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ILLEGAL AGREEMENTS AND THE LESSER EVIL PRINCIPLE

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When parties enter into an agreement[1] to engage in illegal transactions,[2] and bring their dispute to a U.S. court,[3] they put the court in the proverbial position between a rock and a hard place. Enforcing the agreement is universally

1. 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. ARTHUR LINTON 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. *See id.*

2. This article's reference to illegal transactions includes 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.* § 1374, at 5–6. Some authors use 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, 563–64 (2012). Professor Williston uses the terms "illegal bargain" or "illegal agreement." 5 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 12:1, at 695 (Richard A. Lord ed., 4th ed. 2009). 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 because they violate either explicit legislation or a particular public policy not explicitly articulated by the legislature.

3. 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 an article discussing policy regarding tax or federal spending issues, see Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 U. KAN. L. REV. 397, 397–99 (2005).

considered a bad idea.[4] It is antithetical to the courts' role to uphold the law,[5] and it undermines the legitimacy and dignity of the law.[6] Thus, the non-enforcement rule is deemed necessary to deter illegal agreements.[7]

Non-enforcement, however, presents its own unique problems. Refusal to enforce a bargain struck by two private parties offends the fundamental principles of freedom of contract and party autonomy.[8] It also undermines contract law's goal of maintaining certainty of contracts.[9] Worse yet, non-enforcement may run afoul of sound public policy by inadvertently creating incentives to enter into additional illegal agreements and engage in more illegal activities when non-enforcement allows a party to retain a windfall, undermining the very purpose for the non-enforcement rule.[10]

Such illegal agreement disputes place U.S. courts in the crossfire of multiple conflicting interests that go to the essence of the kind of a society we have or

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4. *See* Bank of United States v. Owens, 27 U.S. (2 Pet.) 527, 538–39 (1829) (stating 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?").

5. *See* Gibbs v. Consolidated Gas Co., 130 U.S. 396, 412 (1889); Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 165–66 (1985).

6. *See* Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine Be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53, 106 (1995).

7. McMullen v. Hoffman, 174 U.S. 639, 669–70 (1899) (commenting that "[t]o refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum").

8. *See* Note: *Validity of Contracts Which Violate Regulatory Statutes*, 50 YALE L. J. 1108, 1108 (1941) [hereinafter Yale Note] (acknowledging that the non-enforcement rule "conflict[s] with the more basic policy of preserving the inviolability of contracts"); *see also* Eldridge v. Johnston, 245 P.2d 239, 251 (1952) (noting that "public policy requires that men 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 over-powering rule of public policy . . . intervenes, rendering such agreement illegal, that it will not be enforced").

9. Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 116–17 (1988); Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1496 (2010) (noting that "the breadth of the public policy doctrine impairs the certainty and predictability of contractual enforcement in California relative to that which obtains in New York"); *see* Prince, *supra* note 5, at 166.

10. Armstrong v. Toler, 24 U.S. (11 Wheat.) 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"); M.P. Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L. J. 267, 284 (1966) (noting that "[i]t is notorious that the effect of declaring a contract illegal is often to confer an undeserved reward on one party"); John W. Wade, *Benefits Obtained Under Illegal Transactions*, 25 TEX. L. REV. 31, 55 (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").

would like to have.[11] These disputes implicate issues related to the proper scope of government regulation of private market behavior and the limits of private individuals to manage their own affairs.[12] It forces a court to confront its own role in a system based on separation of powers.[13] Understandably, courts struggle to balance these multiple competing interests.[14]

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,"[15] a "rather

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11. *See* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 446 (1993). In deciding whether a plaintiff could recover money paid under an illegal agreement, one court described the dilemma faced by courts, noting:

> The 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 (N.Y. App. Div. 1956).

12. F. H. Buckley, *Perfectionism*, 13 SUP. CT. ECON. REV. 133, 139 (2005) (noting that the doctrine of illegality sits at the border between public and private ordering); Shell, *supra* note 11, at 437–38. This Article does not intend to join the debate about whether contracts are public or private.

13. *See*, U.S. CONST. art. I, § 1 (vesting all legislative powers in Congress); U.S. CONST. art. III, § 1 (vesting the judicial power in one supreme court).

14. This balancing approach is reflected in the RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981) 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.

15. Peter Birks, *Recovering Value Transferred Under an Illegal Contract*, 1 THEORETICAL INQUIRIES L. 155, 156 (2000). According to Professor Birks, this confusing state of affairs does not seem to be unique to the U.S. courts. *Id.* at 156–57. He described the English approach as "riddled with contradictions and evasions." *Id.* at 158.

confusing,"[16] or "vast . . . mysterious area of the law."[17] Legal scholars, noting the courts' handling of illegal agreements lacks a comprehensive philosophy or analytical framework,[18] have been searching for a coherent theory to explain or streamline the courts' treatment of such agreements.[19] One author proposes to explain the doctrine of illegality with a unified "efficient deterrence theory."[20] Another advocates an approach that would predicate remedial judgments on a showing of harm instead of non-enforcement as the presumptive remedy.[21] A third author suggests that, even if an agreement is unenforceable due to illegality, recovery should be permitted if failure to do so would "stultify" the law.[22]

This Article builds on the existing scholarship and joins the search for "consistency and rationality."[23] 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[24] shows that the courts have, by and large, consistently (albeit implicitly) applied the lesser evil principle[25] in adjudicating the disputes.[26] Based on this insight, this Article advocates for a

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16. Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445, 1445 (2006) [hereinafter Harvard Note 2006].

17. George A. Strong, *The Enforceability of Illegal Contracts*, 12 HASTINGS L.J. 347, 347–48 (1961) (noting that unenforceable contracts may become so in a "changing socio-economic environment").

18. Kostritsky, *supra* note 9, at 120–21; Harvard Note 2006, *supra* note 16, at 1445.

19. Adam B. Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 GEO. MASON L. REV. 483, 487 (2010); Birks, *supra* note 15, at 156; Friedman, *supra* note 2, at 564–66; Kostritsky, *supra* note 9, at 120–21 (offering a unified efficient deterrence theory with regard to the judicial relief provided upon finding of illegality); Harvard Note 2006, *supra* note 16, at 1465–66 (offering a law and economics approach with regard to the non-enforcement remedies).

20. Kostritsky, *supra* note 9, at 121–22.

21. Badawi, *supra* note 19, at 487.

22. Birks, *supra* note 15, at 160, 191.

23. *Id.* at 203.

24. 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 January 1, 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.

25. 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. For examples of such, see Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 35 YALE J. INT'L L. 1, 2–3 (2010). In this article, "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.*, Oregon Steam Nav. Co. v. Winsor, 87 U.S. (20 Wall.) 64, 68 (1873) (using the word "evils" to describe the injuries to the public resulting from contracts in restraint of trade); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

26. No court appears to have explicitly acknowledged the lesser evil principle in resolving the illegality dispute based on a randomly selected case review and a targeted search in the All State and Federal database on Westlaw, using the search terms "contract or agreement /s illegal! and

more explicit adoption of the lesser evil principle when courts are called upon to resolve disputes involving illegal agreements. This Article, the first to advocate for an explicit recognition of the lesser evil principle in private law, draws upon the courts' explicit adoption of the principle in criminal and tort law and its implicit adoption of the principle when resolving illegal agreement disputes.

The principle forwarded in this Article is not impermeable from disputation. The principle itself does not provide a desired substantive standard.[27] It does not readily provide the clarity and certainty desired because it does not answer certain fundamental questions; namely, what the evils are, and, more importantly, which of the evils society deems as the lesser.[28] This deficiency, however, is more attributable to the nature of the interests implicated.[29] Despite its limitations, the lesser evil principle provides a better understanding of courts'

"lesser evil" on September 10, 2014." Some U.S. Supreme Court cases have described the consequences in terms of evils. *See, e.g.*, Oregon Steam Nav. Co., 87 U.S. (20 Wall.) at 68. Some lower courts have also expressed the same sentiment. Appeal of Bredin, 92 Pa. 241, 247 (Pa. 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"); Gaspard v. Offshore Crane & Equip., Inc., No. CIV.A. 94-261, 1998 WL 388597, at *5 (E.D. La. July 8, 1998) (using the word "evil" to describe actions that are deemed to be against the public policy of a state).

27. Re'em Segev, *Moral Justification, Administrative Power and Emergencies*, 53 CLEV. ST. L. REV. 629, 631 (2005); *see* Martha Minow, *What Is the Greatest Evil?*, 118 HARV. L. REV. 2134, 2139 (2005) (noting the "central difficulty" with identifying evil is that "[e]vil is obvious only in retrospect") (quoting GLORIA STEINEM, *If Hitler Were Alive, Whose Side Would He Be On?*, *in* OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 332, 346 (2d ed. 1995)). The lesser evil principle is similar to the proportionality principle, which the Court has adopted in its constitutional review of government actions. *See* Peter P. Swire, *Proportionality for High-Tech Searches*, 6 OHIO ST. J. CRIM. L. 751, 751 (2009). However, that principle itself does not provide a criterion. 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 "proportionality 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"); John T. Noonan, Jr., *Religious Liberty at the Stake*, 84 VA. L. REV. 459, 470–71 (1998) (criticizing the proportionality test as "extraordinary" and unsupported by precedent).

28. In our system of government, as adjudicators of contract disputes, the judicial branch has the duty to interpret and apply the law. *The Judicial Branch*, THE WHITE HOUSE, http://www.whitehouse.gov/our-government/judicial-branch (last visited Feb. 27, 2015). The lesser evil principle, however, does not tell us who is in the best position to answer these questions. The author assumes that the courts are the ones that are entrusted with answering these questions. However, this Article does not address the issue of the proper role of courts in determining what public policy is or whether the courts have usurped the legislature's role in declaring what public policy is.

29. *See* MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 8–9 (Princeton Univ. Press 2004) (noting where a lesser evil position applies, the analysis will be complicated as "there are no trump cards, no table-clearing justifications or claims" that simplify the inquiry).

adjudication of illegal agreement disputes[30] and provides a more predictive framework for how U.S. courts approach the complex issues presented by illegal agreements.[31] An explicit adoption of the principle would allow courts to begin the process of refining the substantive standards when resolving illegal agreement disputes.[32] This would lead to more certainty in the marketplace. Finally, because courts have by and large been following the principle already, the implementation of explicit adoption would not be overly burdensome.

To provide a context for the discussions, Part I of this Article introduces the lesser evil principle and the general areas where the principle has been applied.[33] Part II briefly reviews the explicit adoption by U.S. courts of the principle in the field of criminal and tort law. Part III sets forth examples of implicit judicial adoption of the principle in resolving illegal agreement disputes. Part IV advances arguments in favor of an explicit adoption of the lesser evil principle. Finally, this Article concludes with an argument for the explicit adoption of the lesser evil principle when resolving illegal agreement disputes.

I. OVERVIEW OF THE LESSER EVIL PRINCIPLE

Originating from two great ancient classical Greek philosophers, Aristotle and Epicurus,[34] the lesser evil principle[35] applies to situations where an actor is forced to choose between competing options, all of which breach a moral principle.[36] The principle describes a pragmatic (albeit controversial) way to

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30. Many common law contract doctrines are vague and incomplete. *See* 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 (2008). However, incompleteness alone does not render a doctrine ineffective, rather the doctrines can be viewed as partial plans to be refined over time. *Id.*

31. This Article does not intend to participate in the greater moral debate concerning the 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 the cultural, moral, and legal values of each individual society. *See* Blum, *supra* note 25, at 55; *see e.g.*, IGNATIEFF, *supra* note 29, at 19 (discussing the lesser evil principle in the context of the fight against terrorism following September 11, and acknowledging the need to resort to certain measures under the lesser evil principle under certain conditions). Nor does this Article intend to join the debate about the pros and cons of the public policy doctrine. *See, e.g.*, Prince, *supra* note 5, at 166.

32. *See* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW 169 (Oxford Univ. Press 2009).

33. With respect to assessing which is the greater evil, this Article does not intend to engage in the debate concerning the proper role of the judiciary in determining what public policy is.

34. Sean Molloy, *Aristotle, Epicurus, Morgenthau and the Political Ethics of the Lesser Evil*, 5 J. INT'L POL. THEORY 94, 99–100 (2009) (explaining that Aristotle discussed the lesser evil principle approvingly and considered it "good").

35. The principle is sometimes referred to as the doctrine of the lesser evil or the doctrine of the necessary evil.

36. *See* IGNATIEFF, *supra* note 29, at 8.

solve the dilemma—by choosing the lesser of two evils.[37] The principle has often been applied to rationalize certain actions in international relations and politics.[38] 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.[39] Even though the principle itself is widely accepted or tolerated, it is far more difficult to determine what the evils are and which of the evils is the lesser.[40]

The lesser evil principle automatically invokes the broader philosophical debate about what is considered "evil."[41] Where one stands on certain issues depends on one's political and moral values.[42] 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.[43] Further, what is deemed the more, or lesser, of the evils also changes over time.[44] Such analyses are often complicated by decision makers' failure to articulate the values behind their reasoning.[45]

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37. This Article does not intend to join the broader debate about the morality of this principle. *See, e.g.*, IGNATIEFF, *supra* note 29, at 5–6 (addressing issues related to the permissibility of the lesser evil doctrine within the boundaries of a democracy committed to the rule of law).

38. 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. *See, e.g.*, Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT'L L. 447, 447–48 (2012) (discussing how the lesser evil doctrine has been used in politics and international relations as well as some of the controversies surrounding the doctrine).

39. Blum, *supra* note 25, at 32 (noting that there are important variations in application of the lesser evil doctrine depending on one's values and beliefs).

40. *See* Segev, *supra* note 27, at 631 (stating that the lesser evil principle "seems obviously justified and widely accepted").

41. IGNATIEFF, *supra* note 29, at 12.

42. Blum, *supra* note 25, at 2. As one judge pointed out, with respect to when sufficient fraud exists to avoid a contract, differences in outcomes depend on the kind of policy that the judge would prefer 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.

Birdsall v. Coon, 139 S.W. 243, 246 (Mo. Ct. App. 1911) (citation omitted).

43. *See* Richard L. Barnes, *Delusion by Analysis: The Surrogate Mother Problem*, 34 S.D. L. REV. 1, 3–4 (1989) (presenting examples of differing values depending on one's political, moral, and religious beliefs).

44. *See* Shell, *supra* note 11, at 477 (noting the more recent Supreme Court cases that have enforced contractual waivers of certain constitutional rights); Wallihan v. Hughes, 82 S.E.2d 553, 558 (Va. 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").

45. *See* Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 289 (2007).

II. EXPLICIT APPLICATION OF THE LESSER EVIL PRINCIPLE IN U.S. CRIMINAL AND TORT LAW

U.S. law has explicitly adopted the lesser evil principle in criminal and tort law.[46] The Model Penal Code permits a criminal defendant to assert a choice of evil justification defense under certain conditions.[47] 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.[48] In addition, the defendant must not have other legal alternatives available to avoid inflicting the harm, and the defendant must not cause the foreboding situation through his own negligence or recklessness.[49] For example, in criminal law the argument of self-defense under certain conditions justifies an otherwise intentional homicide.[50] 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 such is unavoidable.[51] Criminal law deems self-defense (essentially the sanctioning of the intentional killing of another) 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.[52] For example, a defendant in a civil case can respond to a tort action claim based on trespass—the invasion of an owner's exclusive possessory interest in his property[53]—by asserting the defense of necessity.[54]

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46. *See* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 969 (1999); 1 DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS, § 142, at 449–50 (2d ed. 2011).

47. For a detailed discussion of the common law defense of necessity, see Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-Of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191, 197 (2007) (pointing out that "[c]ourts have always accepted necessity as a principle limiting the reach of overbroad criminal prohibitions and defenses"); Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not An Excuse — And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 884 (2003).

48. Westen & Mangiafico, *supra* note 47, at 884.

49. MODEL PENAL CODE § 3.02(1)(a) (1985) provides:

> Section 3.02. Justification Generally: Choice of Evils
> (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another 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 . . . .

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

51. *Id.*

52. RESTATEMENT (SECOND) OF TORTS § 197, at 355 (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 enters is unwilling that he shall take such action.

53. Wilson v. Interlake Steel Co., 649 P.2d 922, 925 (Cal. 1982).

54. RESTATEMENT (SECOND) OF TORTS § 197, at 355 (1965).

While allowing the defense of necessity harms an owner's interest in exclusive possession, courts deem it the lesser (or necessary) evil.[55]

By allowing the defenses of necessity and self-defense justification for otherwise criminal or tortious conduct, U.S. laws and judges have explicitly incorporated the lesser evil principle in the adjudication of difficult cases involving the relationship between the state and private individuals, and between private individuals in the public law arena.[56] These principle-based defenses allow courts to weigh competing values implicated in these cases.[57]

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 law, U.S. courts have generally not explicitly adopted the principle in contract law or in resolving illegal agreement disputes.[58]

The prevailing view of illegal agreements is that U.S. courts generally follow the rule of non-enforcement with multiple exceptions depending on the specifics of each case.[59] However, a close examination of many U.S. courts' reasoning in numerous cases shows that courts' decisions turn more on their concern for

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55. *See, e.g.*, Rossi v. DelDuca, 181 N.E.2d 591, 593 (Mass. 1962) ("[O]ne is privileged to enter land in the possession of another if it is, or reasonably appears to be, necessary to prevent serious harm . . . .").

56. *See, e.g.*, Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 532 (2006).

57. *See* Hoffheimer, *supra* note 47, at 229 (discussing the role that judges and jurors have in evaluating competing values).

58. *See* Note, *Principles Governing Recovery by Parties to Illegal Contracts*, 26 HARV. L. REV. 738, 738–39 (1913) [hereinafter Harvard Note 1913]. One could also argue that courts have implicitly adopted the lesser evil principle in recognizing certain contract law defenses such as fraud, incompetence, duress, undue influence, mistake, misrepresentation, unconscionability, illegality, and 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 contract law defenses and excuses. Courts in these situations generally chose not to enforce the contract because non-enforcement does less harm than enforcement. *See id.* at 738–39. Enforcing contracts in these specified situations harms some important values, such as fairness, and creates adverse incentives to engage in fraud or other unsavory practices such as duress or undue influence. *See id.* at 739. Therefore, enforcement would have been the greater evil than the negative impact on parties' freedom to contract.

59. For a detailed discussion of the general rule related to the illegality defense and the various exceptions, see Birks, *supra* note 15, at 158; Kostritsky, *supra* note 9, at 116–18, 126; Strong, *supra* note 17, at 347–48, 351, 354–55, 361–62; Wade, *supra* note 10, at 31, 47; Yale Note, *supra* note 8, at 1108–09; *see also* Franklin v. Nat C. Goldstone Agency, 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., 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."); 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.").

the consequences of their choices, rather than on the illegality of the agreements.[60] These cases show a pattern of courts choosing the option that tolerates the less harmful consequence when considering the other available options. That pattern is consistent with an application of the lesser evil principle in other fields of law.[61]

There are a number of potential evils, or potential kinds of damage, important to the public interest that are implicated by illegal agreement disputes. A number of cases, depicting U.S. courts' attempt to choose the lesser evil when adjudicating these complicated disputes, support this notion. By examining closely the insight sustaining these courts' decisions, specifically the articulated or implicit rationale supporting their rulings, one will discern the already existing presence of the lesser evil principle in illegal agreement disputes.[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 concern that the alternative would damage or undermine an important public interest.[64] There are numerous potential evils courts have identified when resolving disputes arising out of illegal agreements.[65] This sometimes requires reading between the lines while understanding and recognizing the dominant values of our society in the context of our governing system.

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60. *See* Birks, *supra* note 15, at 158 ("The inquiry is constantly an inquiry into consistency and rationality, not into turpitude. Turpitude may have no role at all. Or it may be that gross turpitude can have a role in a rare case, as a long-stop."). 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." Harvard Note 1913, *supra* note 58, at 740.

61. *See* Strong, *supra* note 17, at 348, 354–60, 362, 364–65, 367–73.

62. Part of the analytical difficulty lies in the fact that courts often fail to explicitly articulate reasons for their decisions. For example, in one of the early cases, the 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." Armstrong v. Toler, 24 U.S. (11 Wheat.) 258, 260 (1826). 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., 184 U.S. 540, 547 (1902). The Court, in neither case, explicitly elaborated on concerns addressing enforcing, or refusing to enforce, the illegal agreement. For this reason, a certain amount of reading between the lines is necessary.

63. *See, e.g.*, R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 360 (1873); Bein v. Heath, 47 U.S. (6 How.) 228, 247 (1848); Gates v. Rivers Constr. Co., 515 P.2d 1020, 1022 (Alaska 1973).

64. *See infra*, Part III.B.2.a.iii.

65. *See infra*, Part III.A.1–7. 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. Rather, it highlights the public interests most often cited by courts to support their choices when resolving illegal agreement disputes.

1. Undermining the Legitimacy of the Law and the Good Name of the Court

A major apprehension of U.S. courts, when resolving an illegality dispute, concerns the risk of undermining the legitimacy of the law and the dignity of the court system.[66] The U.S. Supreme Court has articulated this concern loudly and clearly in support of the general rule of non-enforcement. For example, the Court pointed out that a court of justice cannot be the "handmaid of iniquity"[67] or "degrade itself" by using its power to aid those who have violated the law.[68] Because of this concern, courts have often referred to the non-enforcement rule as a fundamental principle.[69]

This concern is understandable because of the court's role in our system of government.[70] The U.S. Constitution fashioned the judiciary as the mechanism through which laws are enforced.[71] Enforcing an agreement where the parties attempt to engage in illegal transactions undermines the very essence of the court's function.[72] Courts loath being put in a position where they may run the risk of being perceived as aiding or abetting any violation of the law.[73]

In addition, maintaining the law is important to every functioning government.[74] In a democratic country where the rule of law prevails, public laws express the collective will of the people through a representative

66. Bartle v. Nutt, 29 U.S. (4 Pet.) 184, 189 (1830); Bank of the United States v. Owens, 27 U.S. (2 Pet.) 527, 538–39 (1829); Martin v. Wade, 37 Cal. 168, 176 (1869) ("The Courts, refusing to defile their hands with those transactions, deny the parties all relief.").

67. *Owens*, 27 U.S. (2 Pet.) at 538.

68. *Bartle*, 29 U.S. (4 Pet.) at 189.

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

70. *See* 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 this role "by a balancing of court-devised factors").

71. Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439, 442 (1872) (identifying the Constitution as the source of the judiciary's authority; therefore, courts could never enforce a contract that would impair the supremacy of the Constitution).

72. Bank of the United States v. Owens, 27 U.S. (2 Pet.) 527, 538–39 (1829).

73. *See, e.g.*, Gibbs v. Consol. Gas Co. of Balt., 130 U.S. 396, 412 (1889) ("We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done . . . ."); *Owens*, 27 U.S. (2 Pet.) at 538 ("The answer would seem to be plain and obvious, that no court of justice can in its nature be made the handmaid of iniquity."); Vaszauskas v. Vaszauskas, 161 A. 856, 858 (1932) ("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.").

74. *See* MAX WEBER, THE VOCATION LECTURES 34 (Rodney Livingstone trans., David Owen & Tracy B. Strong eds., 2004) ("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.").

government.[75] Laws are enacted to govern the relationship between the state and its people.[76] To allow private parties to contract irrespective of the law, and then expect judicial intervention and remedy undermines the legitimacy of, and the public interest promoted by, the law.[77]

2. Overstepping the Boundaries of the Court's Constitutional Role

The Constitution created three separate and equal branches of government.[78] With respect to the rule of law, legislators are tasked with enacting laws and are in the best position to declare what public policy is,[79] while the judiciary is charged with interpreting and enforcing laws.[80] As the U.S. Supreme Court pointed out, the judiciary "can listen only to the mandates of law; and can tread only that path which is marked out by duty."[81] Resolving illegal agreement disputes can force courts to wrestle with the limits of their role in our system of government, typically because these disputes can implicate situations where the legislature has not spoken explicitly on the public interests worthy of being protected.[82] In those situations, courts are left to divine proper public policy,[83]—

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75. Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 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."); *Rule of Law: Essential Principles*, DEMOCRACY WEB, http://www.democracyweb.org/rule/principles.php (last visited Sept. 13, 2014) (stating that in a democracy, "the 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").

76. *See* WEBER, *supra* note 74, at 34.

77. R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 378 (1873).

78. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 354 (13th Ed. 1997).

79. *See* IGNATIEFF, *supra* note 29, at 3.

80. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 11 (3rd ed. 2009).

81. Craig v. Missouri, 29 U.S. (4 Pet.) 410, 438 (1830).

82. *See* Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) ("[I]t 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."); 5 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 12:2, at 767–71 (4th ed. 2009).

83. This is also the reason why numerous scholars have criticized the doctrine, fearing that it gives judges too much discretion in determining public policy. Likewise, "[u]nder 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." *See, e.g.*, Shell, *supra* note 11, at 442. *See also* Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329, 340 (considering the vagueness of statutory guidelines, "courts are left to decide each case according to their own idiosyncratic inclinations, leading to inconsistent and unpredictable results"); Moran v. Harris, 182 Cal. Rptr. 519, 522 (Cal. Ct. App. 1982) ("[J]uridical realization of the meandering nature of 'public policy' necessitates judicial restraint."). In addition, judicial consonance with public policy has

often assessing, among multiple competing interests, which is more important—a task constitutionally delegated to the legislature.[84] As a result, courts thrust into this situation have often been accused of legislating from the bench.[85]

3. Restraint on Freedom of Contract

Another potential evil implicated by an illegality dispute is the potential to restrain parties' freedom of contract.[86] Freedom of contract is a fundamental principle of U.S. contract law;[87] it is a part of our national identity, built on respect for individual autonomy,[88] and it is reflected in the general rule that private agreements are enforced as bargained for by the parties.[89] Contracts are generally viewed as private ordering by the parties.[90] A court's refusal to enforce a private agreement is considered a restraint on parties' freedom of

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been described as "a very unruly horse, . . . once get astride it you never know where it will carry you." Lynn C. Percival, IV, *Public Policy Favoritism in the Online World: Contract Voidability Meets the Communications Decency Act*, 17 TEX. WESLEYAN L. REV. 165, 182 (2011) (quoting Richardson v. Mellish, 130 Eng. Rep. 294 (C.P.) 303 (1824)); *but cf.*, Prince, *supra* note 5, 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.").

84. *See* Leacock, *Lotteries and Public Policy in American Law*, 46 J. MARSHALL L. REV. 37, 42, 43–45 (2012) ("Identifying and declaring violations of public policy is a delicate, subtle, and difficult intellectual task."). As commented on by Justice Scalia:

> [T]he 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.

Scalia, *supra* note 25, at 863.

85. Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 187 (2007).

86. Even the staunchest advocate of freedom of contract concedes that there are limits to that freedom. To that extent, one can say, refusing to enforce illegal agreements will not affect freedom of contract at all. This is definitely true in some extreme cases of highway robbery or murder for hire. However, when the illegality is particularly subtle, it becomes incredibly difficult for a court to draw a line, and the court has the potential to infringe upon parties' freedom to contract. *See* Yale Note, *supra* note 8, at 1108, 1113.

87. ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 215 (2d ed. 2004).

88. Kirsten L. McCaw, *Freedom of Contract Versus the Antidiscrimination Principle: A Critical Look at the Tension Between Contractual Freedom and Antidiscrimination Provisions*, 7 SETON HALL CONST. L.J. 195, 198 (1996) ("The desirability of individual autonomy and economic efficiency lies at the core of freedom of contract.").

89. *See* In re McInnis, 110 P.3d 639, 644 (Or. Ct. App. 2005).

90. Buckley, *supra* note 12, at 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.

contract.[91] Accordingly, illegality disputes effectively force the judiciary to mark the outer boundaries of private contracting behavior.

Freedom of contract has been defended on multiple grounds.[92] Respecting a party's freedom of contract is said to promote certainty and predictability.[93] For contracts to function effectively as a risk allocation tool fostering economic development, parties need to be able to rely on contracts.[94] Certainty of contract provides incentives for parties to engage in investment—activities that can be socially beneficial.[95]

4. Forfeiture of Property

Another concern of courts in reviewing illegal agreement disputes is the risk of property forfeiture.[96] Generally, the judicially imposed forfeiture of property is, from a policy standpoint, disfavored.[97] This attitude is reflected in the property protection afforded by the Due Process Clause of the Fifth Amendment[98] and the Restatement's explicit enumeration of the risk of forfeiture as one of the factors to be assessed in resolving illegal agreement disputes.[99]

In the illegal agreement dispute context, risk of property forfeiture exists where parties have agreed to an exchange of performances in sequential order.[100]

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91. *See* Eldridge v. Johnston, 245 P.2d 239, 245 (Or. 1952) (noting that free and voluntary private contracts are "held sacred" and "shall be enforced by courts of justice"); Yale Note, *supra* note 8, at 1108.

92. 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, see Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 352 (1999).

93. *See* Miller, *supra* note 9, at 1496.

94. *See* Robert Cooter, *Doing What You Say: Contracts and Economic Development*, 59 ALA. L. REV. 1107, 1109 (2008) (stating that "[c]ontractual commitment is the fundamental means for economic coordination provided by law"); *see also* H. Ward Classen, *Judicial Intervention in Contractual Relationships Under the Uniform Commercial Code and Common Law*, 42 S.C. L. REV. 379, 383 (1991) ("Because allocating risks 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.").

95. Thorsten Beck, *Legal Institutions and Economic Development* 22–24 (CentER Discussion Paper Series No. 2010-94), http://ssrn.com/abstract=1669100.

96. See *infra* Part III.B.2.b.iii.

97. Seaman v. State, 396 S.E.2d 525, 526 (Ga. Ct. App. 1990) (indicating that statutes permitting forfeiture of property are to be strictly construed and limited); Lloyd Capital Corp. v. Pat Henchar, Inc., 80 N.Y.2d 124, 128 (1992) (noting that "[a]s 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'") (quoting Charlebois v. J.M. Weller Assocs., Inc., 531 N.E.2d 1288, 1292 (N.Y. 1988)).

98. U.S. CONST. amend. V.

99. RESTATEMENT OF CONTRACTS, *supra* note 14, § 178(2)(b), at 6.

100. *See* HILLMAN, *supra* note 87, at 218. *See also* Benjamin E. Hermalin et al., *Chapter on the Law & Economics of Contracts*, *in* THE HANDBOOK OF LAW AND ECONOMICS, at 4 (2006),

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 excuse B from any obligation and result in A forfeiting property or the value of his services.[101]

5. Corruption of Morals

Courts are also exceedingly concerned about aiding or facilitating any transactions that would encourage corruption,[102] and are especially vigilant against aiding or facilitating any transactions that would encourage a corruption of morals.[103] Courts' concerns with respect to corruption are well-founded considering its remaining prevalence, despite universal condemnation.[104] Corruption imposes many costs on societies.[105] It interferes with government's ability to perform efficiently,[106] undermining the legitimacy of, and the people's confidence in, government.[107] As a result, the law values honest service by public servants.[108]

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http://www.econ.uiuc.edu/~avillami/course-files/contract_law_handbook_article.pdf (last visted Feb. 24, 2015).

101. *See, e.g.*, Oscanyan v. Arms Co., 103 U.S. 261, 263 (1880); Farbenfabriken Bayer A.G. v. Sterling Drug, Inc., 307 F.2d 207, 210 (3d Cir. 1962) ("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.") (quoting Cont'l Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 262 (1909)); Williams v. Weber Mesa Ditch Extension Co., Inc., 572 P.2d 412, 414 (Wyo. 1977) (holding that in consideration of the silence of the legislature, the defendant was not obligated to pay for illegal gambling debt).

102. *See e.g.*, *Oscanyan*, 103 U.S. at 273 (commenting that "[p]ersonal 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").

103. *Id.* at 277; Bartle v. Nutt, 29 U.S. (4 Pet.) 184, 188 (1830).

104. David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C2 Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593, 595 (2000) (stating that "even through the 1990s . . . corruption bec[a]me one of the most important policy issues in the international economy").

105. *Id.* at 596–99.

106. *Id.* at 612.

107. *Id.* at 594.

108. *See* John D. Feerick, *Toward a Model Whistleblowing Law*, 19 FORDHAM URB. L.J. 585, 594 (1992) (stating "we expect . . . public servants conform to a higher set of standards than simply avoiding breaking the law, a model law must account for the problems of corruption, conflict of interest, abuse of position, gross waste of funds and gross mismanagement in order to effectuate this goal"); Joshua A. Kobrin, *Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346*, 61 N.Y.U. ANN. SURV. AM. L. 779, 781 (2006) (noting the judiciary's recognition of congressional objectives in amending fraudulent mail practices in the early twentieth century to impose a broader "honest services" duty upon public employees).

6. Incentives to Engage in More Illegal, Fraudulent, or Opportunistic Behavior

Courts are also concerned about another evil: creating incentives for parties to engage in more illegal or other socially undesirable conduct such as fraud or opportunistic behavior.[109] The general rule of non-enforcement is often justified on the basis of deterring illegal behavior.[110] However, under certain circumstances, non-enforcement may encourage, rather than deter illegal behavior.[111] Courts have often commented on this unfortunate aspect of pernicious actors engaging in opportunistic behavior with the expectation of taking advantage of the illegality defense in order to obtain a windfall.[112]

Similar to the property forfeiture context, opportunistic behavior is more likely to exist when parties to an illegal agreement perform their obligations sequentially.[113] 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.[114] These situations are ripe for opportunistic behavior, especially where an illegal transaction generates profit, and the parties dispute about how to divide the profits arising out of the illegal transaction.[115]

7. Injury to Other Miscellaneous Public Interests

Cases show that there are multiple public interests that courts seek to protect when resolving an illegality dispute, as much varied as the laws allegedly

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109. *See, e.g.*, Kelly v. Kosuga, 358 U.S. 516, 520–21 (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'") (quoting Cont'l Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 271 (1909) (Holmes, J., dissenting)); Gates v. Rivers Constr. Co., Inc., 515 P.2d 1020, 1022 (Alaska 1973) (expressing concern that a non-enforcement remedy might encourage employers to "knowingly . . . employ [illegal] aliens and then, with impunity, . . . refuse [to] pay them for their services"); Nizamuddowlah v. Bengal Cabaret, Inc., 399 N.Y.S.2d 854, 857 (App. Div. 1977) (ordering, under a claim of unjust enrichment, recovery in favor of the plaintiff because the defendant was manipulating the system through immigration laws would likely continue to engage in the same conduct).

110. *See* McMullen v. Hoffman, 174 U.S. 639, 669–70 (1899).

111. *See infra*, Part III.B.2.b.

112. *See, e.g.*, *Kosuga*, 358 U.S. at 520–21; *McMullen*, 174 U.S. at 669.

113. George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 954–55 (1992).

114. *See, e.g.*, Parente v. Pirozzoli, 866 A.2d 629, 638 (Conn. App. Ct. 2005). The court noted:

> 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."

Id. (quoting Solomon v. Gilmore, 731 A.2d 280, 293 (Conn. 1999) (alterations in original)).

115. *See infra* Part III.B.2.c.

violated by the content of the agreements.[116] For example, in discussing the validity of the contracts in restraint of trade, the U.S. Supreme Court 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 his occupation and thus being prevented from supporting himself and his family."[117]

In another case 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.[118]

B. Courts' Choices Consistent with the Lesser Evil Principle

The following cases show how courts have by and large made their choices consistent with the lesser evil principle. To resolve illegal agreement disputes, courts typically need to address two questions: the threshold question of whether the agreement implicated is illegal; and second, what form of remedy is proper.[119] Courts have multiple remedies to choose from depending on plaintiffs' theories.[120] Even though courts have not explicitly adopted the lesser evil principle to support their choices, their analyses strongly suggest their decisions are grounded in the principle.[121]

1. Threshold Question of Illegality: Limiting the Scope of Illegality as the Lesser Evil

Courts, addressing the threshold question of illegality, have attempted to limit its scope in multiple ways. First, courts generally presume legality,[122] requiring

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116. *See, e.g.*, Oregon Steam Nav. Co. v. Winsor, 87 U.S. (20 Wall.) 64, 70 (1873) (noting public policy arguments against agreements restraining trade); Nizamuddowlah v. Bengal Cabaret, Inc., 399 N.Y.S.2d 854, 857 (App. Div. 1997) (citing public interests in discouraging employers from deceptive practices); Williams v. Weber Mesa Ditch Extension Co., 572 P.2d 412, 414 (Wyo. 1977) (indicating a public interest in discouraging illegal gambling).

117. *Oregon Steam Nav. Co*., 87 U.S. (20 Wall.) at 68.

118. R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 378 (1873).

119. *See* Kostritsky, *supra* note 9, at 163 n.4 (citing Furmston, *supra* note 10, at 267).

120. *See infra* Parts III.B.2.c.i–ii.

121. Over one-hundred years ago, one scholar commented on the possible injustice of generally applying the non-enforcement rule. The scholar 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 . . . . " Harvard Note 1913, *supra* note 58, at 739.

122. *See* Walsh v. Schlecht, 429 U.S. 401, 408 (1977) (noting that the "general rule of construction presumes the legality and enforceability of contracts, 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") (internal citation omitted).

that the defense of illegality be affirmatively pled.[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.[124] Another way that courts have attempted to limit the scope of illegality is by narrowly interpreting the law allegedly violated.[125]

For example, in an antebellum case, a group of slave traders tried to avoid payment of notes given as part of the purchase price.[126] Even though the Constitution of the State of Mississippi prohibited the sale of slaves imported from other states, the Supreme Court narrowly interpreted the prohibition and enforced the sales agreements, finding that the sales agreements were not invalid until the legislature had acted.[127]

By adopting a presumption against illegality and narrowly construing illegality, courts avoid the greater evil of unduly impinging on parties' freedom of contract and the resulting uncertainty.[128] This 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.[129]

2. 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.[130] For example, if a plaintiff seeks to recover

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123. Brearton v. De Witt, 170 N.E. 119, 120 (N.Y. 1930).

124. *See, e.g.*, Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 551 (1902); Armstrong v. Am. Exch. Nat'l Bank, 133 U.S. 433, 467–68 (1890).

125. *See, e.g.*, Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 501–02 (1841); De Valengin's Adm'rs v. Duffy, 39 U.S. 282, 291 (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).

126. *Groves*, 40 U.S. (15 Pet.) at 497.

127. *Id.* at 500–01.

128. Cont'l Wall Paper Co. v. Louis Voight & Sons Co. 212 U.S. 227, 270–71 (1909) (Holmes, J., dissenting) (stating 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 . . . it makes no difference whether he is glad or sorry for the result"); Kostritsky, *supra* note 9, at 116–17; Yale Note, *supra* note 8, at 1108 (pointing out that the non-enforcement rule "conflict[s] with the more basic policy of preserving the inviolability of contracts").

129. *See* D.R. Wilder Mfg. Co. v. Corn Prod. Ref. Co., 236 U.S 165, 176 (1915) (pointing out that individuals may be prompted by selfish motives to attack the legality of a seller organization); Wade, *supra* note 10, 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.").

130. *See infra* Part III.B.2.a–b.

money paid under the illegal transaction under quasi-contractual theories, courts can deny recovery or allow recovery despite the illegality.[131]

Courts have developed multiple theories to give them the flexibility to choose remedies, adopting rules such as the distinction between *malum in se* and *malum prohibitum*,[132] the principle of *in pari delicto*,[133] the collateral agreement doctrine,[134] the protected class doctrine,[135] failure of consideration,[136] rescission,[137] and unjust enrichment.[138] These theories provide courts with the flexibility to grant or deny relief as called for by the facts of a particular case.[139] Courts have by and large followed the lesser evil principle and applied the rules in a way to achieve a consistent result: avoiding the greater evils.

a. The Non-Enforcement Remedy as the Lesser Evil

The following sets forth some examples where courts have refused to enforce the terms of an illegal agreement to avoid some greater evil. These cases can be roughly grouped into three representative scenarios: courts' avoidance of undermining the legitimacy or the law and the court; courts' avoidance of incentivizing fraud and corruption; and courts' avoidance of undermining other important public interests.[140]

i. Scenario One: To Avoid Undermining the Legitimacy of the Law and the Court

Under this scenario, courts generally have denied plaintiffs relief because it would have in some form aided plaintiffs' violation of law. For example, in *Gibbs v. Consolidated Gas Co. of Baltimore*,[141] the plaintiff helped the defendant negotiate an agreement that state law expressly prohibited.[142] When the

131. *See infra* Part III.B.2.c–d.

132. *See, e.g.*, Lloyd Capital Corp. v. Pat Henchar, Inc., 603 N.E.2d 246, 248 (N.Y. 1992); John E. Rosasco Creameries, Inc. v. Cohen Dairy Co., 276 N.Y. 274, 280 (1937); Yale Note, *supra* note 8, at 1108.

133. *See* Note, *In Pari Delicto, Under the Federal Securities Laws:* Bateman Eichler, Hill Richards, Inc. v. Berner, 72 CORNELL L. REV. 345, 347 (1987) (discussing the common law defense and its specific application in securities litigation).

134. *See* Kostritsky, *supra* note 9, at 159.

135. *See id.* at 156.

136. *See, e.g.*, N.Y. & Pa. Co. v. Cunard Coal Co., 132 A. 828, 831 (Pa. 1926).

137. *See* Harvard Note 1913, *supra* note 58, at 740.

138. *See* Wade, *supra* note 10, at 52–53 (discussing different reasons that the courts have used to support their decisions to allow or refuse recovery where there is a finding of illegality).

139. *Id.* at 62.

140. This is not intended to be an exhaustive list of all possible factual scenarios that can implicate the illegality issue. The scenarios merely provide selected examples for the purpose of discussion.

141. 130 U.S. 396 (1889).

142. *Id.* at 411.

defendant failed to pay the plaintiff, the plaintiff sued to recover the payment.[143] The Court found that the statute in question explicitly provided that the contract was "null and void."[144] Distinguishing between *malum in se* and *malum prohibitum*, the Court refused to enforce the contract because "there can be no legal remedy for which is itself illegal," and doing so would have helped the plaintiff to "obtain the fruits of an unlawful bargain."[145]

Non-enforcement in this 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. The windfall retained by defendants may also create incentives to engage in more illegal activities or opportunistic behavior.[146] It places a constraint upon private parties' freedom of contract. In addition, it potentially results in the forfeiture of property.[147] For example, in *Gibbs*, the plaintiff was not compensated for his services.[148] Nonetheless, the courts deem non-enforcement the lesser evil because the plaintiffs in these cases are seeking the courts' assistance in advancing illegal agreements.[149] Aiding a plaintiff in his or her violation of the law would undermine the legitimacy of the law and the court.[150]

ii. Scenario Two: To Avoid Incentives to Engage in Fraud and Corruption.

The Court in the following case avoided the greater evil of encouraging fraud and corruption by refusing to enforce the illegal agreement. In *Bartle v. Nutt*,[151] the parties disputed a settlement of accounts involving an agreement with a

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143. *Id.* at 403.

144. *Id.* at 411–12.

145. *Id.* at 412 (quoting Russell v. De Grand, 15 Mass. 35, 39 (1818)).

146. *See supra* Part III.A.6.

147. *See Gibbs*, 130 U.S. at 411.

148. *Id.* at 403–04.

149. *See supra* text accompanying notes 146–47.

150. *See, e.g.*, Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 81–82 (1982) (refusing to enforce an agreement on the grounds that to hold otherwise would foster conduct that the antitrust laws specifically forbade); Awotin v. Atlas Exch. Nat'l Bank of Chi., 295 U.S. 209, 214 (1935) (refusing to enforce an agreement between the bank and the customer where the bank agreed to repurchase accrued bonds at par upon maturity, violating a state statute deemed to protect against perilous outcomes in the interest of depositors and the public); Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439, 443–45, 448–49 (1872) (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); Patton v. Nicholson, 16 U.S. (3 Wheat.) 204, 207 (1818) (refusing to enforce a contract where an American citizen issued an illegal license, or pass, from the enemy to be used on board an American vessel during the War of 1812).

151. 29 U.S. (4 Pet.) 184 (1830).

public officer who engaged in fraud.[152] One partner sued the other partner "to account for and to pay . . . one-half of [the] loss sustained by an unsuccessful attempt to impose spurious vouchers on the government."[153] The 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 equalise [sic] the benefits or bur[d]ens which may have resulted by the violation of every principle of morals and of laws."[154]

The non-enforcement remedy arguably impaired the parties' freedom of contract. In addition, it encouraged opportunistic behavior because defendants in these types of cases retained a windfall as a result of the courts' refusal to enforce the agreements. The Court apparently made its choice based on a concern of aiding or facilitating any transactions that would encourage fraud or corruption.[155]

iii. Scenario Three: To Avoid Undermining Other Important Public Interests

In this category, the Court refused to enforce attempted contractual waivers for public policy reasons. In doing so, the Court avoided the greater evil of allowing private parties to override legislative intent to protect public safety.[156]

For example, in *R.R. Co. v. Lockwood*,[157] the Court struck down a contractual provision attempting to exempt the railroad company from its own negligence.[158] Injured while traveling on a stock train, Lockwood sued the New

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152. *Id.* at 184–85.

153. *Id.* at 185, 188.

154. *Id.* at 189; *See also* McMullen v. Hoffman, 174 U.S. 639, 640–44, 669 (1899) (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 v. Arms Co., 103 U.S. 261, 271–72 (1880) (refusing to enforce an agreement where defendant agreed to pay sales commission to the Turkish government in return for plaintiff's influence over an agent of the Turkish government). The *Oscanyan* Court noted:

> The contract was a corrupt one, [] corrupt in its origin and corrupting in its tendencies, the services stipulated and rendered were 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.

Id.

155. *See, e.g.*, *Oscanyan*, 103 U.S. at 273 (commenting that "[p]ersonal 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").

156. *See, e.g.*, United States v. Atl. Mut. Ins. Co., 343 U.S. 236, 239 (1952); Adams Express Co. v. Croninger, 226 U.S. 491, 509–12 (1913); Hart v. Pa. R.R. Co., 112 U.S. 331, 338, 340–41 (1884); Bank of Ky. v. Adams Express Co., 93 U.S. 174, 181, 183 (1876); R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 359–60 (1873).

157. 84 U.S. (17 Wall.) 357 (1873).

158. *Id.* at 383–84.

York Central Railroad Company seeking damages resulting from his injury.[159] The railroad company asserted the contractual waiver as a defense.[160]

The Court upheld the trial judge's decision to strike down the waiver.[161] In supporting its decision, the Court commented that the fundamental principles of common carrier, such as a railroad company, 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."[162] The Court explicitly dismissed the defense that non-enforcement would intrude on the private right to contract, concluding that if a common carrier were at liberty to waive those "essential duties," it would subvert "the very object of the law."[163]

b. The Enforcement Remedy as the Lesser Evil

Courts' focus on the consequences of their choices has led to the enforcement of illegal agreements in many cases, sometimes explicitly and sometimes as a matter of fact.[164] In the following scenarios, the Court weighed the adverse consequences of its choices, and chose to enforce the agreements despite the illegality.

i. Scenario One: To Avoid Fraud

In this scenario, the Court chose to enforce illegal agreements to avoid encouraging fraud. In *Bein v. Heath*,[165] Richard 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.[166] The plaintiffs alleged that these notes "were 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 [his] debt, or to make her property responsible, [was] not binding, but void."[167]

The Court enforced the mortgage despite the agreement's illegality under state law.[168] Supporting its decision, the Court noted that Mrs. Bein regularly paid the interest for the loan, "the house and lot were insured, and the policy [was] annually assigned for the benefit" of Mary Health.[169] These facts showed that

159. *Id.* at 359.
160. *Id.*
161. *Id.* at 384.
162. *Id.* at 377.
163. *Id.* at 378, 379–81.
164. *See infra* Parts III.B.2.b.i–iv.
165. 47 U.S. (6 How.) 228 (1848).
166. *Id.* at 239.
167. *Id.*
168. *Id.* at 241, 248.
169. *Id.* at 247.

the plaintiff deliberately committed fraud.[170] Accordingly, it can be inferred that the Court's decision was based on concern that non-enforcement would "enable the wife to practise [sic] the grossest frauds with impunity."[171]

ii. Scenario Two: To Avoid the "Grossest Injustice"

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

In *Thorington v. Smith*,[172] the plaintiff, Thorington, sold a parcel of land situated in Montgomery, Alabama, to the defendant for $45,000.[173] The defendant paid for most of the purchase with Confederate notes and a promissory note for the remaining balance.[174] While the Court's review commenced after the conclusion of the Civil War, the agreement was made in a Southern state during the life of the Confederacy.[175] Federal notes of the United States were not in circulation in Alabama at that time, nor were silver and gold coins.[176] The only common currency available for business transactions was treasury notes issued by the Confederacy, which became useless upon the conclusion of the Civil War.[177] Thorington, the seller, sued to enforce a vendor's lien upon the land sold, requesting the balance of the stipulated purchase-money in U.S. currency.[178] Smith, the buyer, argued on the grounds that the agreement was to pay in Confederate notes, which were illegal under U.S. law, so U.S. courts could not grant relief.[179]

The Court held that the agreement was in fact enforceable because the notes were used in "the business transactions of many millions of people" and represented "transactions in the ordinary course of civil society."[180] Justice Miller later explained his reluctant enforcement of the agreement in *Thorington*, describing the ruling as "necessary . . . to prevent the grossest injustice in reference to transactions of millions of people for several years in duration."[181]

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170. *Id.*
171. *Id.*
172. 75 U.S. (5 Wall.) 1 (1868).
173. *Id.* at 1–2.
174. *Id.* at 2–3.
175. *Id.* at 1.
176. *Id.* at 1–2.
177. *Id.* at 2.
178. *Id.* at 2–3.
179. *Id.* at 4–5.
180. *Id.* at 11–12.
181. Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439, 449 (1872).

iii. 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 the forced forfeiture of property.

In *Kelly v. Kosuga*,[182] a seller of onions sued his buyer for failure to pay for the full purchase price.[183] The buyer asserted the illegality defense, alleging that the seller was part of the illegal trust.[184] The lower court granted the seller's motion to strike the illegality defense.[185] On appeal, the U.S. Supreme Court upheld the lower court's decision.[186] Justice Brennan justified the enforcement remedy because the transaction was a "completed sale of onions at a fair price" and giving the sale full legal effect would not result in the Court's enforcement of an act in violation of the law.[187] The Court commented that as long as the Court itself would not be enforcing the precise conduct made unlawful by law, the courts should follow the overriding general policy "of preventing people from getting other people's property for nothing when they purport to be buying it."[188]

In *Gates v. River Construction Co.*,[189] plaintiff employee sued his employer for unpaid wages.[190] The employment agreement was to induce an alien to enter the United States without the requisite governmental approval in violation of federal immigration laws.[191] Defendant employer asserted illegality as a defense.[192] The trial court found in favor of the employer.[193]

On appeal, the Supreme Court of Alaska reversed the lower court's decision.[194] The court commented that allowing the employer, who knowingly participated in and promoted an illegal transaction, to profit at the expense of the

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182. 358 U.S. 516 (1959).

183. *Id.* at 516.

184. *Id.*

185. *Id.* at 517.

186. *Id.* at 521.

187. *Id.*

188. *Id.* at 520–21 (quoting Cont'l Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 271 (1908); *see also* D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 172–73, 178 (1915) (enforcing a purchase and sale agreement despite the fact that the seller was part of an illegal trust); Harris v. Runnels, 53 U.S. (12 How.) 79, 85–86 (1851) (enforcing a contract for a 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 was "seeking to add to his breach of the law the injustice of retaining the negroes without paying for them").

189. 515 P.2d 1020 (Alaska 1973).

190. *Id.* at 1021.

191. *Id.* at 1020–21.

192. *Id.* at 1021.

193. *Id.*

194. *Id.* at 1024.

employee would be "a harsh and undesirable consequence of the doctrine that illegal contracts are not to be enforced."[195] 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."[196]

By choosing to enforce the agreements, courts avoid the greater evil of forfeiture of property and opportunistic behavior even though granting relief effectively sanctioned plaintiffs' violation of the law.[197] Between a "clever scoundrel" and a regular criminal, courts seem to have decided to tolerate a regular criminal as the lesser evil.[198]

iv. Scenario Four: To Avoid Undermining the Law

This scenario exemplifies the Supreme Court's enforcement of an illegal agreement because employing the non-enforcement doctrine would have in fact undermined the purpose of the law violated by the agreement. For example, in *A.C. Frost & Co. v. Coeur D'Alene Mines Corp.*,[199] the plaintiff buyer sued defendant seller for breaching an option agreement to purchase defendant's treasury stock in exchange for money received by defendant from proceeds of a previous sale of treasury stock.[200] Defendant denied liability upon the ground, *inter alia*, that the agreement violated a securities law, requiring the treasury stock of the defendant corporation to be registered for sale.[201] Defendant alleged that it did not register the stocks in dispute prior to its sale to the plaintiff—a fact, alleged by defendant, known by the plaintiff to have rendered the transaction illegal.[202]

Despite the illegality of the agreement, the Supreme Court enforced the agreement because the violated statute was designed to protect investors by requiring publication of certain information concerning securities before

195. *Id.* at 1022.

196. *Id.*

197. In some cases, courts allowed recovery under quasi-contractual principles such as unjust enrichment. *See supra* Part III.B.2. However, recovery under quasi-contractual theories in those cases sometimes amount to full enforcement of the illegal agreement depending on the types of agreements. *See supra* Part III.B.3. For example, if a plaintiff is seeking to recover the purchase price of a sales agreement, awarding said plaintiff the purchase price under unjust enrichment or restitution, thereby enforcing the agreement, will in fact accomplish the same result. The difference is mostly semantic.

198. Harvard Note 1913, *supra* note 58, 740 (commenting that "[t]he 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").

199. 312 U.S. 38 (1941).

200. *Id.* at 39.

201. *Id.*

202. *Id.*

offering them for sale.[203] The Court found that refusing to enforce the agreement would have actually hindered the purpose of the securities law.[204]

c. Allowing Recovery Despite Illegality as the Lesser Evil

In some cases, courts have allowed recovery even though the agreement was illegal and not enforceable. Under this scenario, courts have rested their choices on quasi-contractual theories such as restitution, rescission, and unjust enrichment. Recovery in these situations is aimed at avoiding particularized, case specific, greater evils.

i. Scenario One: To Avoid Fraud

In *Brooks v. Martin*,[205] plaintiff Martin and defendant Brooks formed a partnership primarily aimed at purchasing land warrants, prior to their issuance, from soldiers pledged to them under a law passed by Congress.[206] The statute, in order to protect soldiers against malevolent land brokers and others who would take advantage of returning soldiers, prohibited any sale or agreement related to those warrants which have not been issued.[207] There was no dispute that the partnership was illegal.[208]

After Martin sold Brooks his 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 sale of his partnership interest, and for an accounting and division of the illegal partnership profits.[209] Brooks had in his possession lands, money, notes, mortgages, and the profits of the partnership, all of which comprised of the original capital advanced by Martin.[210] Brooks asserted, *inter alia*, illegality of the partnership business as a defense.[211]

The Court, finding Brooks to have obtained possession and control of the proceeds by hiding the true financial status of the partnership, rejected the illegality defense and granted the relief that Martin requested.[212] The Court,

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203. *Id.* at 42–43

204. *Id.* at 43; *see also* CORBIN, *supra* note 1, at § 1540, at 833 ("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 only and he is the only wrongdoer."); Kostritsky, *supra* note 9, at 156 (discussing the protected class doctrine).

205. 69 U.S. (2 Wall.) 70 (1864).

206. *Id.* at 71.

207. *Id.* at 72, 73–75.

208. *Id.* at 79.

209. *Id.* at 70–71, 82.

210. *Id.* at 70–71, 81.

211. *Id.* at 70.

212. *Id.* at 80.

noting the completion of the illegal transaction, ostensibly based its decision upon finding a fraudulent breach of a fiduciary duty Brooks' owed to Martin.[213]

Reading between the lines, one senses that the Court was clearly concerned about fairness, i.e., it would have been unfair if Martin were denied relief.[214] In addition, if the Court were to deny Martin relief, it would have permitted Brooks to retain the profits generated from the illegal partnership.[215] Even though granting the relief sanctioned the illegal partnership and amounted to full judicial enforcement of an illegal agreement, the Court avoided the greater evil of rewarding fraud and forfeiting property.[216]

ii. Scenario Two: To Avoid Opportunistic Behavior and Forfeiture of Property

In this scenario, courts have justified recovery under quasi-contractual theories, aimed at deterring illegal conduct and to avoid the twin evils of forfeiture and opportunism.

In *Nizamuddowlah v. Bengal Cabaret, Inc.*,[217] the plaintiff sued to recover payment for work completed despite relevant immigration laws forbidding his employment.[218] The New York Supreme Court, Appellate Division, considered the existing policy dilemma—a plaintiff who knowingly violated U.S. immigration laws seeking redress, and an equally culpable defendant who manipulated illegal immigrants to work for him.[219] The court reluctantly concluded that the only equitable option was to allow recovery under a quasi-contractual claim of unjust enrichment,[220] believing that to deny plaintiff's relief

213. *Id.* at 87.

214. *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").

215. *See id.* at 78–79, 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").

216. *See id.* at 82–83; *see also* Fellner v. Marino, 158 N.Y.S.2d 24, 33 (N.Y. App. Div. 1956) (allowing plaintiff to recover the money paid under an illegal contract despite the plaintiff's knowledge of illegality). The *Fellner* court commented: "Let 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." *Id. See also* Duval v. Wellman, 124 N.Y. 156, 163 (1891) (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").

217. 399 N.Y.S.2d 854 (1977).

218. *Id.* at 855.

219. *Id.* at 856.

220. *Id.* at 857.

would encourage the defendant, and others, to engage in the same illegal conduct.[221]

The grant of recovery in the above scenario, as exemplified in *Nizamuddowlah*, effectively rewards plaintiffs who also present themselves to court with unclean hands. Even though the *Nizamuddowlah* court allowed recovery under a claim of unjust enrichment and recovery essentially enforced the illegal employment agreement, by allowing recovery the court avoided the greater evil of encouraging opportunistic behavior and accompanying forfeiture of property.[222]

d. Denying Recovery as the Lesser Evil

In some cases, courts denied recovery where plaintiffs sought a return of money paid under an illegal agreement.[223] Denying recovery in those cases allows courts to deter illegal behavior, opportunistic behavior, and to avoid forfeiture of property.

i. Scenario One: To Avoid Aiding Corruption

In *Sinnair v. Le Roy*,[224] defendant, in exchange for $450, promised to procure a beer license for plaintiff or return the money.[225] When defendant was unable to obtain the license and refused to return the money, plaintiff sued to recover the money.[226] The lower court allowed recovery of the money.[227] On appeal, the Supreme Court of Washington reversed.[228] The court noted that evidence presented "contains the germ of possible corruption," and the "parties contemplated the use of means other than legal to accomplish the end desired."[229] Accordingly, the court was unwilling to "aid in the furtherance of an illegal transaction."[230]

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221. *See id.*; *see also* McCauley v. Michael, 256 N.W.2d 491, 501 (Minn. 1977) (denying enforcement of an illegal agreement, but allowing recovery of $500 paid to purchase shares of corporate stock under the illegal agreement); Hobbs v. Boatright, 93 S.W. 934, 937 (Mo. 1906) (holding that to allow plaintiff recovery serves the underlying public policy better than withholding relief because of the illegality of the contract).

222. *See supra* note 10 and accompanying text.

223. *See, e.g.*, *Nizamuddowlah*, 399 N.Y.S.2d at 855. These cases are different from the cases where plaintiffs sought to enforce the terms of illegal agreements.

224. 270 P.2d 800 (Wash. 1954).

225. *Id.* at 800.

226. *Id.* at 801.

227. *Id.* at 802.

228. *Id.*

229. *Id.*

230. *Id.*

ii. Scenario Two: To Avoid the Twin Evils of Property Forfeiture and Opportunism

In *Arcidi v. National Association of Government Employees*,[231] the plaintiff entered into a consulting agreement with the defendant.[232] Under the agreement, plaintiff, in exchange for $250,000, agreed to "secure the approval of a proposed real estate development by" a governmental agency.[233] The transacted agreement was illegal, however, because compensation conditioned upon a pending governmental decision violated state law.[234]

Subsequent to the approval of the project, defendant paid plaintiff $200,000, but refused to pay the remaining $50,000 balance.[235] When the plaintiff sued the defendant to recover the remaining $50,000, the defendant asserted the illegality defense against enforcement and counterclaimed seeking to recover the $200,000 already paid.[236]

The trial court granted summary judgment in favor of defendant, accepting the defendant's illegality defense argument and ordered the plaintiff to return the $200,000 paid.[237] The decision for both issues, the illegality defense and the counterclaim, was affirmed on appeal.[238]

Upon review by the Massachusetts Supreme Court, the court upheld the illegality defense, denying plaintiff relief related to the remaining $50,000 payment.[239] However, the court reversed the lower courts' decision with respect to defendant's counterclaim, finding that public interest 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.[240] If the court were to return to the defendant funds previously paid, it would have resulted in the compulsory forfeiture of the value bestowed upon defendant by plaintiff's consulting services, creating a windfall for the defendant. By denying

231. 856 N.E. 2d 167 (Mass. 2006).
232. *Id.* at 169.
233. *Id.*
234. *Id.*
235. *Id.* at 171.
236. *Id.* at 169.
237. *Id.*
238. *Id.* at 170.
239. *Id.* at 174.
240. *Id.* The *Arcidi* court's application of the non-enforcement rule has the same effect as 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. Ironically, 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 by applying two seemingly inconsistent rules. *See id.* Still, both rulings are consistent with the application of the lesser evil standard.

recovery under these circumstances, the court avoided the greater twin evils of forfeiture of property and opportunism.[241]

IV. REASONS FOR THE EXPLICIT ADOPTION OF THE LESSER EVIL PRINCIPLE

The current rule of non-enforcement, and its corresponding factually distinct exceptions, fails to adequately provide any clarity in this important area of contract law. In this era of increasing business regulations, clarity concerning the underlying principle of resolving illegal agreement disputes will usher in greater certainty and predictability to the marketplace.[242] Courts should explicitly adopt the lesser evil principle when adjudicating illegal agreement disputes for multiple reasons. Explicit adoption of 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, and it will not be a difficult task considering the 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 become more complicated due to increasing business regulations.

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

The current general rule of non-enforcement and its multiple exceptions have resulted in a confusing body of case law as illegality disputes can arise in myriad factual contexts. Generally, the application of the non-enforcement rule is considered necessary to deter illegal transactions, but in many cases, non-enforcement actually creates incentives to engage in more illegal or fraudulent conduct.[243]

The current formulation imposing a general rule of non-enforcement simply is an inadequate tool, a blunt instrument attempting to capture a myriad of factual complexities utilizing only a few decrepit principles when their application is difficult, if not impossible, to apply. [244] As a result, these feeble principles are not serviceable to courts in their efforts to balance multiple competing interests. In fact, the current rules actually become obstacles that courts feel compelled to overcome in order to avoid injustice under the facts of a particular case.[245]

This 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

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241. *See id.* at 173 (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").

242. Miller, *supra* note 9 at 1496.

243. *See supra* Part III.B.2.a.ii.

244. *See* Badawi, *supra* note 19, at 487; *see also* Harvard Note 1913, *supra* note 58, at 739–40 (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").

245. Harvard Note 1913, *supra* note 58 at 739–40.

violated antitrust laws, the U.S. Supreme Court reversed itself twice within thirteen years.[246] Initially, in *Connolly v. Union Sewer Pipe Co.*,[247] the Court enforced a sales agreement despite the plaintiff seller's role in an illegal trust.[248] Seven years later, in *Continental Wall Paper Co. v. Louis Voight & Sons Co.*,[249] arising out of an almost identical fact pattern, the Court reversed its position and refused to enforce a sales agreement in favor of the plaintiff seller.[250] Six years after *Continental Wall Paper*, the Court changed its mind yet again in *DR Wilder Manufacturing Co. v. Corn Products Refining Co.*,[251] unanimously ordering the enforcement of a sales agreement despite its violation of antitrust laws.[252]

One may wonder whether this change of heart would have occurred had the *Continental Wall Paper* Court focused on looking for the choice that caused the lesser evil. Justice Holmes, joined by three other dissenting justices, opined 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."[253] Justice Holmes' dissent in essence suggests that enforcing the agreement would have been the lesser evil in that case. Had the lesser evil principle been explicitly recognized, the majority may have enforced the agreement despite its illegality (as it did six years later).

B. The Lesser Evil Principle Will Help Courts Focus Their Analyses and Lead to More Certainty and Predictability

The strength of the lesser evil principle is its acceptance of the complexities giving rise to a particular dispute.[254] Instead of trying to fashion a standard for each case, an impossible task, the principle directs courts to focus on what is really at stake—the consequences of their decisions. While explicitly adopting the principle will not render these disputes any easier to adjudicate,[255] it will allow courts to better focus their analyses on their task at hand—resolving

246. *See* cases cited *infra* notes 247–52 and accompanying text.

247. 184 U.S. 540 (1902).

248. *Id.* at 550–52.

249. 212 U.S. 227 (1909).

250. *Id.* at 266–67.

251. 236 U.S. 165 (1915).

252. *Id.* at 177.

253. *Cont'l Wall Paper Co.*, 212 U.S. at 270–71.

254. *See* Bridgeman, *supra* note 30, at 1469. As critics may point out, this is also its weakness because it does not provide a substantive standard. However, the first step towards making it better is simply recognizing the principle explicitly. *Id.*

255. *See, e.g.*, Richard G. Singer, *Proportionate Thoughts About Proportionality*, 8 OHIO ST. J. CRIM. L. 217, 218 (2010). 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. *Id.* 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. *See also* SULLIVAN & FRASE, *supra* note 32, at 171.

disputes in a way that minimizes damage to important public interests.[256] Further, explicitly adopting the lesser evil 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.[257]

Explicit adoption of the lesser evil principle will not be difficult. As the above scenarios suggest, despite several courts' attempts to ground their reasoning in the existing rules and their associated exceptions, the courts were typically guided by the invisible presence of the lesser evil principle.[258]

Additionally, explicit adoption of the lesser evil principle will eventually lead to more predictability and certainty in the marketplace.[259] Moreover, these issues can increase transaction costs if parties have to expend resources to contract around the rules.[260] Finally, a lack of certainty with respect to illegal transaction adjudications can also result in over deterring innovative business transactions and under deterring illegal transactions.[261]

Therefore, explicit adoption of the lesser evil principle is urgently needed these days. The easy cases, which gave rise to the non-enforcement remedy historically, are increasingly less likely to occur because of potential sanctions imposed by criminal law.[262] Businesses now face a greater number of regulations over commercial transactions.[263] Under the current state of affairs, "failure to comply with the relevant provision risks a finding that the whole transaction is illegal" and therefore unenforceable.[264] In addition, the prevalence of business regulations means that the issues are likely going to become increasingly complicated, and will likely result in these difficult cases arriving

256. *See* Badawi, *supra* note 19, at 484–85.

257. Wade, *supra* note 10, at 60–62.

258. *Id. See also* cases cited *supra* Part III.B.

259. This Article does not suggest that adopting the lesser evil principle will eliminate all inconsistencies among courts. Still, as the system currently exists, courts face a tremendously difficult task in balancing competing interests in situations where no one interest holds a trump card. Such inconsistency is likely the result of simple differences of opinions while weighing multiple competing interests, which yields conflicting judicial decisions. As noted by one judge, these conflicting decisions can be attributed to different views of public policy among judges' as opposed to a difference in adjudicatory theory. *See* Birdsall v. Coon, 139 S.W. 243, 246 (Mo. Ct. App. 1911); *see also* Strong, *supra* note 17, at 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 these inconsistencies due to confusion surrounding applicable jurisprudential standards.

260. Badawi, *supra* note 19, at 487.

261. *Id.* at 488–89.

262. *Id.* at 487–88.

263. Paula Giliker, *Restitution, Reform and Illegality: An End to Transactional Uncertainty?*, 2001 SING. J. LEGAL STUD. 102, 105.

264. *Id.*

before the courts in a greater frequency.[265] Therefore, a clear standard guiding these courts will better help minimize uncertainty in the marketplace.

V. CONCLUSION

Courts must wrestle with competing interests when adjudicating illegal agreement disputes. While the general rule of non-enforcement is appealing, it is deceptively over-simplistic. Case review shows that courts have not applied the rule rigidly, and rightfully so.[266] Instead, courts have developed multiple exceptions to allow greater flexibility in order to adapt to different factual scenarios.[267] This flexibility allows courts 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.[268] Except for a few scholarly attempts to make sense of the case law,[269] there appears to be no unifying principle. However, close examination of the case law shows the guiding presence of the lesser evil principle, albeit implicitly.

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, allowing a refinement of the standards when applying the principle, and encouraging more consistent application of the principle.

Finally, explicit adoption of the principle will offer better guidance to practitioners when advising clients on these issues.

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265. Badawi, *supra* note 19, at 487–88.
266. Harvard Note 1913, *supra* note 58, at 739–40.
267. Wade, *supra* note 10, at 61–62.
268. *Id.*
269. *See, e.g.*, Furmston, *supra* note 10, at 268–69, 272–75; Wade, *supra* note 10, at 61–62.