^{30}\) This deficiency, however, is more attributable to the nature of the interests implicated.\(^{31}\) Despite its limitations, the lesser evil principle allows us to better understand courts’ adjudication of illegal agreement disputes.\(^{32}\) It would provide a more predictive framework for how US courts approach the complex issues presented by illegal agreements.\(^{33}\) An explicit adoption of the principle proportionality principle, that the Court has adopted in its constitutional review of government actions. That principle itself does not provide a criterion. John T. Noonan, Jr., *Religious Liberty at Stake*, 84 VA. L. REV. 459, 470-71 (1998) (criticizing proportionality test as “extraordinary,” and unsupported by precedent); Pamela S. Karlan, “Pricking the Lines”: The Due Process Clause, Punitive Damages, and Criminal Punishment, 88 MINN. L. REV. 880, 882-83 (2004) (pointing out that “[P]roportionality is both an inherently alluring and an inevitably unsatisfactory measure of constitutionality. . . . [T]he problem lies in translating the principle into a standard for judicial oversight. For all the Court's invocation of objective factors, it turns out that a key aspect of proportionality review remains fundamentally subjective.”).

30 The principle does not tell us who is in the best position to answer those questions. For purpose of this article, I am assuming that the courts are the ones which are entrusted with answering the questions. In our government system, the judicial branch has the duty to interpret the law and to apply the law, as adjudicators of contract disputes. This article does not address the issue of the proper role of courts in determining what public policy is or whether the courts have overextended themselves to usurp the legislature’s role in declaring what public policy is.

31 MICHAEL IGNATIEFF, THE LESSER EVIL PRINCIPLE: POLITICAL ETHICS IN AN AGE OF TERROR 8 (Princeton 2004) (noting where a lesser evil position applies, the analysis will be complicated, “there are no trump cards, no table-clearing justifications or claims.”).

32 Curtis Bridgeman, Why Contracts Scholars Should Read Legal Philosophy Positivism Formalism and The Specification of Rules In Contract Law, 29 CARDOZO L. REV. 1443, 1469 (March 2008) (pointing out that many common law contract doctrines are vague and incomplete, but the incompleteness alone does not render a doctrine ineffective and suggesting rather the doctrines can be viewed as partial plans to be refined over time).

33 This article does not intend to join the greater moral debate about the
would allow courts to begin the process of refining the substantive standards when resolving illegal agreement disputes. This would lead to more certainty in the market place. Finally, as this article will show, explicit adoption is also not difficult because courts have by and large been following the principle already.

To provide a context for the discussions, this article begins by introducing briefly the lesser evil principle and the general areas where the lesser evil principle has been applied. Part II of the article briefly reviews the explicit adoption of the principle in U.S. criminal and tort laws. Part III sets forth some examples of the implicit judicial adoption of the lesser evil principle in resolving illegal disagreements disputes. Part IV offers some arguments in favor of an explicit adoption of the lesser evil principle. This article concludes by urging the explicit adoption of the lesser evil principle when resolving illegal agreement disputes.

I. Overview of The Lesser Evil Principle

The lesser evil principle or the doctrine of the lesser evil (sometimes also referred to as the doctrine of the necessary evil) applies to situations where an actor is forced to choose between competing options, all of which breach a moral pros and cons of the lesser evil principle. The lesser evil doctrine is undoubtedly highly contingent and determining which of the evils implicated is the lesser one will inevitably reflect cultural, moral, and legal values of society at large. Blum, supra note ____; See also Ignatieff, supra note ____, at 19 (discussing the lesser evil principle in the context of the fight against terrorism after September 11 and acknowledging the need to resort to certain measures under the lesser evil principle under certain conditions). This article also does not intend to join the debate about the pros and cons of the public policy doctrine. See Prince, supra note __ at 166.


In trying to assess which is the evil, this article does not intend to join the debate about the proper role of the courts in determining what the public policy is.
principle.\textsuperscript{36} The doctrine describes a pragmatic (albeit controversial) way to solve the dilemma – by choosing the lesser of two evils.\textsuperscript{37}

The lesser evil idea originated from the ancient classical Greek philosophers, Aristotle and Epicurus.\textsuperscript{38} Aristotle discussed the lesser evil principle approvingly and considered it “good.”\textsuperscript{39} The principle has often been applied to justify certain actions in international relations and politics.\textsuperscript{40} In law, the principle has been mostly used to justify certain defenses against criminal charges, for example, the concept of necessity in both common and civil law traditions.\textsuperscript{41}

Even though the principle itself is widely accepted or tolerated, it is far more difficult to determine what the evils are and especially which is the lesser evil.\textsuperscript{42} The lesser evil principle automatically invokes the broader philosophical debate about what is considered “evil.”\textsuperscript{43} Where one stands on certain issues

\textsuperscript{36} Ignatieff, \textit{supra} note _____, at 9.
\textsuperscript{37} This article does not intend to join the broader debate about the morality of this principle. \textit{See} Ignatieff, \textit{supra} note ___ at 1-24 (addressing issues related to the lesser evil permissible within the boundaries of a democracy committed to the rule of law) for one representative views related to the morality of this doctrine.)
\textsuperscript{38} Sean Molloy, Aristotle, Epicurus, Morgenthau and the Political Ethics of the Lesser Evil, 5 J. Int'l Pol. Theory 94, 100 (2009).
\textsuperscript{39} Molloy, \textit{supra} note ___ at p. 100.
\textsuperscript{40} It is beyond the scope of this article to have a detailed discussion of the application of the lesser evil doctrine in political and international relations. For a discussion of how the lesser evil principle has been used in politics and international relations and some of the controversies surrounding the principle, please see Robert D. Sloane, \textit{On the Use and Abuse of Necessity in the Law of State Responsibility}, 106 Am. J. Int'l L. 447 (2012).
\textsuperscript{41} Blum, \textit{supra} note ___, at 32. (pointing out that there are important variations depending on one’s values and beliefs).
\textsuperscript{42} Re’em Segev, \textit{Moral Justification, Administrative Power and Emergencies}, 53 Clev. St. L. Rev. 629, 631 (2005-2006) (Stating that the lesser evil principle “seems obviously just and widely accepted.”).
\textsuperscript{43} Ignatieff, \textit{supra} note ___, at 12.
depends on one’s political and moral values.\textsuperscript{44} For example, people who believe in values important to a democratic system are likely to view certain putative evils differently from those who share beliefs consistent with an authoritarian regime.\textsuperscript{45} What is deemed more or lesser of the evil also changes over time.\textsuperscript{46} Such analyses are often complicated by decision makers’ failure to articulate the values behind their reasoning.\textsuperscript{47}

II. Explicit Application of the Lesser Evil Principle in US Criminal and Tort Law

US law has explicitly adopted the lesser evil principle in criminal and tort law.\textsuperscript{48} The Model Penal Code permits a criminal defendant to assert a choice of

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\textsuperscript{44} Blum, \textit{supra} note __ at 2. As one judge pointed out, differences in outcomes with regard to when sufficient fraud existed to avoid a contract depend on the kind of policy that the judges would like to adopt. “If the judge writing the opinion believed that it is better to ‘encourage negligence in the foolish than fraud in the deceitful,’ then a more liberal view is taken as to what constitutes fraud. On the other hand, if the judge writing the opinion believed that it is better to ‘encourage fraud in the deceitful,’ then the opinion is written with the view of upholding the contract.” \textit{Birdsall v. Coon}, 157 Mo.App. 439 (1911).
\textsuperscript{45} Richard L. Barnes, \textit{Delusion by Analysis: The Surrogate Mother Problem}, 34 S.D. L. REV. 1, 3-4 (1988/1989) (setting forth examples of when values differ depending on one’s political, moral, and religious beliefs).
\textsuperscript{46} Shell, \textit{supra} note ____ , at 477 (noting the more recent Supreme Court cases that have enforced contractual waivers of certain constitutional rights): \textit{Wallihan v. Hughes}, 196 Va. 117, 82 S.E.2d 553, 558 (1954) (describing public policy as a “will-o’-the-wisp of the law [that] varies and changes with the interests, habits, needs, sentiments, and fashions of the day. . . .”).
\end{flushright}
evil justification defense under certain conditions. The defense applies if the defendant was faced with a choice of evils and chose the lesser evil to prevent imminent harm where he reasonably anticipated a causal connection between his actions and preventing the harm. In addition, no legal alternatives to avoid the harm exists and the defendant did not cause the situation through his own negligence or recklessness.

For example, in criminal law, an intentional homicide is justified in the context of self defense under certain conditions. So, when A is faced with the choice of either killing B or being killed by B, A is legally permitted to kill B if that is unavoidable. Criminal law deems self defense (essentially sanctioning intentional killing of another life) as the lesser evil in this limited situation.

U.S. tort law has also explicitly adopted the lesser evil principle in the concept of a necessity defense. A defendant in a civil case can assert the

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50 MPC Article 3.02(1) and the accompanying commentary state as follows: “Article 3.02. Justification Generally: Choice of Evils

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or other is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged. . . .”

51 See, e.g., Brown v. United States, 256 U.S. 335, 343 (1921).

52 Id.

53 Restatement (Second) of Torts § 197 (1965) provides: “(1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to (a) the actor, or his land or chattels, or (b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he
defense of necessity in a tort action based on trespassing. The privilege can be complete (i.e. no liability) or incomplete (liability for damage) depending on the benefit.\textsuperscript{54} A trespass to property is an invasion of the owner's interest in its exclusive possession.\textsuperscript{55} Allowing the defense of necessity harms an owner’s interest in exclusive possession, but courts deem it the lesser (or necessary) evil.\textsuperscript{56} By allowing the defenses of necessity and justification, U.S. law and judges have explicitly incorporated the principle in adjudicating difficult cases involving the relationship between the state and private individuals and between private individuals in public law arena.\textsuperscript{57} These defenses allow courts to weigh competing values implicated in these cases.\textsuperscript{58}

III. The Invisible Presence of the Lesser Evil Principle in Illegal Agreement Disputes

In contrast to the explicit adoption of the lesser evil principle in criminal and tort laws, courts have not explicitly adopted the principle in contract law in general or in resolving illegal agreement disputes.\textsuperscript{59}
The prevailing view of courts’ treatment of illegal agreements is that courts follow the general rule of non-enforcement with multiple exceptions depending on the specifics of each case. However, close examination of courts’ reasoning in numerous cases shows that courts’ decisions turn more on their concern for the consequences of their choices than on the illegality of the agreements. Cases show a pattern of courts choosing an option that causes the principle in recognizing certain contract law defenses such as fraud, incompetence, duress, undue influence, mistake, misrepresentation, unconscionability, and illegality or void for public policy as well as contract law excuses such as impossibility or frustration of purpose. The lesser evil principle offers the overarching principle for all of the contract law defenses and excuses. Courts in those situations chose not to enforce the contract because non enforcement does less harm than enforcement. Enforcing contracts in those specified situations harms some important values such as fairness or creates adverse incentives to engage in fraud or other unsavory practices such as duress or undue influence. Enforcement would have been the greater evil than the negative impact on parties’ freedom to contract resulting from a refusal to enforce contracts.

For a detailed discussion of the general rule related to the illegality defense and the various exceptions, please see Strong, supra note __; Kostritsky, supra note __, Wade, supra note __, Birks, supra note __; Yale Note, supra note ___ at p. 1108-09; See also, Ledbetter v. Townsend, 15 S.W.3d 462, 464 (Tenn.Ct.App.1999) (“It is well settled that the courts of Tennessee will not enforce obligations arising out of a contract or transaction that is illegal.”); Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 204 P.2d 37, 40 (Cal.1949) (“A party to an illegal contract or an illegal transaction cannot come into a court of law and ask it to carry out the illegal contract or to enforce rights arising out of the illegal transaction.”) Arcidi v. Nat’l Assoc. of Gov. Employees, Inc., 447 Mass. 616, 856 N.E.2d 167, 171 (Mass.2006) (“[T]he general rule is that a court leaves parties to an illegal contract in the same position as it finds them.”).

Birks, supra note __ at 155 (commenting that “the attitude to illegality has so dramatically changed that it is no longer possible, except in extreme cases, to say that illegality as such is a defense to restitutionary claims arising under illegal contracts.”) As one commentator pointed out, the “real question at issue is whether in any particular case, the ends of the law will be furthered or defeated by granting the relief asked.” Note, Principles Governing Recovery By Parties to Illegal Contracts, 26 Harv. L. Rev. 738, 740 (June 1913) (hereinafter “Harvard Note 1913”).
lesser evil than other available options, consistent with an application of the lesser evil principle.

To structure the discussion, this section first identifies potential evils or potential kinds of damage to important public interests implicated by illegal agreement disputes. The second part of this section sets forth case examples to show how courts have by and large chosen the lesser evil when adjudicating these disputes. This section supports its insight by examining closely courts’ articulated or implicit rationale for their decisions in selected cases.62

A. Potential Evils Implicated in Illegal Agreement Disputes

Courts’ analyses show that they are keenly aware of the consequences of their choices.63 Courts explicitly and, sometimes implicitly, chose a certain option because of their concerns that the alternative would have damaged or undermined important public interests.64 This section identifies potential evils65

62 Part of the analytical difficulty lies in the fact that the courts often failed to articulate explicitly reasons for their decisions. For example, in one of the early cases, the US Supreme Court praised the non enforcement rule as “a salutary one, founded in morality and good policy, and which recommends itself to the good sense of every man as soon as it is stated.” Toler, 24 U.S. at 260. In another case, the Court justified its decision to enforce an illegal agreement by announcing that “the most startling and dangerous consequences” would follow if the Court refused to enforce the agreement. Connolly v. Union Sewer Pipe Co., 22 S.Ct. 431 (1902). In neither case did the Court elaborate explicitly on what its concerns were in enforcing or refusing to enforce the illegal agreement. For this reason, a certain amount of reading between the lines is necessary.


64 See discussions in Part III (B) infra.

65 Because of the myriad ways in which illegal agreement disputes can arise, with potential harm to numerous public policy interests, this article does not purport to capture all the public policy interests implicated. It highlights the public interests most often cited by courts to support their choices when resolving
identified by courts when resolving these types of dispute based on a close reading of courts’ reasoning in support of their decisions, sometimes reading between the lines and informed by the dominant values of our society in the context of our government system.

**a) Undermining the Legitimacy of the Law and the Good Name of the Court**

One of the top concerns of courts is the risk of undermining the legitimacy of the law and the dignity of the court system when resolving an illegality dispute. The U.S. Supreme Court has articulated this concern loudly and clearly to support the general rule of non enforcement. For example, the Court pointed out that a court of justice cannot be the “handmaid of iniquity” or “degrade itself” by using its power to aid those who violated the law. Because of this concern, courts have often referred to the non enforcement rule as a fundamental principle.

This concern is understandable because of the court’s role in our system of government. The U.S. Constitution sets up the judicial system as the

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67 Owens, 27 U.S. at 538-39; Bartle, 4 Pet. at 189.

68 Searles v. Haynes, 126 Ind. App. 626, 635, 129 N.E.2d 362, 366 (1955) (“It is fundamental that no principle of law is more clearly established than that the law will not enforce an illegal transaction.”) The fierce rhetoric might have inspired the unusual loyalty to the non enforcement principle despite its lack of usefulness in assisting with illegal agreement disputes.

69 Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976) (Commenting that the role of courts is enforcing the law, and that courts have no authority to depart from it “by a balancing of court-devised factors”).

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mechanism through which laws are enforced. Enforcing an agreement where the parties attempt to engage in illegal transactions undermines the very essence of the court’s function. Courts are loath to be put in a position where they may run the risk of being perceived as aiding or abetting any violation of the law.

In addition, maintaining laws is important to every functioning government. In a democratic country where rule of law prevails, public laws express the collective will of the people through a representative government. Laws are enacted to govern the relationship between the state and its people. Allowing private parties to contract around laws undermines the legitimacy of the law and the public interests promoted by the law.

70 Hanauer v. Woodruff, 82 U.S. 439, 442 (1872) (pointing out that the courts’ authority came from the Constitution and it could never enforce a contract that would aid or impair the supremacy of the Constitution).

71 Owens, 27 U.S. at 538.

72 See, e.g., Id; Gibbs, 130 U.S.; Tator v. Valden, 124 Conn. 96, 101, 198 A. 169, 171 (1938) (“It is unquestionably the general rule, upheld by the great weight of authority, that no court will lend its assistance in any way toward carrying out the terms of a contract, the inherent purpose of which is to violate the law.”)

73 See MAX WEBER, THE VOCATION LECTURES 34 (Rodney Livingstone trans., Hackett Publishing 2004) (1919) (“If the state is to survive, those who are ruled over must always acquiesce in the authority that is claimed by the rulers of the day.”).

74 Rule of Law: Essential Principles, DEMOCRACY WEB.ORG, available at http://www.democracyweb.org/rule/principles.php (September 13th, 2014) (in a democracy, “[t]he rule of law could be defined as the subjugation of state power to a country’s constitution and laws, established or adopted through popular consent.”); Michel Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, 74 S. CAL. L. REV. 1307 (2001) (“In the broadest terms, the rule of law requires that the [democratic] state only subject the citizenry to publicly promulgated laws, that the state's legislative function be separate from the adjudicative function, and that no one within the polity be above the law.”).

75 WEBER, supra note____

76 Lockwood, 84 U.S. at 378.
b) Overstepping the Boundaries of the Court’s Constitutional Role

Resolving illegal agreement disputes sometimes forces courts to wrestle with the limits of their role in our system of government. The Constitution created three separate and equal branches of government. Legislators are tasked with enacting laws and are in the best position to declare what public policy is. Courts are charged with interpreting and enforcing laws. As the U.S. Supreme Court pointed out, the Court “can listen only to the mandates of law; and can tread only that path which is marked out by duty.”

Disputes involving illegal agreements sometimes force courts to test the limits of their Constitutional role. Illegality disputes sometimes implicate situations where the Legislature has not spoken directly or explicitly on the public interests worthy of being protected. In those situations, courts are left having to divine what public policy is. This task puts courts in the middle of some

78 Ignatieff, supra note ___ at 3.
79 CHEMERINSKY, supra note_____, at 32-36.
80 Craig v. State of Missouri, 29 U.S. 410, 438 (1830)
81 5 Williston on Contracts, The Various Foundations of Public Policy § 12:2 (4th ed.); Palmateer v. Int’l Harvester Co., 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981) (“It can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State’s constitution and statutes and, when they are silent, in its judicial decisions.”).
82 This is also the reason why numerous scholars have criticized the doctrine against public policy because of the fear that it gives the judges too much discretion in deciding what public policy is. See, e.g., Shell, Supra note____, at 442 (“Under the current public policy doctrine, judges may draw...on their own views of what public interest or morality requires...The power to overrule market choices granted by public policy doctrines gives courts flexibility in administering justice, but adds a degree of uncertainty to commercial transactions.”); Todd Kraft & Allison Aranson, Transnational Bankruptcies: The Section 304 and Beyond, 1993 Colum. Bus. L. Rev. 329, 340 (1993) (When statutory guidelines are vague, 21
difficult determinations of public policy to assess which one is more important where there are multiple competing interests.\textsuperscript{83} Courts have often been accused of legislating from the bench.\textsuperscript{84}

\textbf{c) Restraint on Freedom of Contract}

Another potential evil implicated by an illegality dispute is the potential restraint on parties’ freedom to contract.\textsuperscript{85} A judicial refusal to enforce a private

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“courts are left to decide each case according to their own idiosyncratic inclinations, leading to inconsistent and unpredictable results.”\textsuperscript{83} See also, e.g., \textit{Moran v. Harris}, 131 Cal. App. 3d 913, 920, 182 Cal. Rptr. 519, 522 (Ct. App. 1982) (“juridical realization of the meandering nature of ‘public policy’ necessitates judicial restraint.”). As one court famously stated, public policy “is a very unruly horse, and when you once get astride it you never know where it will carry you.” Lynn C. Percival, IV, \textit{Public Policy Favoritism in the Online World: Contract Voidability Meets the Communications Decency Act}, 17 Tex. Wesleyan L. Rev. 165, 182 (2011) citing \textit{Richardson v. Mellish}, (1824) 130 Eng. Rep. 294 (C.P.) 303. But cf., Prince, supra note ______, at 169 (“The problems spring not from the use of excessive discretion by the courts in traveling new paths because of a perceived change in public policy, but more from a failure to follow with circumspection the path and principles which have already been laid.”).

\textsuperscript{83} Stephen J. Leacock, \textit{Lotteries and Public Policy in American Law}, 46 J. MARSHALL L. REV. 37, 43-44 (Fall 2012). Scalia, supra note ___ at 863 (commenting that “the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely.”).

\textsuperscript{84} Bruce G. Peabody, \textit{Legislating from the Bench: A Definition and a Defense}, 11 LEWIS & CLARK L. REV. 185, 186 (Spring 2007).

\textsuperscript{85} Even the staunchest advocate of freedom of contract concedes that there are limits to the freedom. One can say that to that extent, refusing to enforce illegal agreements will not affect freedom of contract at all. This is definitely true in some extreme cases such as highway robbery way or murder for hire cases. However, in more difficult, subtle illegality disputes, where does a court draw a line has the potential to infringe upon parties’ freedom to contract. See Yale Note, supra note ___ at ___.

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agreement is considered a restraint on parties’ freedom to contract.\textsuperscript{86} Contracts are generally viewed as private ordering by the parties.\textsuperscript{87} Illegality disputes force the Court to mark the outer boundaries of private contracting behavior.\textsuperscript{88}

Freedom of contract is a fundamental principle of US contract law.\textsuperscript{89} The principle is reflected in the general rule that private agreements are enforced as bargained for by the parties.\textsuperscript{90} Freedom to contract has been defended on multiple grounds.\textsuperscript{91} Freedom to contract is a part of our national identity built on respect for individual autonomy.\textsuperscript{92}

Respecting a party’s freedom to contract is said to promote certainty and predictability.\textsuperscript{93} For contracts to function effectively as a risk allocation tool to foster economic development, parties need to be able to rely on contracts.\textsuperscript{94}

\textsuperscript{86} See Yale Note, \textit{supra} note __ at 1108; Eldridge, 245 P.2d at 245 (noting that free and voluntary private contracts are “held sacred” and “shall be enforced by courts of justice”).
\textsuperscript{87} F. H. Buckley, \textit{Perfectionism}, 13 Sup. Ct. Econ. Rev. 133, 139 (noting that the doctrine of illegality marks off the border between public and private ordering.) This article does not intend to join the debate about whether contracts are public or private.
\textsuperscript{88} Id.
\textsuperscript{89} ROBERT HILLMAN, \textsc{Principles Of Contract Law} 2 (West 2d ed. 2004).
\textsuperscript{90} McInnis, 199 Or. App. at 230-31.
\textsuperscript{91} Volumes have been written on this topic. This article only offers a brief summary to provide a context for discussion. For a detailed discussion on this topic, please See Mark Pettit, Jr., Freedom, \textit{Freedom of Contract, and the "Rise and Fall"}, 79 B.U. L. Rev. 263, 352 (1999).
\textsuperscript{93} Miller, \textit{supra} note __ at __.
Certainty of contracts provides incentives for parties to engage in investment activities that can be socially beneficial.\textsuperscript{95} Refusing to enforce contracts creates uncertainty in the marketplace, undermining the effectiveness of contracts as a risk allocation tool.

d) Forfeiture of Property

Another concern of courts is the risk of property forfeiture.\textsuperscript{96} Forfeiture of property is disfavored as a general rule.\textsuperscript{97} This attitude is reflected in the property protection afforded by the Due Process Clause of the Fifth Amendment.\textsuperscript{98} The Restatement explicitly listed the risk of forfeiture as one of the factors to be assessed in resolving illegal agreement disputes.\textsuperscript{99}

In the illegal agreement dispute context, risk of property forfeiture exists where parties have agreed to an exchange of performances in sequential order.\textsuperscript{100} For example, A and B agree to engage in an illegal transaction. Party A performs first and then B refuses to perform. When A sues to recover from B, the court’s refusal to enforce the agreement due to illegality would result in A forfeiting through long-term contracts is essential to accurate planning and, thus, to the viability of a business in a free market economy, courts rarely excuse sophisticated commercial parties from their contractual obligations.”).


\textsuperscript{96} See discussions in Part III(B) \textit{infra}.

\textsuperscript{97} \textit{Seaman v. State}, 196 Ga.App. 634, 635 (1990) (noting that Forfeiture of property is disfavored and statutes permitting such are to be strictly construed and limited); \textit{Lloyd Capital Corp. v. Pat Henchar, Inc.}, 80 N.Y.2d 124, 128 (1992) (noting that as a general rule, “forfeitures by operation of law are disfavored, particularly where a defaulting party seeks to raise illegality as “a sword for personal gain rather than a shield for the public good”).

\textsuperscript{98} U.S. CONST. amend. V.

\textsuperscript{99} The Restatement, \textit{supra} note \textsc{___} at §178 (2)(b).

\textsuperscript{100} See HILLMAN, \textit{supra} note\textsc{____}, at 218.
property or value of his services.  

e) Corruption of morals

Courts are also very concerned about aiding and/or facilitating any transactions that would encourage corruption. Courts’ concerns about corruption are well founded. Corruption has been universally condemned. It imposes many costs on societies. Corruption undermines the legitimacy of a government and people’s confidence in the government. Corruption interferes with government's ability to perform efficiently. As a result, the law values honest services by public servants. Courts are vigilant against aiding or facilitating any transactions that would encourage corruption of morals.

f) Incentives To Engage In More Illegal, Fraudulent or Opportunistic Behavior

Another evil that courts are concerned about is creating incentives for

101 See, e.g., Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539 (1880); Farbenfabriken Bayer A. G. v. Sterling Drug, Inc., 307 F.2d 207, 210 (3d Cir. 1962) (defendant not obligated for agreement that violated anti-trust law. “In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties.”); Williams v. Weber Mesa Ditch Extension Co., 572 P.2d 412, 414 (Wyo. 1977) (defendant not obligated to pay for illegal gambling debt).

102 Oscanyan 103 U. S. at 273 (commenting that personal influence to be exercised over an officer of government in the procurement of contracts “is not a vendible article in our system of laws and morals”).


104 Id. at 596-99.

105 Id. at 594.

106 Id. at 612.

107 See Id. at 622.

108 Oscanyan, 103 U.S.; Bartle, 4 Pet.
parties to engage in more illegal or other socially undesirable conduct such as fraud or opportunistic behavior.\textsuperscript{109} The general rule of non-enforcement is often justified on the basis of its deterrence effect against illegal behavior.\textsuperscript{110} However, under certain circumstances, non enforcement may encourage, rather than deter illegal behavior.\textsuperscript{111} Courts have often commented on incentives for opportunistic behavior when a party seeks to take advantage of an illegality defense to obtain a windfall.\textsuperscript{112}

Similar to the property forfeiture context, incentives to engage in more illegal transactions or fraud exist generally when parties to an illegal agreement perform their obligations sequentially.\textsuperscript{113} This evil is related to forfeiture of property. Courts’ refusal to enforce an agreement due to illegality will sometimes result in forfeiture of property for Party A, but a windfall for Party B, essentially two sides of the same coin.\textsuperscript{114} The situation is ripe for opportunistic behavior, especially where an illegal transaction generated profit and the parties had a

\textsuperscript{109} See, e.g.,\textit{Kelly v. Kosuga}, 358 U.S. 516, 520-2 (1959) (commenting that “the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, ‘of preventing people from getting other people’s property for nothing when they purport to be buying it.’); \textit{Gates} 515 P.2d at 1020 (expressing a concern that non-enforcement remedy might encourage employers “to knowingly employ illegal aliens and then, with impunity, refuse to pay for their services”); \textit{Nizamuddowlah v. Bengal Cabaret Inc.}, 399 N.Y. S.2d 854 (1977) (allowing recovery under a claim of unjust enrichment because of the likelihood that defendant would engage in the same conduct again).

\textsuperscript{110} \textit{McMullen}, 174 U.S. at 669-70.

\textsuperscript{111} See discussions in Part III(B) \_ infra.

\textsuperscript{112} \textit{Kosuga}, 358 U.S. at 520-21; \textit{McMullen}, 174 U.S. at 669.


\textsuperscript{114} See, e.g. \textit{Parente v. Pirozzoli}, 87 Conn. App. 235, 250, 866 A.2d 629, 638 (2005) (“Although the end result of holding the 1995 partnership agreement illegal may be to allow the defendant to receive a windfall at the plaintiff’s expense, our Supreme Court has stated ‘that this result is common, and ... necessary in many cases in which contracts are deemed unenforceable on the grounds of furthering overriding public policies.’”).
dispute about how to divide up profits arising out of illegal transactions.\textsuperscript{115}

g) Injury to Other Miscellaneous Public Interests

Cases show that there are multiple public interests that courts seek to protect in resolving the illegality dispute. The public interests implicated are as varied as the laws allegedly violated by parties’ agreements.\textsuperscript{116} For example, in discussing the validity of the contracts in restraint of trade, courts identified as evils “the injury to the public by being deprived of the restricted party’s industry and the injury to the party himself by being precluded from pursuing this occupation and thus being prevented from supporting himself and his family.”\textsuperscript{117}

In another line of cases addressing the validity of contractual waivers of liability by common carriers, the U.S. Supreme Court identified the public policy underlying the common carrier law as promoting the utmost care and diligence in providing safe transportation to the public.\textsuperscript{118}

B. Courts’ Choices Consistent With the Lesser Evil Principle.

This section sets forth a few case examples to show how courts have by and large made their choices consistent with the lesser evil principle. To resolve illegal agreement disputes, courts generally need to address two questions: The threshold question of whether the agreement implicated is illegal and the question of what remedies to choose.\textsuperscript{119} Courts have multiple remedies to choose from

\textsuperscript{115} See discussions in Part III(B)(2)(c) infra.
\textsuperscript{116} See, e.g., Nizamuddowlah, 399 N.Y.S.2d at 857 (public interest in discouraging employers from deceptive practices); Oregon Steam Nav. Co., 87 U.S. at 70 (public policy against agreements in restraint of trade); Williams, 572 P.2d at 414 (public interest in discouraging illegal gambling).
\textsuperscript{117} Oregon Steam Nav. Co., 87 U.S. at 68.
\textsuperscript{118} Lockwood, 84 U.S. at 378.
\textsuperscript{119} Furmston, supra note ___ at 267.
depending on plaintiffs’ theories.\textsuperscript{120} Even though courts have not explicitly adopted the lesser evil principle to support their choices, their analyses strongly suggest their grounding in the principle.\textsuperscript{121}

\textbf{a) Threshold Question of Illegality: Limiting the Scope of Illegality as the Lesser Evil}

When addressing the threshold question of illegality, courts have adopted multiple ways to limit the scope of illegality. Courts generally presume legality.\textsuperscript{122} They require that the defense of illegality be affirmatively pled.\textsuperscript{123} Courts have also tried to assess how closely connected the agreement seeking to be enforced is to the unlawfulness of forbidden acts, often referred to as the collateral agreement rule.\textsuperscript{124} Another way that courts limited the scope of illegality is by narrowly interpreting the law allegedly violated.\textsuperscript{125}

For example, in one group of early cases, buyers of slaves tried to avoid

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\textsuperscript{120} See discussions \textit{infra} Part III(B)(\textsection).  
\textsuperscript{121} Over one hundred years ago, one commentator commented on the possible injustice of the general rule of non-enforcement to the parties. Harvard Note 1913, \textit{supra} note \textsection at 739. The author observed courts’ willingness to develop various limitations on the general rule and continued: “While these limitations on the general doctrine have considerably lessened its evils, they furnish no relief in many cases in which the rule works a palpable injustice…” \textit{Id.} \textsuperscript{122} \textit{Walsh v. Schlecht}, 429 U.S. 401, 408 (1977) (noting that “the general rule of construction presumes the legality and enforceability of contracts…” that ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable.”) (citations and quotations omitted). 
\textsuperscript{123} \textit{Brearton v. De Witt}, et al., 252 N.Y. 495, 500 (1930). 
\textsuperscript{125} \textit{See, e.g., Groves v. Slaughter}, 40 U.S. 449 (1841); \textit{De Valengin’s Adm’rs v. Duffy}, 39 U.S. 282 (1840) (refusing to find a contract illegal even though the parties lied about property ownership in order to get reimbursement from another government during a war).  
\end{flushright}
payment of notes given as part of the purchase price.\textsuperscript{126} Even though the Constitution of the State of Mississippi prohibited the sale of slaves, the U.S. Supreme Court interpreted the prohibition narrowly and enforced the sales agreements, finding that the sales agreements were not invalid until the legislature had acted.\textsuperscript{127}

By adopting a presumption against illegality and narrow construction of illegality, courts avoid the greater evil of unduly impinging on parties’ freedom of contract and the resulting uncertainty.\textsuperscript{128} In addition, the narrow construction allows courts to avoid a host of other evils that often accompany a non-enforcement choice such as forfeiture of property and incentives for opportunistic behavior.\textsuperscript{129}

\textbf{b) Courts’ Choices of Remedies}

Upon a finding of illegality, courts have multiple options at their disposal. They can refuse to enforce an illegal agreement or they can enforce an illegal agreement despite its illegality.\textsuperscript{130} If plaintiff seeks to recover money paid under

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\textsuperscript{126} \textit{Groves}, 40 U.S. 449.
\textsuperscript{127} \textit{Id.} at 456-60, 494.
\textsuperscript{128} \textit{Continental Wall Paper}, 212 U.S. at 270-71 (Justice Holmes’ commenting in his dissent that “because the policy of not furthering the purposes of the trust is less important than the policy of preventing people from getting other people’s property for nothing when they purport to be buying it.”); \textit{Kostritsky, supra note __} at 116; \textit{Note: Validity of Contracts Which Violate Regulatory Statutes}, 50 Yale L. J. 1108 (April 1941) (pointing out that the non-enforcement rule “conflict[s] with the more basic policy of preserving the inviolability of contracts”).
\textsuperscript{129} \textit{DR Wilder Mfg. Co. v. Corn Products Refining Company}, 236 U.S 165, 176 (pointing out that individuals may be prompted by selfish motives to attack the legality of a seller organization); \textit{Wade, supra note ___} at 55 (“To a defrauder, the knowledge that the law will permit him to keep ill-gotten gains will be an incentive to induce another to participate in an illegal contract.”).
\textsuperscript{130} See \textit{infra} Part III (B) (b) (1)-(2).
the illegal transaction under quasi contractual theories, courts can deny recovery or allow recovery despite the illegality.\footnote{See infra Part III (B) (b) (3)-(4).}

Courts have developed multiple theories to give them the flexibility to choose remedies. They have adopted different rules such as the distinction between \textit{malum in se} and \textit{malum prohibitum},\footnote{Lloyd Capital Corp. v. Pat Henchar, Inc., 80 N.Y.2d 124 (1992); Rosasco Creameries v. Cohen, 276 N.Y. 274, 280 (1937); Yale Note, supra note \__, at p. 1108;}{\footnote{See Note, In Pari Delicto, Under the Federal Securities Laws, Bateman Eichler, Hill Richards, Inc. v. Berner, 72 Cornell L. Rev. 345, 347 (1987) (for a discussion of the traditional application of the doctrine and its specific application in securities litigation).}{\footnote{See Kostritsky, supra note \__ at 159 (discussing the collateralness principle).}{\footnote{Id. at 156 (discussing the protected class doctrine).}{\footnote{New York & Pennsylvania Co. v. Cunard Coal Co., 286 Pa. 72, (Pa. 1926).}}}}\footnote{Harvard Note 1913, supra note \___ at 740.}{\footnote{See Wade, supra note __ (for a discussion of different reasons that the courts have used to support their decisions to allow or refuse recovery where there is a finding of illegality).}{\footnote{Wade, supra note __ at 62.}}

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section roughly groups cases into three representative scenarios.\(^\text{140}\)

(a) **Scenario One: To Avoid Undermining the Legitimacy of the Law and the Court**

In one group of cases, courts denied plaintiffs' relief because granting relief in those situations would have aided plaintiffs' violation of law. For example, in *Gibbs v. Consolidated Gas Co. of Baltimore*,\(^\text{141}\) the plaintiff helped the defendant negotiate an agreement that state law expressly prohibited the defendant from entering into.\(^\text{142}\) When defendant failed to pay the plaintiff, the plaintiff sued to recover the payment. The Court found that the statute in question provided explicitly that the contract was "null and void."\(^\text{143}\) The Court refused to enforce the contract because doing so would have helped the plaintiff to "obtain the fruits of an unlawful bargain."\(^\text{144}\)

Non-enforcement in this type of situation leaves the plaintiffs without any relief. This can deter the plaintiffs from engaging in illegal transactions in the future. However, denying relief in these situations carries a price tag. It placed a constraint upon private parties' freedom of contract. In addition, it resulted in forfeiture of property. In *Gibbs*, the plaintiff did not get compensated for his services. The windfall retained by defendants may also create incentives to engage in more illegal activities or opportunistic behavior.\(^\text{145}\) Nonetheless, non-enforcement is deemed the lesser evil because plaintiffs were seeking the court's aid to enforce an illegal agreement. Aiding plaintiffs in their violation of the law

\(^{140}\) This is not intended as an exhaustive list of all possible factual scenarios that the illegality issue can be implicated. The scenarios are provided merely as selected examples for purpose of discussion.

\(^{141}\) 130 U.S. 396 (1889).

\(^{142}\) Id. at 411.

\(^{143}\) Id. at 412

\(^{144}\) Id.

\(^{145}\) See discussions infra Part III(B).
would undermine the legitimacy of the law and the court.\textsuperscript{146}

(b) **Scenario Two: To Avoid Incentives to Engage in Fraud and Corruption.**

Courts in the following cases avoided the greater evil of encouraging fraud and corruption by refusing to enforce the illegal agreements. For example, in *Bartle v. Nutt*,\textsuperscript{147} the parties disputed settlement of accounts involving a contract with a public officer who engaged in fraud. One partner sued the other partner for an accounting and to pay half of a loss sustained by an unsuccessful attempt to defraud the government. The U.S. Supreme Court commented that “a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other; or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws.”\textsuperscript{148}

\textsuperscript{146} *See also Kaiser Steel Corp. v. Mullin*, 455 U.S. 72, 81-82 (refusing to enforce an agreement where the court would have to enforce conduct that the antitrust laws specifically forbade); *The Patton v. Nicholson*, 16 U.S. 204 (1818) (refusing to enforce the contract where the seller sued to recover the purchase price of a license from the enemy to be used on board an American vessel during the War of 1812 between the United States and the Great Britain); *Hanauer* 82 U.S.(refusing to enforce a promissory note where the only consideration for the note was war bonds issued by the confederate states for the purpose of supporting the war against the federal government during the Civil War and noting that the Court’s authority came from the Constitution and it could never enforce a contract that would aid or impair the supremacy of the Constitution); *Awotin v. Atlas Exchange Nat. Bank of Chicago*, 55 S.Ct. 674 (1935) (refusing to enforce an agreement between the bank and the customer where the bank agreed to repurchase the bonds at maturity, at par and accrued when a state statute had only authorized the buying and selling of investment securities without recourse deemed to be perilous to the interest of depositors and the public at that time).

\textsuperscript{147} 29 U.S. 184 (1830).

\textsuperscript{148} *Id.* at 189; *See also Oscanyan*, 103 U.S. at271-2 (refusing to enforce an agreement where defendant agreed to pay sales commission from arms sales to the Turkish government in return for plaintiff’s influence over an agent of the Turkish government and noting that “[t]he contract was a corrupt one,—corrupt in
The non-enforcement remedy arguably impaired parties’ freedom of contract. In addition, it also encouraged opportunistic behavior because defendants in those cases retained a windfall as a result of the courts’ refusal to enforce the agreements. Courts apparently made their choices based on their concern about aiding and/or facilitating any transactions that would encourage fraud or corruption.  

(c) **Scenario Three: To Avoid Undermining Other Important Public Interests.**

In this group of cases, courts refused to enforce contractual waivers for public policy reasons. By refusing to enforce this type of agreement, courts avoided the greater evil of allowing private parties to override legislative intent to protect public safety.

For example, in *New York Central R. Co. v. Lockwood*, the U.S. Supreme Court struck down a contractual provision attempting to exempt the railroad company from its own negligence. Lockwood was injured when travelling on a stock train of the New York Central Railroad Company.

its origin and corrupting in its tendencies and services prohibited by considerations of morality and policy which should prevail at all times and in all countries, and without which fidelity to public trusts would be a matter of bargain and sale, and not of duty.”) *McMullen*, 174 U.S. at 669 (refusing to enforce an agreement to share in profits generated from public works construction where the parties engaged in fraud in the bidding process to obtain the projects.)

*Oscanyan*, 103 U. S. at 273 (commenting that personal influence to be exercised over an officer of government in the procurement of contracts “is not a vendible article in our system of laws and morals).


151 84 U.S. 357 (1873).
Lockwood sued the railroad company to recover damages for the injury. The railroad company asserted the contractual waiver as a defense. \textsuperscript{152}

The Court upheld the trial judge’s decision striking down the waiver.\textsuperscript{153} In supporting its decision, the Court commented that the fundamental principles of the common carrier law were “to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community.”\textsuperscript{154} The Court concluded that if a carrier were at liberty to waive those duties, it would have been permitted to avoid those “essential duties.”\textsuperscript{155} The Court explicitly dismissed the argument that non enforcement would intrude on the private right to contract.\textsuperscript{156}

\textbf{(2) Enforcement Remedy as the Lesser Evil}

Courts’ focus on the consequences of their choices led to their enforcing illegal agreements in many cases, sometimes explicitly and sometimes as a matter of fact. In the following scenarios, courts weighed the adverse consequences of their choices and chose to enforce the agreements despite the illegality.

\textbf{(a) Scenario One: To Avoid Fraud}

In these situations, courts chose to enforce illegal agreements to avoid encouraging fraud. For example, in \textit{Bein v. Heath},\textsuperscript{157} Bein and his wife, Mary Bein, sued to enjoin proceedings under a writ of seizure and sale by the appellee, Mary Heath, to sell Mary Bein’s property that she had given to secure two notes drawn by her in favor of her husband. The plaintiffs alleged that these notes were

\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.} at 384.
\textsuperscript{154} \textit{Lockwood},\textsuperscript{84} at 377-78.
\textsuperscript{155} \textit{Id.} at 378.
\textsuperscript{156} \textit{Id.} at 379-81
\textsuperscript{157} 47 U.S. 228 (1848).
given for a loan obtained by Richard Bein, the husband, for his own use and that under the Louisiana laws at that time, the mortgage of the wife, and her promise to pay the debt, or to make her property responsible, was not binding, but void.\textsuperscript{158}

The U.S. Supreme Court enforced the mortgage despite its illegality under the state law. The Court noted that Mrs. Bein punctually paid the interest for the loan and that the house and lot were insured, and the policy annually assigned for the benefit of the mortgagee and these facts showed that the plaintiff committed a deliberate fraud. The Court was concerned that non enforcement would “enable the wife to practice the grossest frauds with impunity.”\textsuperscript{159}

(b) \textit{Scenario Two: To Avoid “Grossest Injustice”}

In the following situation, the U.S. Supreme Court chose to enforce an agreement despite its illegality because the plaintiff had no choice due to circumstances beyond his control.

In \textit{Thorington v. Smith},\textsuperscript{160} the plaintiff, Thorington, sold a parcel of land situated in Montgomery, Alabama, to the defendant for $45,000. The defendant buyer paid for part of the purchase-money with Confederate notes and a promissory note for the balance, payable by its terms in dollars. Alabama at that time was part of the Confederate States. There was no gold or silver coin, nor were there any notes of the United States in circulation in that State. The only currency in ordinary use, in which people engaged in their daily business, were treasury notes of the Confederate States. After the end of the Civil War, the Confederate notes became useless. Plaintiff seller sued to enforce a vendor’s lien upon the land sold, claiming the balance of the stipulated purchase-money in lawful money of the United States. The defendant buyer asserted illegality as a

\textsuperscript{158} \textit{Id.} at 229.
\textsuperscript{159} \textit{Id.} at 247.
\textsuperscript{160} 75 U.S. 1 (1868).
defense. The court below upheld the illegality defense and refused to grant relief.\textsuperscript{161}

On appeal, the Court held that the contract was enforceable because the notes were used in business transactions of many millions of people and that the notes had no necessary relations to the hostile government and represented transactions in the ordinary course of civil society.\textsuperscript{162} Justice Miller reluctantly agreed to the enforcement ruling as necessary “to prevent the grossest injustice in reference to transactions of millions of people for several years in duration.”\textsuperscript{163}

(c) **Scenario Three: To Avoid The Twin Evils of Forfeiture of Property and Opportunism**

In the following line of cases, courts chose to enforce agreements despite their illegality to avoid encouraging illegal and opportunistic behavior and to avoid forfeiture of property.

*In Kelly v. Kosuga*,\textsuperscript{164} the seller of onions sued buyer for failure to pay for the full purchase price. The buyer asserted the illegality defense by alleging that the seller was part of the illegal trust. The lower court granted the seller’s motion to strike the illegality defense. On appeal, the U.S. Supreme Court upheld the lower court’s decision. Justice Brennan justified the enforcement remedy because the transaction was a completed sale and giving legal effect to a completed sale of onions for a fair consideration would not result in the Court’s enforcement of a violation of the law. The Court commented that as long as the Court would not itself be enforcing the precise conduct made unlawful by law, the courts should follow the overriding general policy “of preventing people from

\textsuperscript{161} Id. at 2.
\textsuperscript{162} Id. at 14.
\textsuperscript{163} Hanauer 82 U.S. at 449 (Justice Miller discussing, as part of the Hanauer opinion, his prior reasoning in Thorton).
\textsuperscript{164} Kosuga, 358 U.S. 516.
getting other people's property for nothing when they purport to be buying it.”  

In Gates v. River Construction Co., plaintiff employee sued his employer for unpaid wages. The employment contract was to induce an alien to enter the United States without the requisite governmental approval in violation of federal immigration laws. Defendant employer asserted illegality as a defense. The trial court found in favor of the employer.

On appeal, the Supreme Court of Washington reversed the lower court’s decision. The court commented that allowing the employer who knowingly participated in an illegal transaction to profit at the expense of the employee would be “a harsh and undesirable consequence of the doctrine that illegal contracts are not to be enforced.” The court noted that applying the non-enforcement rule would encourage employers to engage in the very same conduct sought to be prevented if employers could “knowingly employ excludable aliens and then, with impunity, to refuse to pay them for their services.”

By choosing to enforce the contracts, courts avoided the greater evil of forfeiture of property and opportunistic behavior even though granting relief sanctioned plaintiffs’ violation of the law. Between a “clever scoundrel” and a

165 A long line of cases enforced agreements despite their illegality in similar situations. Harris v. Runnels, 53 U.S. 79 (1851) (enforcing a contract for sale of slaves even though the agreement violated the law and pointing out that the defendant buyer was aware of the violation of the law and that he was “seeking to add to his breach of the law the injustice of retaining the negroes without paying for them.”); See also, e.g., R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165 (1915) (enforcing a purchase and sale agreement despite the fact that the seller was part of a illegal trust).

166 515 P.2d 1020 .

167 Id.

168 Id. at 1022.

169 Id.

170 In some cases, courts allowed recovery under quasi contractual principles such as unjust enrichment (see discussions in Part III(B) ). However, recovery under quasi contractual theories in those cases sometimes
regular criminal, courts seem to have decided to tolerate a regular criminal as the lesser evil.\footnote{Harvard Note 1913 at 740 (also commenting that “the reluctance of the courts to adjust the rights of criminals is hardly a sufficient reason for allowing clever scoundrels to defraud their victims whenever they can involve them in crime.”).}

\textbf{(d) Scenario four: To Avoid Undermining the Law}

In these type of cases, courts have enforced agreements despite illegality where refusing to enforce would have undermined the purpose of the law violated. For example, in \textit{A.C. frost & Co. v. Coeur D’Alene Mines Corp.}\footnote{61 S.Ct. 414 (1941).} the plaintiff buyer sued defendant seller for breaching an option agreement to purchase treasury stock of defendant and for money had and received by defendant from proceeds of sale of treasury stock. Defendant denied liability upon the ground, among others, that the contract violated the securities law that required that treasury stock of the defendant corporation be registered for sale. Defendant alleged that it did not register the stocks before its sale to the plaintiff and that plaintiff knew that defendant could not legally sell him the stock.\footnote{Id. at 39.}

The U.S. Supreme Court enforced the contract because the statute violated was designed to protect investors by requiring publication of certain information concerning securities before offered for sale.\footnote{Id. at 40.} “The Court found that refusing to enforce the contract would have actually hindered the purpose of the securities

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amount to full enforcement of the illegal agreement depending on the types of agreements. For example, if a plaintiff is seeking to recover the purchase price of a sales agreement, awarding plaintiff the purchase price under unjust enrichment or restitution and enforcing the agreement will accomplish the same result. The difference is mostly semantic.
(3) Allowing Recovery Despite Illegality As the Lesser Evil

In some cases, courts have allowed recovery even though the agreement was illegal and not enforceable. Courts have rested their choices on quasi contractual theories such as restitution, rescission, and unjust enrichment. Recovery in certain situations avoids greater evils under the circumstances of those cases.

(a) Scenario One: To Avoid Fraud

In *Brooks v. Martin*, plaintiff Martin and defendant Brooks formed a partnership to purchase land warrants from soldiers issued to them under a law passed by Congress. However, in order to protect soldiers against land brokers and others who would take advantage of the soldiers, the statute prohibited any sale or contract related to those warrants. There was no dispute that the partnership was illegal.

After Martin sold Brooks his share of the interest in the partnership for a small amount, Martin realized that Brooks had concealed from him the true financial status of the partnership and sued to set aside the contract of sale and for an accounting and division of the illegal partnership profits. Brooks asserted illegality of the partnership business as a defense.

The Court rejected the illegality defense and granted relief that Martin

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175 *Id.* at 43; *See also* [CORBIN, supra note ___ at §1540 (*“if a bargain is illegal, not because a performance promised under it is an illegal performance, but only because the party promising it is forbidden by statute or ordinance to do so, the prohibition is aimed at that party and he is the only wrongdoer.”*); KOSTRITSKY, *supra* note ___ at 156 (discussing the protected class doctrine)].

176 69 U.S. 70 (1864).

177 *Id.* at 79.

178 *Id.* at 70.
requested. The Court supported its decision by pointing out that the illegal transactions had already been completed. Brooks had in his possession lands, money, notes, and mortgages, the results of the partnership business, the original capital for which Martin had advanced. The Court found that Brooks had obtained possession and control of the proceeds by hiding the true financial status of the partnership. The Court ostensibly based its decision to grant relief due to Brooks’ fraudulent breach of a fiduciary duty towards Martin.

Reading between the lines, one senses that the Court was clearly concerned about fairness if plaintiff was denied relief in this case.\textsuperscript{179} Another consequence of denying relief in the case would have allowed the defendant to retain the profits from the illegal partnership.\textsuperscript{180} Even though granting the relief sanctioned the illegal partnership and amounted to full enforcement of the illegal agreement, the Court avoided the greater evil of rewarding fraud and forfeiting property in this case.\textsuperscript{181}

\textbf{(b) Scenario Two: To Avoid Opportunistic Behavior and}

\textsuperscript{179} Id. at 80 (finding it “difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all [profits] in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner ..).

\textsuperscript{180} Id. at 79, 86 (noting that Martin advanced the money for the purchase of the land warrants and that his “share of the profits were $30,000, for which Brooks gave him substantially nothing.”).

\textsuperscript{181} See also, \textit{Fellner v. Marino}, 158 N.Y.S.2d 24, 33 (allowing plaintiff to recover the money paid under an illegal contract despite the plaintiff’s knowledge of illegality and commenting that “[l]et it once be known that a fraud doer can escape the consequences of his fraud by insinuating into his remarks to the defrauded person some vague element of ultimate illegality, there would be no way in which to protect defrauded persons.”); \textit{Duval v. Wellman}, 124 N.Y. 156, 163 (1891) (expressing the same sentiment and commenting that “[t]o decide that money could not be recovered back would be to establish the rules by which the defendant and others of the same ilk could ply their trade and secure themselves in the fruits of their illegal transactions.”).
Forfeiture of Property

In another group of cases, courts allowed recovery under quasi contractual theories to deter illegal conduct and to avoid the twin evils of forfeiture and opportunism.

In *Nizamuddowlah v. Bengal Cabaret Inc.*,\(^{182}\) plaintiff sued to recover payment for his work even though he was not permitted to work under the immigration laws. The court noted the dilemma between a plaintiff who violated the immigration laws and a defendant who violated the law and manipulated illegal immigrants to work for him. The court reluctantly concluded that the only equitable option was to allow recovery in this case under a claim of unjust enrichment.\(^{183}\) Denying relief would encourage the defendant to engage in the same illegal conduct.\(^{184}\)

Allowing recovery in the above type of cases awarded the plaintiffs who also violated the law. Even though the *Nizamuddowlah* court allowed recovery under a claim of unjust enrichment, recovery in that case essentially enforced the illegal employment agreement.\(^{185}\) Nonetheless, allowing recovery avoided the greater evil of encouraging opportunistic behavior (and the accompanying forfeiture of property).

(4) Denying Recovery as the Lesser Evil

In some cases, courts denied recovery where plaintiffs sought a return of


\(^{183}\) *Id.* at 856-57.

\(^{184}\) *Id.* at 857; *See also Hobbs v. Boatright*, 93 S. W. Rep. 934 (holding allowing plaintiff recovery in that case serves the underlying public policy better than withholding relief because of the illegality of the contract); *McCauley v. Michael*, 256 N.W.2d 491 (Minn. 1977) (denying enforcement of illegal agreement, but allowing recovery of $500 paid to purchase shares of corporate stock under the illegal agreement).

\(^{185}\) Wade, *supra* note ___ at 33 and examples provided therein.
money paid under an illegal agreement.\textsuperscript{186} Courts’ decisions denying recovery under the specific circumstances of those cases allow courts to deter illegal behavior, opportunistic behavior, and to avoid forfeiture of property.

(a) \textbf{Scenario One: To Avoid Aiding Corruption}

In \textit{Sinnair v. Le Roy},\textsuperscript{187} plaintiff paid $450 to defendant upon latter’s promise either to get a beer license for plaintiff or return the money. When defendant refused to pay back the money, plaintiff sued to recover the money. The lower court allowed recovery of the money.

On appeal, the Supreme Court of Washington reversed. The court found that the illegality was of a serious nature and that evidence pointed to “the germ of possible corruption.”\textsuperscript{188}

(b) \textbf{Scenario Two: To Avoid the Twin Evils of Property Forfeiture and Opportunism}

In \textit{Arcidi v. National Association of Government Employees}, the plaintiff entered into a consulting agreement with the defendant.\textsuperscript{189} Under the agreement plaintiff agreed to secure the approval of a proposed real estate development by a government agency. The agreement provided that plaintiff was to receive $250,000 if he was able to obtain the agency’s approval. The agreement was illegal because Massachusetts law prohibited contracts in which compensation was conditioned on a decision of a government authority. Defendant paid plaintiff $200,000 after the project was approved by MTA but refused to pay the

\textsuperscript{186} These cases are different from the cases where plaintiffs sought to enforce the terms of illegal agreements. Plaintiffs in some cases seek recovery of money paid by relying on equitable or quasi contractual theories such as unjust enrichment or rescission.

\textsuperscript{187} 44 Wash.2d 728 (1954).

\textsuperscript{188} Id. at 731.

\textsuperscript{189} 447 Mass 616 (2006).
remaining $50,000 balance.

When plaintiff sued defendant to recover the remaining $50,000, the defendant asserted illegality as a defense against enforcement and counterclaimed against plaintiff to recover the $200,000 already paid. The trial court granted the defense summary judgment motion on its defense and on its counterclaim. The appellate court affirmed the lower court decisions on both issues on appeal. The Massachusetts Supreme Court upheld the illegality defense, denying plaintiff relief related to the $50,000 remaining payment. The court, however, reversed the lower courts’ decision on the counterclaim, finding that public interests weighed against granting defendant’s relief and no other equitable consideration justified allowing the defendant to recover the $200,000 already paid to the plaintiff.\(^{190}\)

In that case, allowing the defendant to recover the funds paid would have resulted in forfeiture of the value of plaintiff’s consulting services and a windfall for the defendant. By denying recovery under the circumstances, the court avoided the greater twin evils of forfeiture of property and opportunism.\(^{191}\)

IV. Reasons For the Explicit Adoption of the Lesser Evil Principle

Courts should explicitly adopt the lesser evil principle when adjudicating

\(^{190}\) The Arcidi court’s application of the non-enforcement rule has the same effect of the cases where courts enforced an illegal agreement or allowed recovery in favor of a party who sought payment for services or goods under the illegal agreement. The two apparently contradictory rulings achieve the same result – allowing the party who provided services or goods to be paid. The courts avoided the twin evils of forfeiture of property and encouraging opportunistic behavior through applying two seemingly inconsistent rules. Both rulings are consistent with application of the lesser evil standard.

\(^{191}\) The court was clearly concerned about encouraging opportunistic behavior in this case. Arcidi, 447 Mass at 622 (rejecting a defense argument in support of its recovery and noting that adopting defendant’s position would make it “too easy for organizations to reap the benefits of illegal contracts when it is convenient, while deflecting the consequences onto agents and third parties when it is not.”).
illegal agreement disputes for multiple reasons. The current rule of non-enforcement and its multiple exceptions fails to provide any clarity in this important area of contract law. The lesser evil principle will provide better guidance to courts when adjudicating these difficult disputes. It will lead to more consistent application of the standard. Adopting the principle will not be a difficult task because courts have by and large been following the principle when adjudicating these cases. Finally, a clearer standard is necessary because illegal agreement disputes of the future are likely to get more complicated due to increasing business regulations.

A. The Current Rules Fail to Guide Courts When Adjudicating Illegality Disputes.

The current general rule of non-enforcement and its multiple exceptions have resulted in an apparently confusing body of case law. As the above examples demonstrate, illegality disputes can arise in myriad factual contexts. For example, the general rule of non-enforcement is considered necessary to deter illegal transactions, but non enforcement in many cases may actually create incentives to engage in more illegal or fraudulent conduct because of the circumstances. 192

The current formulation of general rule of non-enforcement and its exceptions are inadequate tools in this area because they are trying to capture all of the factual complexities in a few rules when it is difficult, if not impossible to do so. 193 As a result, they are not meaningful to courts in their efforts trying to balance multiple competing interests. The current rules actually become obstacles

192 See discussions in Part III(B)(b)(1)(b), (2)(c), 3(b) and (4)(b).
193 Badawi, supra note __ at 487. See also, Note: Principles Governing Recovery by Parties to Illegal Contracts, 26 Harv. L. Rev. 738, 739-40 (June 1913) (commenting that the doctrine of in pari delicto is “so much broader than the legitimate scope of the policy that it would be well to discard it altogether.”).
courts feel compelled to overcome in order to avoid injustice under the facts of a particular case.\footnote{194}

Lack of clarity may have also led to some inconsistent rulings among courts. For example, in a line of cases dealing with sales agreements that violated the antitrust laws, the U.S. Supreme Court reversed itself twice within 13 years. The Court first enforced a sales agreement even though plaintiff seller was part of an illegal trust in \textit{Connolly}.\footnote{195} Seven years later, in an almost identical fact pattern, the Court reversed its position and refused to enforce a sales agreement in favor of plaintiff seller in \textit{Continental Wall Paper Co. v. Louis Voight & Sons Co.} in a substantially similar fact pattern.\footnote{196} Six years later, an unanimous Court changed its mind again in \textit{DR Wilder Mfg. Co. v. Corn Products Refining Co.}\footnote{197} and enforced the sales agreement despite its violation of the antitrust laws.

One wonders whether this changing of heart would have happened had the \textit{Continental Wall Paper} Court focused on looking for the choice that caused the lesser evil. Justice Holmes and three other justices dissented in that opinion.\footnote{198} Justice Holmes pointed out that the “policy of not furthering the purposes of the trust is less important than the policy of preventing people from getting other people’s property for nothing when they purport to be buying it.” Justice Holmes’ dissent suggested that enforcing the agreement would have been the lesser evil in that case. Had the lesser evil principle been explicitly recognized, the majority might have heeded Justice Holmes’ dissent and enforced the agreement despite its illegality (as it did six years later).

\textbf{B. The Lesser Evil Principle Will Help Courts Focus Their Analyses and}

\footnote{194}{Harvard Note 1913, \textit{supra} note __ at 739-40.}
\footnote{195}{184 U.S. at550-52.}
\footnote{196}{212 U.S. 227 (1909).}
\footnote{197}{236 U.S. 165, 177 (1915).}
\footnote{198}{212 U.S. at 271.}
Lead to More Certainty and Predicatability.

The strength of the lesser evil principle is that it accepts the complexities of the dispute. Instead of trying to fashion a standard for each case, an impossible task, it directs courts to focus on what is really at stake – the consequences of their decisions. Even though explicitly adopting the principle will not make these disputes any easier to adjudicate, the principle will allow courts to better focus their analyses on their task at hand – resolving disputes in a way that minimizes damage to important public interests. Explicitly adopting the principle relieves courts of having to explain their way around the general rule of non-enforcement by creating numerous exceptions called for by the facts of the particular cases.

Explicit adoption of the lesser evil principle will not be difficult. As the above scenarios show, even though courts tried to ground their reasoning in the existing rules and their multiple exceptions, courts were by and large guided by the invisible presence of the lesser evil principle.

Explicit adoption of the lesser evil principle will eventually lead to more

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199 This is also its weakness as its critics may point out because it does not provide a substantive standard. However, recognizing the principle explicitly is the first step towards making it better over time. Bridgeman, supra note __ at 1469.

200 On this point, the lesser evil principle is analogous to the proportionality principles that the U.S. Supreme Court has implicitly adopted in its Constitutional review of government actions. Richard G. Singer, Proportionate Thoughts About Proportionality, 8 Ohio St. J. Crim. L. 217 (Fall 2010). Some scholars have been advocating an explicit adoption of the proportionality principles to guide the Court’s Constitutional review of government actions and their impact on individual rights. FRASE, supra note _____ at 171.

201 Badawi, supra note __ at p. 484-85.

202 Wade, supra note __ at 60-62.

203 Id. See also discussions in Part III(B) and cases cited therein supra.
predictability and certainty in the market place. Lack of predictability and certainty can increase transaction costs if parties have to expend resources to contract around the rules. Lack of certainty can also result in over deterrence of innovative business transactions and under deterrence of illegal transactions. Businesses now face more and more regulations over commercial transactions. Failure to comply with the routine regulations risks a finding that the whole transaction is illegal and unenforceable under the current state of affairs.

Explicit adoption of the lesser evil principle is urgently needed these days. The easy cases which gave rise to the non-enforcement remedy in the old days are less likely to occur these days because of potential sanctions imposed by criminal law. The prevalence of business regulations means that the issues are likely going to get more complicated and hence more likely that more difficult cases will be before the courts more frequently. A clear standard that guides courts better will help minimize uncertainty in the market place.

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204 This article does not suggest that adopting the lesser evil principle will eliminate all inconsistencies among courts. Courts face a difficult task of balancing multiple competing interests in situations where no one interest holds a trump card. In this type of situation, inconsistency can be simply a result of differences of opinions when weighing multiple competing interests. As one judge pointed out, apparently conflicting decisions can be simply a result of judges’ different views of public policy as opposed to a difference in adjudicatory theory. Birdsall v. Coon, 157 Mo.App. 439 1911) See also, Strong, supra note __ at p. 348 (pointing out that “[o]ne of the reasons for the apparent confusion is the fact that illegality may appear in many forms and in varying degrees…”).

However, adopting the lesser evil principle will minimize the inconsistencies due to confusion about applicable standards.

205 Badawi, supra note __ at p. 487.
206 Id. at p. 488-89.
208 Badawi, supra note __ at 488.
209 Id. at 487-88.
Conclusion

Courts have to wrestle with competing interests when adjudicating illegal agreement disputes. The general rule of non-enforcement is appealing, but deceptively overly simplistic. Case review shows that courts have not applied the rule rigidly, and rightfully so. Instead, they have developed multiple exceptions to give them the flexibility to adapt to different factual scenarios. This flexibility allows courts to be nimble and to grant or deny relief depending on the facts of each case, but it also creates a confusing body of law that defies a coherent theory.

Courts’ choices of remedies have so far been primarily explained and understood in terms of a general rule of non-enforcement with multiple exceptions and exceptions within exceptions. Except for a few scholarly attempts to make sense of the case law, there appears to be no unifying principle. However, close examination of the case law shows the guiding presence of the lesser evil principle, albeit invisibly.

This article advocates an explicit adoption of the lesser evil principle in adjudicating illegal agreement disputes. The principle provides better guidance to courts than the current hodgepodge of rules with exceptions. It helps courts focus their analyses on the consequences of their choices. This may allow a refinement of the standards when applying the principle and encourage more consistent application of the principle.

Explicit adoption of the principle will also offer better guidance to practitioners when advising clients on these issues. In this era of increasing business regulations, clarity of the underlying principle resolving illegal

\[210\] Harvard Note 1913, supra note ___ at 739-40.
\[211\] Wade, supra note ___ at 61-62.
\[212\] Wade, supra note ___ at 61-62.
\[213\] See supra note ___.
agreement disputes will help bring more certainty and predictability to the market place.\textsuperscript{214}

\textsuperscript{214} Miller, \textit{supra} note \_\_ at 1496.