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Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?

Harry G. Prince*

Whoever reads the count will see something is to be done on each side; that has been held to be a good consideration. The declaration is framed upon that. Then the next point is, that it is illegal. I am of opinion, that on the face of this count there is no illegality. If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.¹

INTRODUCTION

Parties generally enter into contracts confident that courts will enforce the agreement against a party who fails to render a promised performance when it becomes due.² Without the courts as an avenue for relief in the event of a breach, contracting parties would be extremely vulnerable and perhaps would refrain from bargaining. The maintenance of a judicial process to encourage contracting facilitates efficient commercial and other exchanges in our free-market society.³ Apart from

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

2. Cf. Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970) ("Our system . . . is not directed at *compulsion* of *promisors* to *prevent* breach; rather it is aimed at *relief* to *promisees* to *redress* breach.") (emphasis in original).

3. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629-30 (1943). Kessler states:

With the development of a free enterprise system based on an unheard of division of labor, capitalistic society needed a highly elastic legal institution to safeguard the exchange of goods and services on the market. Common law lawyers, responding to this social need, transformed "contract" from the clumsy institution that it was in the

concepts of economic efficiency, the role of the courts in enforcing promises is a vital corollary to the long-standing principle that the right to contract is an important aspect of individual freedom.⁴

Courts never have been available, however, to enforce every promise or purported contract.⁵ Rather, contract law has developed largely as a means of identifying when conduct has resulted in a contract and of placing certain limits on the enforceability of contracts.⁶ Even when all the essential require-

sixteenth century into a tool of almost unlimited usefulness and pliability. Contract thus became the indispensable instrument of the enterpriser, enabling him to go about his affairs in a rational way. Rational behavior within the context of our culture is only possible if agreements will be respected. It requires that reasonable expectations created by promises receive the protection of the law or else we will suffer the fate of Montesquieu's Troglodytes, who perished because they did not fulfill their promises. This idea permeates our whole law of contracts, the doctrines dealing with their formation, performance, impossibility and damages.

Thus freedom of contract does not commend itself for moral reasons only; it is also an eminently practical principle. It is the inevitable counterpart of a free enterprise system.

Id. (footnote omitted); see also Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 554-58 (1933) (historical observations on the relationship between the growth of contract and the growth of commerce); see generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.1 (2d ed. 1977); Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 743-44 (1982); Farber, *Contract Law and Modern Economic Theory*, 78 NW. U.L. REV. 303 (1983).

4. See *Baltimore & Ohio Southwestern Ry. v. Voight*, 176 U.S. 498, 505 (1899). The reasoning of the Court was undoubtedly based largely on the moralistic notion that parties should faithfully keep the promises that have been fairly bargained for:

[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.

Id. at 505 (quoting *Printing & Co. v. Sampson*, 19 L.R.-Eq. 462, 465 (1875)); see also Cohen, *supra* note 3, at 571-75 (indicating that a social duty to keep promises is implied as a normative obligation); Linzer, *On the Amoralism of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 112-17 (1981) (suggesting that the moral basis for enforcement may be stronger in a noncommercial setting).

5. See Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 588-89 (1969) ("No legal system devised by man has ever been reckless enough to make all promises enforceable.").

6. The growth of contract seems to spur the growth of limitations on contracts. As one commentator has noted:

Maine's observation that the progress of the law is from status to contract is, therefore, partly true in certain periods of expanding trade. But close on the heels of expansion comes consolidation or

ments for a contract are satisfied,⁷ the contract may be voidable if one of the parties lacks capacity because of infancy, mental illness, or the like.⁸ Moreover, contracts may be rendered unenforceable because of the application of the statute of frauds⁹ or some doctrine excusing performance such as mistake,¹⁰ duress,¹¹ impracticability of performance or frustration of purpose.¹² Finally, courts may refuse to enforce an otherwise valid contract on the grounds that it is illegal or, more properly stated, because it is against public policy.¹³

The doctrine of unenforceability based on public policy generated concern on the part of early jurists.¹⁴ While it is instinctive to conclude that courts should not enforce contracts structured to attain some reprehensible goal or to be performed in some reprehensible manner, it is equally instinctive to have some concern about courts possessing an unfettered ability to refuse enforcement of valid contracts solely on the basis of amorphous notions of morality or public good. Even the most

closer organization; and in the wake of increased freedom of contract we find increased regulation, either through the growth of custom and standardization or through direct legislation. At no times does a community completely abdicate its right to limit and regulate the effect of private agreements, a right that it must exercise to safeguard what it regards as the interest of all its members.

Cohen, *supra* note 3, at 588.

7. The essential elements for formation of enforceable contracts include manifestation of mutual assent to exchange promises or performance as consideration. RESTATEMENT (SECOND) OF CONTRACTS §§ 1, 17 (1979). Detrimental reliance is an alternative basis for formation of a contract. *See id.* §§ 82-94.

8. *See id.* §§ 12-16.

9. *See id.* §§ 131-37.

10. *See id.* §§ 151-58.

11. *See id.* §§ 174-77; *see also id.* §§ 159-73 (dealing with misrepresentation as a basis for making a contract voidable).

12. *See id.* §§ 261-72.

13. Although courts and scholars have often referred to this doctrine by the term "illegal contracts or bargains," that label is actually a misnomer, hence the change in title of the relevant chapter in the Restatement (Second) of Contracts to "Unenforceability on Grounds of Public Policy," *see* RESTATEMENT (SECOND) OF CONTRACTS ch. 8 (1979), from its title in the first Restatement of Contracts, "Illegal Bargains," *see* RESTATEMENT OF CONTRACTS ch. 18 (1932). Most of the types of contracts involved in this area are not illegal in that they violate some statutory prohibition. *See infra* notes 64-66 and accompanying text. Instead courts simply refuse to enforce these contracts or promises on the ground that they are contrary to public policy. *See* 54 A.L.I. PROC. 74-75 (1977) (comments of Reporter, Professor E. Allan Farnsworth, concerning change in title of chapter).

14. *See* Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 86-88 (1928) (citing contradictory opinions of 18th and 19th century judges concerning value of public policy generally in the common law, but including contract law).

even-handed and objective judges are likely to have very different opinions concerning morality or what conduct is consistent with the public good. Judges in different geographical regions are likely to have different perspectives as are judges in different periods of time.¹⁵ While some variation in law over time and among jurisdictions is unavoidable, and probably desirable, undue variation is not helpful in establishing the proper level of certainty in the law.¹⁶ The inherent vagueness present in public policy interests invites uncertainty.¹⁷ This concern about the potential for mischief under the guise of public policy may prove to be unwarranted, however, if courts judiciously apply the doctrine in a few, limited situations.¹⁸

15. See *infra* notes 20-22 and accompanying text; cf. B. CARDOZO, THE GROWTH OF THE LAW 144 (1924) ("What one judge most earnestly believes to be the right method is met by the challenge of men as able and conscientious who say it is the wrong one.").

16. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

17. Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 695 (1935). Gellhorn states:

The obvious criticism of any suggestion that the validity of contracts should depend upon an independent judicial answer to the question whether they comport with public policy, is that too much uncertainty would thus be injected into contractual relationships. If "public policy" should be defined as something having no relationship to the judgments formulated by Constitutions, statutes, and prior judicial and non-judicial investigations, but as being ascertainable only by an unassisted judicial discovery of "what is naturally and inherently just and right between man and man," there would be much to be said in favor of the criticism. But if a determination of the relevant public policy rests upon authoritative legislative pronouncement and upon intelligent effort to procure informative data, the criticism loses force. Of course it is true that in many situations neither courts nor the lawyers who argue before them have knowledge necessary to determine whether desirable public ends are to be attained by enforcement or refusal to enforce particular contracts. Just so, today, they have not the knowledge (nor do they very assiduously seek to acquire the knowledge) necessary to determine whether one decision or another will better serve the particular legislative purpose they discern in a penal statute. To make either determination, the good lawyer or the good judge must become adept in making essentially non-"legal" judgments based upon essentially non-"legal" materials.

Id. (footnote omitted); see also Winfield, *supra* note 14, at 92-93 (the concept of public policy is by nature elusive and leads to paradoxical results).

18. See *Moran v. Harris*, 131 Cal. App. 3d 913, 919-20, 182 Cal. Rptr. 519, 522 (1982). The court stated:

"Public policy" is a vague, somewhat troublesome and malleable expression. Frequently, it has been defined in conclusionary or visceral terms. For example, "Public policy means the public good. Anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel is against public policy." But it is exactly because of this subjective, amorphous definition and the variations in human

Observers of recent developments in contract law might doubt the ability of courts to reasonably apply the public policy doctrine in light of the courts' starkly conflicting applications in recent decisions on the enforceability of cohabitation agreements.¹⁹ For example, courts in some jurisdictions have held that cohabitation by an unmarried couple will not render unenforceable contracts for property division or continued support between the parties.²⁰ Other courts have maintained that cohabitation agreements involve immoral consideration and are therefore completely unenforceable as against public policy.²¹

response to the same facts, depending upon the philosophical or psychological perceptions of those involved, that courts have been cautious in blithely applying public policy reasons to nullify otherwise enforceable contracts. . . . Although the law has a genius for creativity, correctly refusing to remain immobile in what is seen as the proper case, juridical realization of the meandering nature of "public policy" necessitates judicial restraint.

Id. (citation omitted) (quoting *Noble v. City of Palo Alto*, 89 Cal. App. 47, 51, 264 P. 529, 530-31 (1928)).

19. The cohabitation agreement cases typically involve two unmarried people who have lived together for a period of time during which they pooled their resources and shared expenses. During the cohabitation, acquired property may have been placed in the name of one party, and one party may have refrained from working or pursuing an education as part of the cohabitation arrangement. Upon dissolution of the cohabitation arrangement, the party whose name is not on the property title or who has refrained from pursuing an education or career may sue to enforce promises of the other party to share the acquired property or to provide financial support in the event of separation. Such promises for division of property or provision of financial support may be either express or implied-in-fact. See *infra* note 157 for distinction between express and implied-in-fact promises. The party without the property may also advance a claim on a theory of implied-in-law or quasi-contract to recover the value of contributions or services rendered during the cohabitation. See *infra* note 157. The party being sued may defend on the grounds that the cohabitation arrangements involved sexual relations, and therefore illicit sex constituted part of the consideration, thereby rendering any connected promise unenforceable on grounds of public policy.

20. See, e.g., *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (en banc); *Mason v. Rostad*, 476 A.2d 662 (D.C. 1984); *Poe v. Estate of Levy*, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982); *Glasgo v. Glasgo*, — Ind. App. —, 410 N.E.2d 1325 (1980); *Donovan v. Scuderi*, 51 Md. App. 217, 443 A.2d 121 (1982) (dictum); *In re Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983); *Kinckenon v. Hue*, 207 Neb. 698, 344 N.W.2d 454 (1984); *Hay v. Hay*, — Nev. —, 678 P.2d 672 (1984); *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979); *Beal v. Beal*, 282 Or. 115, 577 P.2d 507 (1978) (en banc).

21. See, e.g., *Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977); *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. Ct. App. 1983), *cert. denied*, 443 So. 2d 1122 (La.), *cert. denied*, 104 S. Ct. 2389 (1984). These courts have found that cohabitation agreements are unenforceable because they are contrary to the public policy of promoting marriage over non-marital cohabitation arrangements. See also *Slocum v. Hammond*, 346 N.W.2d 485, 491 (Iowa 1984) (suggesting in dictum that cohabi-

Still other courts have arrived at Solomon-like decisions by enforcing some forms of cohabitation contracts while refusing to recognize others.²²

Responding to this inconsistency, commentators have often focused on a perceived need for legislative action to protect the cohabitants, including proposals for the grant of property rights as a matter of status rather than contract.²³ Little attention has been given, however, to whether the contract law doctrine of unenforceability on grounds of public policy operates in a proper or desirable manner in these cohabitation cases.

In the famous passage from an 1824 English case quoted

tation agreements would be contrary to public policy favoring *de jure* marriage); *Grishman v. Grishman*, 407 A.2d 9, 12 (Me. 1979) (citing *Hewitt* with approval in reversing trial court decision which included property acquired during pre-marriage cohabitation in marital property for purpose of division upon divorce); *Merrill v. Davis*, 100 N.M. 552, 673 P.2d 1285, 1287 (1983) (citing *Hewitt* with approval in denying claim based on implied agreement to share property acquired during cohabitation and implicitly questioning prior lower court decision allowing recovery on express cohabitation agreement).

22. See, e.g., *Carnes v. Sheldon*, 109 Mich. App. 204, 311 N.W.2d 747 (1981); *In re Estate of Alexander*, 445 So. 2d 836 (Miss. 1984); *Tapley v. Tapley*, 122 N.H. 727, 449 A.2d 1218 (1982); *Morone v. Morone*, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980). These courts have been willing to enforce express cohabitation agreements where meretricious sexual relations were not the sole consideration, but they have refused to recognize implied promises, at least those that involve domestic services. The decisions rest on the grounds that the expectations of the parties will not support an implied-in-fact contract, see *infra* notes 195-198 and accompanying text, and that to recognize implied-in-law or quasi-contractual remedies would be contrary to legislative policy reflected in statutes abolishing common law marriage, see *infra* note 179 and accompanying text. See also *Hill v. Ames*, 606 P.2d 388, 390 (Alaska 1980) (allowing for possible enforcement of express promise but leaving standing decisions apparently denying equitable remedies); *Cook v. Cook*, 142 Ariz. 573, 579-80, 691 P.2d 664, 670-71 (1984) (en banc) (enforcing express agreement but emphatically distinguishing it from implied contract for services).

23. See, e.g., *Blumberg, Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981); *Caudill, Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-Law Marriage*, 49 TENN. L. REV. 537 (1982); *Fineman, Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275; Note, *Minnesota's Cohabitation Statute*, 2 LAW & INEQUALITY 335 (1984); Comment, *The Enforcement of Cohabitation Agreements: Theories of Recovery for the Meretricious Spouse*, 61 NEB. L. REV. 138 (1982). The argument is that cohabitants become de facto spouses and that the law ought to provide for dissolution of such relationships. But see *Bruch, Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101 (1976); *Casad, Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again*, 77 MICH. L. REV. 47 (1978). These writers suggest contractual theories as a method for enforcing cohabitation agreements.

above,²⁴ Justice Burrough compared public policy to an unruly or wild horse, likely to carry one away from the well-trod path of sound law. The question is, however, whether the public policy doctrine in the years since that case has proven to be untamed, or whether it has proven to be more like a circus pony trodding along a familiar path and rarely departing from it. Based solely on the variance or flux in the cohabitation agreement cases, one might expect that public policy has proven itself to romp in an unbridled manner, with judges in different places and at different times reaching very different conclusions about morals and the public good and refusing to enforce contracts on that basis. A close examination of recent cases, however, indicates that the cohabitation agreement dispute is the exception rather than the rule in public policy cases. The types of public policy limits and the application of those limits in other contract cases have proven constant. The main problem with the doctrine in the cohabitation area has not been the presence of great variance in perceptions of public policy. Rather, the problems with the doctrine have been a lack of preciseness in defining public policy interests and a lack of flexibility in assuring that the disposition of cases legitimately involving public policy interests is consistent with actually furthering those interests. 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.

This Article surveys the public policy doctrine and challenges some jurisdictions' application of the public policy doctrine to cohabitation agreement cases. The first half of the Article describes the public policy doctrine and its evolution. This section examines the sources of public policy interests and the application of the doctrine to contract cases in general. The second half of the Article specifically examines the judicial application of the doctrine to cohabitation agreements. This section examines the need for proper identification of the boundaries of existing public policy interests and proper application of those interests. It also suggests alternative approaches for the equitable disposition of cohabitation cases.

24. See *supra* text accompanying note 1.

I. THE PUBLIC POLICY DOCTRINE AND ITS EVOLUTION

An early commentator, focusing on public policy in the common law tradition, identified two ways in which courts use public policy in reaching decisions.²⁵ A court might either base its decision expressly on notions of public policy or lace its decision with public policy principles in the absence of statutory and decisional law to serve as precedent. In older court decisions, the latter use was more prevalent because of the lack of judicial precedent and the lack of comprehensive statutes.²⁶ The courts' use of public policy in this way helped develop rules that subsequently took on their own vitality without constant need for reaffirmation. Now, such hardened decisional law²⁷ and more comprehensive statutory law²⁸ provide rules that are relatively certain and against which parties can confidently gauge and plan their conduct. The objections to the public policy doctrine are almost entirely based on the perception that it lacks the degree of certainty found in other rules.²⁹

The phrasing of the public policy doctrine as applied to contracts has been fairly consistent across time and jurisdictions. The Anglo-American courts have stated repeatedly that they will not enforce contracts that are contrary to public policy in that they injure the public welfare or interests, or are contrary to public decency, sound policy, and good morals.³⁰ The proffered reasons for refusing to enforce the contract or

25. See Winfield, *supra* note 14, at 77.

26. *Id.*

27. See *supra* notes 8-12 and accompanying text.

28. For examples of cases involving statutory public policy, see *infra* notes 65-66.

29. Similar uncertainty objections have been raised concerning the doctrine of unconscionability. See Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 931 (1969). But see E. FARNSWORTH, CONTRACTS § 4.28 (1982) (concluding that on the whole, courts have been cautious in applying the doctrine, thereby limiting the perceived uncertainty).

30. The Supreme Court has stated:

In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. . . . It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, . . . no alleged right founded upon it can be enforced in a court of justice.

Trist v. Child, 88 U.S. (21 Wall.) 441, 448 (1874). This rule has also been acknowledged by state courts. See, e.g., Wood v. Casserleigh, 30 Colo. 287, 290-92, 71 P. 360, 361 (1902); Roanoke Agency, Inc. v. Edgar, 101 Ill. 2d 315, 461 N.E.2d 1365, 1371 (1984); Enders v. Enders, 164 Pa. 266, 271, 30 A. 129, 130 (1894).

promise³¹ found to be contrary to public policy are generally twofold.³² One reason is that resort to the courts to enforce a contract which is contrary to public policy is a misuse of the courts; enforcement would be an improper function for the courts to assume.³³ If the courts were to enforce such contracts they would be acting against the public good and interest, and perhaps fostering such unwanted activity on the part of private individuals. This possible encouragement of bad conduct leads to the other reason for not enforcing contracts contrary to public policy: courts hope to discourage such unwanted private activity by refusing enforcement.³⁴

When a court is faced with a contract that may be contrary to public policy, a three-step analysis is in order. The court must first ascertain the relevant public interest. Next, the court must verify that there is a conflict between that interest and the contract in question. Then the court must determine what remedy would best serve the public policy interest. In deciding what comprises public interests, the courts look to legislative enactments as well as to established notions of public decency that are reflected in past judicial decisions.³⁵ This identification of public goals and interest can be made with more certainty when legislative enactments exist.³⁶ Legislative public policy derives from several sources: federal and state constitutions, federal and state legislation, administrative agency rules, and local ordinances.³⁷ The basis for the statutory public policy rule is that a duly constituted, public representative body has established law that reflects some public interest. The courts are then bound to act in accordance with this statutory public policy.

31. It is possible that enforcement may be refused to the entirety of the contract, a promise, a term, or part of a term such as a condition. See RESTATEMENT (SECOND) OF CONTRACT §§ 178, 184 (1979).

32. See E. FARNSWORTH, CONTRACTS § 5.1 (1982); see also Shand, *Unblinking the Unruly Horse: Public Policy in the Law of Contract*, 30 CAMBRIDGE L.J. 144, 148-50 (1972) (acknowledging and dismissing punitive goals as a possible third justification for the doctrine).

33. E. FARNSWORTH, CONTRACTS § 5.1 (1982).

34. *Id.*

35. See *Roanoke Agency, Inc. v. Edgar*, 101 Ill. 2d 315, 461 N.E.2d 1365, 1371 (1984); *Haakinson & Beatty Co. v. Inland Ins. Co.*, 216 Neb. 426, 429, 344 N.W.2d 454, 457 (1984).

36. Legislatures have increasingly enacted legislation to serve the public good. See RESTATEMENT (SECOND) OF CONTRACTS § 179 comment b (1979); Gellhorn, *supra* note 17, at 679. The legislatures are now the primary authorities on public policy and the courts serve the role of interstitialists.

37. See RESTATEMENT (SECOND) OF CONTRACTS § 178 comment a (1979).

When the courts are without relevant legislative direction, however, they must focus on the specific policy standards accepted by society. Courts rely on their subjective perceptions to determine these societal standards. These perceptions will almost certainly vary depending on how judges view their social environment, where the environment is located and what the current societal morals are. Additionally, courts sometimes encounter contracts that pose novel conflicts with existing notions of public morality. Courts have consistently re-emphasized, however, that decisions to void an otherwise valid contract should be reached with great caution, lest the varying opinions of judges as to moral decency and public good usurp the role to be played by the more certain rules of contract law.³⁸ Furthermore, courts must properly restrict the boundaries of the public policy doctrine so that only those contracts that are clearly against public policy are not enforced.³⁹

Allowing that some change, particularly toward discarding obsolete rules of the public policy doctrine, might be expected and desirable,⁴⁰ the question still remains whether the rules of

38. See *Superior Oil Co. v. Western Slope Gas Co.*, 549 F. Supp. 463, 467-68 (D. Colo. 1982) (applying Colorado law), *aff'd*, 758 F.2d 500 (10th Cir. 1985); *Stephens v. Southern Pac. Co.*, 109 Cal. 86, 89-90, 41 P. 783, 784 (1895); *Haakinson & Beatty Co. v. Inland Ins. Co.*, 216 Neb. 426, 429, 344 N.W.2d 454, 457 (1984).

39. For example, it would be wrong for a court to decide, as did the court in *Rehak v. Mathias*, 239 Ga. 541, 238 S.E.2d 81 (1977), that cohabitation by two parties automatically disables the parties from entering into *any* enforceable agreement because of a presumption of immorality attached to unmarried cohabiting couples. The public policy rules in cohabitation cases, whether derived from an interest in discouraging meretricious sexual relations or an interest in promoting marriage, are simply not that absolute or broad and thus should not be applied so freely. For criticism of the *Rehak* decision, see *infra* note 141.

40. As society changes in its economic and social makeup, the perception is that its policy interests also need to change. See RESTATEMENT (SECOND) OF CONTRACTS § 179 comment a (1979). People expect judges to recognize that the public interests do change and that the rules based on those public interests must change also. The difficulty in the task facing the courts is recognizing when the public interests have changed enough so that a rule has become obsolete. Courts must also recognize when a new public interest has risen to a level such that a new rule is necessary to protect the interest. When evidence of measurable erosion of a former public interest is present, courts should act quickly to acknowledge this diminution of interest and should cease denying enforcement of related contracts. In contrast, when courts deal with a new public interest, they should refrain from denying enforcement of a contract until that interest becomes certain and identified, preferably through legislative enactment. A strong argument can be made that present day courts should not attempt to foster new doctrines of public policy at all; they should simply continue to recognize long-standing policies and any new standards de-

public policy have shifted unevenly or have remained constant. An examination of an early book on public policy by Greenwood, the first Restatement of Contracts, and the Restatement (Second) of Contracts suggests that the categories of public policy have not changed. Greenwood's work, published in 1886,⁴¹ lists many topic areas, but they can be condensed into seven broad areas of public policy.⁴² The first Restatement, written between 1923 and 1932,⁴³ lists nine areas of public policy in its section on illegal bargains.⁴⁴ These nine areas, however, are substantially the same as the seven areas listed in Greenwood.⁴⁵ The treatment of public policy in the Restatement (Second) of Contracts is greatly abbreviated. The Restatement (Second) of Contracts, written between 1962 and 1979,⁴⁶ established a general balancing test that is applicable to all questions of public policy except when legislation specifically provides that the contracts are unenforceable.⁴⁷ Consequently, the Restatement (Second) of Contracts is designed to have a broad application to all the categories *previously* included.⁴⁸ Although some of the cases cited in Greenwood reflect perceptions of public interests

rived from emerging legislation. See RESTATEMENT (SECOND) OF CONTRACTS § 179 comment b (1979) ("The declaration of public policy has now become largely the province of legislators rather than judges. This is in part because legislators are supported by facilities for factual investigations and can be more responsive to the general public.").

41. See E. GREENHOOD, *THE DOCTRINE OF PUBLIC POLICY IN THE LAW OF CONTRACTS—REDUCED TO RULES* (1886).

42. The rather massive text includes thirty-eight subdivisions. The seven condensed areas include contracts which are contrary to statutory law, contracts that are harmful to marriage or domestic relations, contracts affecting the rights of third parties, contracts to exculpate or indemnify for negligence, contracts abridging public or private fiduciary duty, contracts affecting administration of justice, and contracts for commercial freedom or restraint on trade.

43. See RESTATEMENT OF CONTRACTS introduction, at vii (1932).

44. See RESTATEMENT OF CONTRACTS ch. 18 (1932). The bargains deemed illegal are those that involved restraint of trade, wagering, usury, Sunday contracts, obstructing the administration of justice, violating a public or fiduciary duty, injuring third parties, violating a statute, or domestic relations. See *id.*

45. Compare the areas listed in note 44 to those listed in note 42.

46. See RESTATEMENT (SECOND) OF CONTRACTS foreword, at VII (1979). The chapter entitled "Unenforceability on Grounds of Public Policy" was discussed by the American Law Institute in 1977. 54 A.L.I. PROC. 72-176 (1977).

47. See *infra* note 76 and accompanying text.

48. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 1, reporter's note (1979). Although discrete treatment is given to only two topics, restraint of trade and impairment of family relations, the other subject areas included in Greenwood and the first Restatement of Contracts are found in a grouping of "Other Protected Interests" or in the comments and illustrations throughout the chapter. *Id.* ch. 8.

yielding decisions that probably would not be rendered today,⁴⁹ the broad topics discussed in *Greenhood* are consistent with those included in the first Restatement and the Restatement (Second) of Contracts. Therefore, it appears that the basic rules of public policy have not shifted unevenly.

The Reporter's Note to section 179 of the Restatement (Second) of Contracts identifies areas of public policy interest that have been deemed obsolete, rather than characterized as changes in statutory law.⁵⁰ Specifically, the note cites two instances in which courts found the public policy in question obsolete.⁵¹ In one, *Marvin v. Marvin*,⁵² the dispute involved the enforceability of express or implied promises to share property and provide financial support after a discontinuation of the relationship between a cohabiting unmarried, heterosexual couple.⁵³ The *Marvin* court decided that cohabitation agree-

49. Consider *Greenhood's* digest of a 1825 case: "A prints a book for B, the book being a history of the amours of a woman of pleasure, and of her adventures with persons of rank and distinction. He cannot recover his bill." E. GREENHOOD, *supra* note 41, at 202 (citing *Poplett v. Stockdale*, Ry. & M. 337, 171 Eng. Rep. 1041 (N.P. 1825)). Another example is his digest of two cases from the latter part of the 19th century concerning verbal attack upon an established religion: "A promised to let B have his hall for the delivery of lectures. B, however, desired it for the purpose of delivering a lecture against Christianity. A, learning of B's purpose, broke his promise. B cannot recover for the breach." E. GREENHOOD, *supra* note 41, at 207 (citing *Pringle v. Corp. of Naponee*, 43 Upper Can. Q.B. 285 (1878) and *Cowan v. Milbourne*, 2 L.R.-Ex. 230 (1867)). A present day court would, without doubt, enforce these two types of contracts. While many people might still find the objectives of the contracts somewhat offensive, the modern perception of the vital public interest in freedom of speech would lend support to the enforcement of contracts for that type of publication or hall rental. The essential public interest in these areas has not changed in a fundamental way; rather the public interest has become more refined due to other interests such as freedom of speech. The courts should recognize such refinements and rely on them in decisions granting enforcement of such contracts.

50. See RESTATEMENT (SECOND) OF CONTRACTS § 179, reporter's note (1979).

51. See *id.* (citing *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) and *Davis v. Boston Mut. Life Ins. Co.*, 370 Mass. 602, 351 N.E.2d 207 (1976)).

52. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

53. The *Marvin* case generated considerable interest because famous movie actor Lee Marvin was the defendant. Lee Marvin lived with Michelle Marvin for seven years. During that time he continued his career and acquired substantial earnings and property in his name while she discontinued her career in order to devote her time to homemaking for the couple. Upon dissolution of the cohabitation arrangement, Lee Marvin provided support to Michelle Marvin for over one year before refusing to continue. At that time Michelle Marvin brought suit to enforce an oral agreement to "combine their efforts and earnings" and "share equally any and all property accumulated as

ments were not *per se* contrary to public policy and should be enforced within limits.⁵⁴

The reference to the *Marvin* case in the reporter's note suggests that the decision reflected a marked departure from some prior established rule of public policy because of the change in public attitude towards cohabitation. It is arguable, however, that *Marvin* does not represent an unprecedented shift in public policy interests or public morals, but rather a more exact application of preexisting rules attendant to cohabitation cases.⁵⁵ The *Marvin* court refined its determination of the relevant public policy interests involved in a cohabitation agreement case and the types of agreements that the doctrine should render unenforceable.⁵⁶

In *Davis v. Boston Mutual Life Insurance Co.*,⁵⁷ the other case cited by the reporter's note to section 179, the dispute involved the enforceability of a life insurance contract when the

a result of their efforts whether individual or combined." *Id.* at 666-67, 557 P.2d at 110, 134 Cal. Rptr. at 820. Lee Marvin defended on several theories including unenforceability on grounds of public policy because of their unmarried cohabitation. *Id.* at 669, 557 P.2d at 112, 134 Cal. Rptr. at 821. The court rejected this theory, concluding that a sexual relationship would invalidate an agreement only if the agreement expressly and inseparably rested upon a consideration of meretricious sexual services. *Id.* at 670-72, 557 P.2d at 113-14, 134 Cal. Rptr. at 822-23.

The case only involved a cause of action based upon an alleged express agreement. Nonetheless, the court considered whether the complaint could be amended to state a cause of action based upon theories of implied contract or equitable relief. *Id.* at 675, 557 P.2d at 116, 134 Cal. Rptr. at 825. The court concluded that, in the absence of an express agreement, those theories could provide a remedy consistent with the parties' lawful expectations. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. In reaching this conclusion, the court dismissed suggestions that such a result would be contrary to the public policies of promoting marriage, *id.* at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831, and discouraging meretricious sex, *id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831, or contrary to statutorily based public policy against common law marriage, *id.* at 685 n.24, 557 P.2d at 122 n.24, 134 Cal. Rptr. at 831 n.24. Justice Clark did dissent on the issue of allowing recovery on a basis beyond express or implied-in-fact agreements, on grounds that recovery on purely equitable grounds might be inconsistent with legislative policy reflected in the family law statutes. *Id.* at 685-86, 557 P.2d at 123-24, 134 Cal. Rptr. at 832-33 (Clark, J., concurring and dissenting).

54. *See id.*

55. *See infra* notes 202-205 and accompanying text.

56. *Marvin* has been called "one of the most misunderstood decisions of modern times." Kay & Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CAL. L. REV. 938, 954 (1977). That description most aptly applies to its relationship to prior case law. *Id.* at 956-62.

57. 370 Mass. 602, 351 N.E.2d 207 (1976).

insured died as a result of his criminal activity.⁵⁸ The *Davis* court held that the beneficiary was entitled to recover⁵⁹ despite a contrary rule in that jurisdiction.⁶⁰ Again, this does not represent a large shift in public policy; the court emphasized that it was harmonizing its approach to this situation with the approach of other jurisdictions.⁶¹

A careful study of *Marvin* and *Davis* illustrates that although in theory the public policy doctrine seems dynamic rather than static, in actuality there has been very little change since Greenwood's work on public policy limits on contracts. Those changes in public policy that have occurred have undoubtedly resulted from legislation rather than judicial decisions.⁶²

Given that the public policy interests have not changed drastically over the years, the first step of the public policy doctrine analysis, identifying the relevant statutory or common law public policy that a contract may contradict, is not usually the hardest step. The next step, determining whether the contract or promise is contradictory and therefore presumably unenforceable, presents more problems. There are several ways in which a contract may be contrary to *statutory* public policy.⁶³ The most obvious is when a contract is expressly prohibited by a statute.⁶⁴ Although these cases are rare, there is no doubt

58. *Id.* at 603-04, 351 N.E.2d at 208.

59. *Id.* at 607-08, 351 N.E.2d at 210.

60. The court in *Davis* cites a jagged line of authority that ultimately produced the rule, based on public policy, that even an innocent beneficiary could not recover on a life insurance contract if the insured died while in the commission of or as a result of his own criminal act. *Id.* at 603, 351 N.E.2d at 207. The *Davis* court overruled a 1951 decision, *Molloy v. John Hancock Mut. Life Ins. Co.*, 327 Mass. 181, 97 N.E.2d 422 (1951), which was based on this rule.

61. The *Davis* court noted that the line of authority supporting the rule was weak and that some of the decisions upon which *Molloy* had relied had been rejected by many courts. *Davis*, 370 Mass. at 607-08, 351 N.E.2d at 210.

62. See RESTATEMENT (SECOND) OF CONTRACTS introductory note, ch. 8, at 3-4 (1979) (areas in which modern legislation has become preeminent include labor agreements, restraint of trade, usury, gambling, administration of justice, arbitration, and responsibilities of public officials).

63. See generally Gellhorn, *supra* note 17; Note, *The Doctrine of Illegality and Petty Offenders: Can Quasi-Contract Bring Justice?*, 42 NOTRE DAME LAW. 46 (1966); Comment, *Contracts in Violation of Statutes—Necessarily Illegal?*, 5 UCLA-ALASKA L. REV. 381 (1976).

64. Examples include legislation concerning gambling contracts, such as ILL. ANN. STAT. ch. 38, § 28.7 (Smith-Hurd Supp. 1985) which states:

§ 28-7. Gambling contracts void. (a) All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn, or entered into, or executed by any person whatsoever, where the whole or

that courts may not enforce such agreements. Most cases involving statutorily based public policy, however, do not involve express legislative prohibitions against enforcement of a contract. For example, a contract may involve a promise to violate a statute as consideration.⁶⁵ Similarly, the objective of the con-

any part of the consideration thereof shall be for any money or thing of value, won or obtained in violation of any Section of this Article are null and void.

(b) Any obligation void under this Section may be set aside and vacated by any court of competent jurisdiction, upon a complaint filed for that purpose, by the person so granting, giving, entering into, or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser or other person interested therein; or if a judgment, the same may be set aside on motion of any person aforesaid, on due notice thereof given.

(c) No assignment of any obligation void under this Section may in any manner affect the defense of the person giving, granting, drawing, entering into or executing such obligation, or the remedies of any person interested therein.

Id. Other examples include legislation concerning acceleration clauses in consumer contracts, such as N.J. STAT. ANN. § 17:16C-35 (West 1984) which states: § 17:16C-35. Prohibited contract provisions; acceleration clause

No retail installment contract or retail charge account or separate instruments executed in connection therewith shall contain any acceleration clause under which any part or all of the balance, not yet matured, may be declared immediately due and payable because the retail seller or holder deems himself to be insecure and any such provision shall be void and unenforceable.

Id.

65. See, e.g., *McBrearty v. United States Taxpayers Union*, 668 F.2d 450, 450-51 (8th Cir. 1982) (contract to pay expenses of incarceration upon conviction for violation of tax laws not enforced); *Aiea Lani Corp. v. Hawaii Escrow & Title, Inc.*, 64 Hawaii 638, 647, 647 P.2d 257, 263 (1982) (agreement for kick-back fees contrary to prohibition in federal Real Estate Settlement Procedures Act); *Lewis v. City of Washington*, 63 N.C. App. 553, 555, 305 S.E.2d 752, 755, *modified*, 309 N.C. 818, 310 S.E.2d 610 (1983) (lease agreement requiring that buildings be constructed where prohibited by zoning code was not enforceable when city refused to change zoning law); *Ogan v. Ellison*, 297 Or. 25, 682 P.2d 760, 764 (1984) (en banc) (contract to purchase portion of land unit without governmental approval of partition as required by state statute was unenforceable by seller of property); *Mountain Fir Lumber Co. v. Employee Benefits Ins. Co.*, 296 Or. 639, 679 P.2d 296, 298-99 (1984) (oral agreement for partial rebate of workers' compensation insurance premium contrary to state statutory provisions); *Springer v. Rosauer*, 31 Wash. App. 418, 421-22, 641 P.2d 1216, 1218 (1982) (employee not licensed to sell stock could not recover commission for finding purchasers for company's stock); cf. *Aetna Screw Prods. Co. v. Borg*, 116 Ill. App. 3d 206, 210-12, 451 N.E.2d 1260, 1264 (1983) (defendant was unable to prove that tax indemnification provision of contract for sale of business was tainted by collateral agreement to illegally understate inventory). Each of these examples involves some rather obvious public interest: the procurement of insurance should not involve improper inducements or involve kickbacks that unduly increase premiums; municipalities should control building to provide for orderly expansion of the city; persons selling securities should be of reputable character as evidenced by licensing; and each person ought to con-

tract may conflict with the purpose of a statute although it does not involve a performance that actually violates it.⁶⁶ When faced with a contract running counter to such statutes and policy, courts should reach an outcome consistent with the evident state policy interests.

When persuaded that a contract is indeed contrary to public policy, be it statutory or common law, courts have generally responded by refusing to aid either party and simply leaving both parties where the court found them.⁶⁷ In cases where the contracts are wholly executory at the time the unenforceability is determined, this result would not be so unfair since neither party has yet given anything. In those instances where parties

tribute a fair share of taxes for support of government and government services.

66. *See, e.g.*, *Shadis v. Beal*, 520 F. Supp. 858, 864-65 (E.D. Pa. 1981) (contract provision between state and legal services organization prohibiting attorney's fees in civil rights cases was contrary to statute which allowed legal recourse to elderly and low-income persons), *aff'd*, 685 F.2d 824 (3d Cir.), *cert. denied sub nom.* *O'Bannon v. Shadis*, 459 U.S. 970 (1982); *Evans Prods. Co. v. Millmen's Union No. 550*, 159 Cal. App. 3d 815, 819, 205 Cal. Rptr. 731, 734 (1984) (employer's agreement to hire persons recommended by union could theoretically run contrary to laws on child labor); *Emory Univ. v. Porubiansky*, 248 Ga. 391, 394, 282 S.E.2d 903, 905 (1981) (university dental clinic could not contract against liability when state statute imposed affirmative duty to exercise profession with reasonable degree of care and skill and provided that failure to exercise such care would constitute an actionable tort); *Klubeck v. Div. Medical X-Ray, Inc.*, 108 Ill. App. 3d 630, 634-36, 439 N.E.2d 506, 509-10 (1982) (agreement by physician to transfer right to payment under state medical aid statute was unenforceable where statute provided that all aid would be unalienable); *Meehan v. Meehan*, — Ind. —, 425 N.E.2d 157, 160 (1981) (divorce settlement agreement could not immutably establish child support obligation when state statute expressly provided that either party could seek modification or revocation on basis of changed circumstances); *McMillan v. Iserman*, 120 Mich. App. 785, 794-95, 327 N.W.2d 559, 563 (1982) (restrictive covenant intended to prohibit use of property by handicapped individuals was contrary to statutory equal opportunity policy); *Glengariff Corp. v. Snook*, 122 Misc. 2d 784, 790-92, 471 N.Y.S.2d 973, 977-78 (N.Y. Sup. Ct. 1984) (agreement with nursing home could not waive statutory right to have medicaid payments constitute payment in full for services by nursing home); *Durham v. Ciba-Geigy Corp.*, 315 N.W.2d 696, 700 (S.D. 1982) (pesticide manufacturer could not contract against liability for injury resulting from mislabeling where state statute reflected intent to protect users from falsely labeled pesticides).

67. *See, e.g.*, *Weil v. Neary*, 278 U.S. 160, 174 (1929); *Anabas Export Ltd. v. Alper Indus. Inc.*, 603 F. Supp. 1275, 1278 (S.D.N.Y. 1985). One analysis supporting this approach focuses on the requirement that for a valid bilateral contract there must be consideration on both sides. If the promise of one party is illegal, then it does not constitute valid consideration, and no part of the agreement is enforceable by either party. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 22-3 (2d ed. 1977); *see also* L. SIMPSON, *CONTRACTS* § 222 (1965) (citing *Holmon v. Johnson*, 1 Cowper 341, 98 Eng. Rep. 1120 (K.B. 1775)).

have performed, however, this result can cause a drastic forfeiture and corresponding unjust enrichment. Consider the example of a consumer who pays a great sum of money to a breaching construction repair company under an oral contract that is deemed contrary to the public policy found in a statute requiring that such consumer repair agreements be in writing.⁶⁸ To leave the parties where they are found would cause a forfeiture on the part of the consumer and unjust enrichment on the part of the company. The public policy behind the statute requiring a written contract and the nature of the proscribed act raises questions as to the justice of this result.

Although there is substantial precedent for leaving the parties where found,⁶⁹ a substantial argument can be made for a more flexible approach.⁷⁰ Courts in fact have used a variety of

68. This hypothetical is based on *Gannon & Son, Inc. v. Emerson*, 291 Md. 443, 435 A.2d 449 (1981), which involved the converse situation.

69. See *supra* note 67. In *Weil v. Neary*, the Court considered an argument that an improper fee splitting arrangement between attorneys for a bankrupt debtor and his creditors had resulted in a useful settlement and no actual harm, the court stated:

But this is not a sufficient answer to the charge of illegality. The contract is contrary to public policy—plainly so. What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases. . . . Enforcement of such contracts when actual evil does not follow would destroy the safeguards of the law and lessen the prevention of abuses.

. . . .

Where a party seeks to enforce a contract and it is found to be invalid because contrary to public policy, the usual result is that the court dismisses the action and leaves the parties as it finds them.

Weil v. Neary, 278 U.S. 160, 173-74 (1928) (citations omitted).

70. Professor Walter Gellhorn has strongly appealed for flexibility in this area:

In the field of contracts, in particular, the courts have failed to develop a useful approach to [determine whether penal statutes bar contract actions or remedies]. The difficulty has lain in their general unwillingness to accept realistically the proposition that the legislature, when adopting a penal statute, has rarely had in mind the problems of contract law that may later arise. Legislators are prone to regard the criminal law as the definitive disposition of undesirable activities. Make something a crime and that thing will promptly disappear, except in so far as a few depraved individuals may continue in their wayward course. If, contrary to expectation, the antisocial manifestations do not vanish forthwith, the cure is a more stringent punishment, to intimidate recalcitrants into a law-abiding frame of mind. Time after time has this progression of ideas appeared; it is almost a pattern of habit with legislators and, even more generally, with the public at large. Despite this general poverty of imagination upon the part of the statute-makers, the courts have persisted in speculating (and in reaching divergent conclusions) as to whether the legislature "intended" contracts to be treated as void when they ran afoul of laws

exceptions to lessen the effect of the general principle,⁷¹ including the doctrine of severability. If a contract contains a portion which is contrary to public policy but has other valid portions, then either the valid portions should be enforced, if they are proportionately divisible from the unenforceable parts,⁷² or the unenforceable portions severed, if the severable term does not go to the essence of the exchange.⁷³ If enforcement of the remaining portions after division or severance would yield an unfair bargain, however, the court should refuse to enforce the whole contract.⁷⁴ Courts should especially deny enforcement of divided or severed contracts if even partial enforcement would still encourage conduct in contravention of public policy.

More significant than the use of the severability doctrine or other patchwork exceptions, the courts of several jurisdictions,⁷⁵ as well as the Restatement (Second) of Contracts, in

which penalized some act of the contractors but which said nothing concerning enforcement of the bargains.

. . . . [T]he courts must now be prepared to utilize [penal statutes] in weighing the question whether they will aid in enforcing contracts which, while not expressly banned by the legislature, have some tendency to bring about the results which have been officially stigmatized as undesirable. The penal statutes thus become significant not as controlling the disposition of a civil case, but as enlightening the judiciary concerning specific "public policies." In approaching the cases, the judges are not bound to regard as void every contract which seems in some way to fall within the general aura of the criminal law, but only those whose enforcement, they are persuaded, after respectfully studying the "public policy" involved, will disserve the general interest as it has been indicated by the legislature.

Gellhorn, *supra* note 17, at 682, 686 (footnote omitted).

71. See Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV. 261 (1947) (discussing series of exceptions under which courts have granted at least restitution to party to "illegal" transaction).

72. See RESTATEMENT (SECOND) OF CONTRACTS §§ 183, 195 (1979).

73. See *id.* §§ 184, 195.

74. See *id.* § 184 comment b; E. FARNSWORTH, CONTRACTS § 5.8, at 360-61 (1982); see also *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984) (dictum).

75. See *Key Bank v. Crawford*, 600 F. Supp. 843, 845-46 (E.D. Pa. 1985); *Gannon & Son, Inc. v. Emerson*, 291 Md. 443, 452-53, 435 A.2d 449, 454 (1981); *Ogan v. Ellison*, 297 Or. 25, 682 P.2d 760, 763-64 (1984) (en banc); *Fitzpatrick v. Shay*, 314 Pa. Super. 450, 458-59, 461 A.2d 243, 247-48 (1983); *Goldberg v. Sanglier*, 96 Wash. 2d 874, 883-88, 639 P.2d 1347, 1353-55 (1982), *amended*, — Wash. 2d — 647 P.2d 489 (1982).

A digest of two of these cases will illustrate this flexible approach. In *Ogan v. Ellison*, 297 Or. 25, 682 P.2d 760 (1984), the Supreme Court of Oregon considered a contract that involved the sale of partitioned land. The government, however, had not approved the partitioning as required by statute. *Id.* at —, 682 P.2d at 761-62. The buyer, alleging that the seller had misrepresented the legality of the transaction, wanted to recover damages on the con-

section 178,⁷⁶ have adopted a more flexible approach as a basic

tract. The court considered whether the seller could take advantage of his own violation of the statute by having the contract considered illegal and unenforceable as against public policy, and thereby avoid any obligation under the contract. *Id.* at —, 682 P.2d at 763. The court noted that the statute was designed to protect the buyer in these situations, as well as to allow governmental control over the division of units of property. Finding that neither the government's interest nor the buyer's interest would be adversely affected in an intolerable way, the court ruled that the buyer could enforce the contract even though it would have been unenforceable by the seller. *Id.* at —, 682 P.2d at 764. This decision reflects the equitable results that are possible when the flexible approach of looking at the purpose of the statute is used. It is reasonable, in this case, that the seller should not be allowed to force the improperly partitioned land on the buyer. It would not be necessarily inconsistent with the statute to allow the buyer to enforce the agreement and then attempt to arrange for accommodation of his interest by getting governmental approval or through some other means. In this case, the purchasers had separately purchased both parts of the illegally partitioned unit of land. *Id.* at —, 682 P.2d at 761; *accord* *Sienkiewicz v. Smith*, 97 Wash. 2d 711, 714-17, 649 P.2d 112, 114-15 (1982) (*en banc*).

In *Gannon & Son, Inc. v. Emerson*, 291 Md. 443, 435 A.2d 449 (1981), a Maryland court considered an oral contract for home improvement construction work. The state statute required, however, that such contracts be in writing. *Id.* at 445-46, 435 A.2d at 450-51. When the construction company sought a mechanic's lien for nonpayment, the home owner responded that the contract was not in writing as required by statute and was, therefore, void and unenforceable. *Id.* at 446, 435 A.2d at 451. The court did not automatically deny enforcement but rather examined the provisions of the statute in search of legislative intent. The court concluded that the legislative scheme allowed for state administrative sanctions, and civil or criminal liability. *Id.* at 451, 435 A.2d at 454. The legislature did not, however, intend the contracts to be unenforceable by the parties. *Id.* at 458, 435 A.2d at 457. Moreover, reading the statute to render all oral contracts void would cause an unduly harsh effect on contractors. *Id.* at 456-57, 435 A.2d at 456-57. The court took notice that in the home improvement industry, there is a recognized practice of salesmen taking deposits prior to approval and execution of the contract by the contractor. To read the state statute literally as rendering all contracts unenforceable when money was paid prior to memorializing the agreement in writing would cause most such contracts to be at least partially unenforceable even though the contractor might have completed performance. It also places the contractor at risk of tremendous forfeiture. *Id.*

76. See RESTATEMENT (SECOND) OF CONTRACTS § 178 comment b (1979). Section 178 of the Restatement (Second) of Contracts has a balancing test applicable to public policy cases:

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

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

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

- (a) the parties' justified expectations,
- (b) any forfeiture that would result if enforcement were denied, and

rule: unless enforcement of a contract is expressly prohibited by a statute, courts should first identify the public interest involved and then determine whether non-enforcement or enforcement would be most consistent with the public policy interest. The purpose of such balancing is to ensure that promises are enforced whenever possible and that enforcement is denied on public policy grounds only when there is a clear basis for doing so.⁷⁷ The comments to section 178 note that in some cases, the public policy interest may not be effectively promoted by a refusal to enforce.⁷⁸ In keeping with an observation made during the drafting of this chapter—that the whole of the Restatement is concerned with making private agreements enforceable, and that public policy limits are among the exceptional limitations⁷⁹—courts should ensure that a refusal

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- (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.

Id. § 178. Section 179 lists the sources for the public policy used in the § 178 balancing test:

§ 179. Bases of Public Policies Against Enforcement

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

- (a) legislation relevant to such a policy, or
- (b) the need to protect some aspect of the public welfare, as is the case for the judicial policies against, for example,
 - (i) restraint of trade (§§ 186-188),
 - (ii) impairment of family relations (§§ 189-191), and
 - (iii) interference with other protected interests (§§ 192-196, 356).

Id. § 179.

Many courts have used this balancing test. *See, e.g.,* *Shadis v. Beal*, 685 F.2d 824, *cert. denied*, 459 U.S. 970 (1982); *McKnight v. Rice*, Hoppner, Brown & Brunner, 678 P.2d 1330 (Alaska 1984); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 178 app. (1979 & Supp. 1984) (annotation of cases citing § 178).

77. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 comments b and e (1981). Comment e reads in part: "A court will be reluctant to frustrate a party's legitimate expectations unless there is a corresponding benefit to be gained in deterring misconduct or avoiding an inappropriate use of the judicial process." *Id.* at comment e.

78. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 comment b (1979).

79. 54 A.L.I. PROC. 72-73 (1977) (comments of Reporter, Professor E. Allan Farnsworth).

to enforce a portion of or an entire contract effectively serves a legitimate public interest.

Some important factors that should be considered in the Restatement balancing test are the knowledge of the parties and the severity of the offensive conduct. The comments to section 178 warn that while some promises may involve a serious crime and, therefore, should not be enforced, others may involve more trivial contraventions of public policy that should not bar enforcement.⁸⁰ Additionally, courts should remember the presumption that contracts are legal, and that when alternative readings are possible, the reading that renders the contract enforceable will prevail.⁸¹ This does not suggest, however,

80. See RESTATEMENT (SECOND) OF CONTRACTS § 178 comments b and d (1979). Comment d reads in part:

The extent to which a refusal to enforce a promise or other term on grounds of public policy will further that policy depends not only on the strength of the policy but also on the relation of the term to that policy and to any misconduct involved. . . . [A]s the relation between the conduct and the promise becomes tenuous, it becomes difficult to justify enforceability unless serious misconduct is involved. A party will not be barred from enforcing a promise because of misconduct that is so remote or collateral that refusal to enforce the promise will not deter such conduct and enforcement will not amount to an inappropriate use of the judicial process.

Id. at comment d.

Two cases involving collateral contracts illustrate how the severity of the conduct involved should be considered. In *Dodd v. Harper*, 670 S.W.2d 646 (Tex. Civ. App. 1983), the Texas Court of Civil Appeals correctly refused to enforce a promise to repay money under a loan agreement entered into for the purpose of financing the buying and selling of cocaine in contravention of statutes prohibiting transactions of controlled substances. *Id.* at 650. The loan agreement was collateral to the serious misconduct of buying and selling cocaine. If parties could enter into such arrangements with the assurance that, in the event of breach, they could then enforce such contracts in court, contravention of laws and misuse of the courts would be likely to ensue. In contrast, in *Contemporary Mission, Inc. v. Bonded Mailings, Inc.*, 671 F.2d 81, 83-84 (2d Cir. 1982), a claim of unenforceability on grounds of public policy was not allowed as a defense to a breach of contract to provide bulk mailing services to a customer when the defense was based on an allegation that the customer's non-profit mailing permit was obtained from the Post Office through improper or illegal methods. Here, not only is the misconduct of using illegal methods not as serious, but the nexus is also different than the cocaine example. The mailing contract could have been performed with or without the special permit; it did not affect the compensation received by the mailer. *Id.*

81. E. FARNSWORTH, CONTRACTS § 5.1 (1982). For an example of the application of this rule see *J.E.L. Realtors, Inc. v. Mettelle*, 111 Ill. App. 3d 987, 991, 444 N.E.2d 750, 752-53 (1982) (contract clause requiring transfer of non-negotiable liquor license should be read to require surrender of license to state and request for reissuance to new party as permitted by law).

A corollary to this rule is the suggested rule in a conflict of law situation: states should apply the public policy of the state that is likely to render the

that courts should ignore contracts that run afoul of public interests; case law requires that courts take notice of such problems even if the parties fail to raise the issue.⁸²

This flexibility is found in some statutory public policy cases⁸³ but it is also found in the application of the public policy doctrine in several common law areas. Two of the more frequently litigated areas are restraint of trade and exculpatory clauses. The law governing restraint of trade has become so

promise enforceable. Two cases illustrate the appeal of this rule: *National Recovery Sys. v. Mazzei*, 123 Misc. 2d 780, 475 N.Y.S.2d 208 (N.Y. Sup. Ct. 1984) and *Resorts Int'l Hotel, Inc. v. Agresta*, 569 F. Supp. 24 (E.D. Va. 1983) (applying Virginia law). Both courts were faced with nearly the same problem. One party sought enforcement of a promise to repay a gambling debt in the forum state where laws prohibited gambling. The debt was incurred in a state where gambling was legal. *Agresta*, 569 F. Supp. at 24-25; *Mazzei*, 123 Misc. 2d at 780, 475 N.Y.S.2d at 209. Both Virginia and New York had previously held that gambling debts are unenforceable as against the statutory public policy of discouraging gambling since it is an illegal activity. *Agresta*, 569 F. Supp. at 25; *Mazzei*, 123 Misc. 2d at 781, 475 N.Y.S.2d at 210. The Virginia court simply decided that since gambling was contrary to law and public policy in Virginia, the promise to repay the loan should not be enforced. *Agresta*, 569 F. Supp. at 26. The court relied on recent Virginia state court decisions construing a state statute prohibiting "gaming, betting, or wagering" and rendering "utterly void" any contract to repay money relating to those activities. *Id.* at 25-26. The most obvious problem with this decision is that it will have little effect on Virginia's legitimate public policy interest in discouraging gambling or the loaning of money to gamble in the state of Virginia. The decision might very well discourage gambling in New Jersey where the debt was incurred, but gambling, within some limits, is not contrary to any New Jersey public policy. The court apparently did not investigate whether gambling debts, *per se*, were enforceable in New Jersey, but rather presumed that the debt would be enforceable. *Id.* at 25.

The approach of the New York court in contrast is more appealing. The New York court indicated that the gambling debt would not be enforced unless valid and enforceable in the jurisdiction where the transaction occurred. *Mazzei*, 123 Misc. 2d at 781, 475 N.Y.S.2d at 210. Since it was possible that the debt may have been enforceable in Nevada, a motion to dismiss based on the public policy argument was denied. *Id.* at 782, 475 N.Y.S.2d at 210. Nevada law provides that gambling debts are unenforceable as a basic matter, but that they are enforceable if not made solely for the purpose of gambling. Consequently, the circumstances surrounding the transaction must be considered. *Id.* at 781-82, 475 N.Y.S.2d at 210.

82. See *I.U.B.A.C. Local 31 v. Anastasi Bros. Corp.*, 600 F. Supp. 92, 94-95 (S.D. Fla. 1984) ("[F]ederal courts have a duty to determine whether a contract violates federal law and must reach the merits of an illegality defense *before* enforcing a contract. . . . Thus a party cannot waive the defense of illegality of the contract. The Court itself is bound to raise the issue *sua sponte*"); *National Recovery Sys. v. Mazzei*, 123 Misc. 2d 780, 781, 475 N.Y.S.2d 208, 209 (N.Y. Sup. Ct. 1984) ("[A] trial court may refuse to enforce a contract when it becomes apparent from the evidence adduced that the agreement is antagonistic to the public interest. . . .").

83. See cases cited *supra* note 75.

well established through legislation and judicial decisions that arguably it should no longer be considered part of the doctrine of public policy.⁸⁴ Covenants against competition and restrictions on employment, however, are still governed by common law rules.⁸⁵ In these types of cases, there are no flat prohibitions against promises that restrict competition or employment. Instead, this area of the law is permeated by rules of reason stressing that while restraints on competition and employment are generally not in the best public interest of promoting free enterprise, competition, and employment, occasionally those goals or other important interests are served by enforcing some restraints.⁸⁶ More specifically, when parties have freely contracted to restrict their activities in this area, those agreements ought to be enforced unless a well-defined public interest would be derogated.⁸⁷

Similar flexibility is found in cases dealing with exculpatory clauses. These clauses limit or transfer liability for negligence. In the negligence area, the general rule is that "there is no violation of public policy by contracting against liability for negligence."⁸⁸ Courts, however, relying on public interests in the negligence area, have carefully limited what parties may accomplish by contract. To begin with, not just *any* party can contract against liability for *any* negligence.⁸⁹ For example,

84. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 2, introductory note, at 35 (1979).

85. See E. FARNSWORTH, CONTRACTS § 5.3 (1982).

86. See RESTATEMENT (SECOND) OF CONTRACTS §§ 186 comment a, 188 comment a (1979).

87. See *Barnes Group, Inc. v. Harper*, 653 F.2d 175, 179 (5th Cir. 1981) (applying Georgia law) (even with broad restrictions, the restraints are not *per se* invalid but require a judgment of reasonableness on a case-by-case basis), *cert. denied*, 455 U.S. 921 (1982).

88. See, e.g., *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1488 (9th Cir. 1983); *Hall v. Skate Escape Ltd.*, 171 Ga. App. 178, 179, 319 S.E.2d 67, 70 (1984); *McClure Eng'g Assocs., Inc. v. Peuben H. Donnelley Corp.*, 95 Ill. 2d 68, 71-72, 447 N.E.2d 400, 402-03 (1983); cf. *Baltimore & Ohio Southwestern Ry. v. Voigt*, 176 U.S. 498, 513-14 (1899) (contract between railroad and express messenger that relieved railroad of liability was valid).

89. Occasionally, statutes prohibit certain classes of persons from contracting against liability for negligence. See, e.g., *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982, 987 (Colo. Ct. App. 1983) (operator of ski facility could not exclude liability for breach of duties imposed by statute); *Emory Univ. v. Porubiansky*, 248 Ga. 391, 392-93, 282 S.E.2d 903, 904-05 (1981) (dental clinic could not exclude liability for breach of duty imposed by statute); *Geise v. County of Niagara*, 117 Misc. 2d 470, 471, 458 N.Y.S.2d 162, 163-64 (N.Y. Sup. Ct. 1983) (public recreation facilities statutorily prohibited from exempting themselves from negligence liability).

persons in positions of public service or trust may not be able to contract against negligence.⁹⁰ Also, parties that are able to contract against ordinary negligence may not contract against liability for intentional, wanton, or grossly negligent acts.⁹¹ Even when ordinary negligence may be contracted against, courts construe exculpatory clauses strictly and only enforce those that are express and unambiguous.⁹² Finally, courts state that unless parties have carefully and fairly bargained to transfer the risk, they will be liable for their negligence.⁹³ These limits provide the parties with incentive to act with due care. These limits are not, however, wooden and inflexible. Many courts

90. See, e.g., *Baltimore & Ohio Southwestern Ry. v. Voigt*, 176 U.S. 498, 505 (1899) (common carriers cannot contract to exclude liability for negligence to passengers); *Kelley v. Astor Investors, Inc.*, 123 Ill. App. 3d 593, 598, 462 N.E.2d 996, 999-1000 (1984) ("As a general proposition, trust or contractual instruments containing an exculpatory clause for simple negligence are valid unless they violate public policy, involve one of a limited number of semipublic relationships (e.g., common carriers) or result from overreaching or abuse of a fiduciary relationship."), *aff'd*, 106 Ill. 2d 505, 478 N.E.2d 1346 (1985); *DeFrancesco v. Western Pennsylvania Water Co.*, 329 Pa. Super. 508, 478 A.2d 1295, 1306-07 (1984) (water utility company could not contract to exclude liability for negligence because of its public service duty); *Petry v. Cosmopolitan Spa Int'l, Inc.*, 641 S.W.2d 202, 203 (Tenn. Ct. App. 1982) (exculpatory clauses are ineffective when they involve a business "of a type generally thought suitable for public regulation" (quoting *Olson v. Molzen*, 558 S.W.2d 429, 431 (Tenn. (1977))). *But cf. McClure Eng'g Assocs., Inc. v. Reuben H. Donnelley Corp.*, 95 Ill. 2d 68, 72-73, 447 N.E.2d 400, 403 (1983) (citing several jurisdictions as authority for its holding that telephone company yellow pages advertising is not a business activity suitable for public regulation).

91. E.g., *Fena v. Wickstrom*, 348 N.W.2d 389, 390 (Minn. Ct. App. 1984); *Kleartone Transparent Prods. Co. v. Dun & Bradstreet, Inc.*, 88 A.D.2d 353, 356, 453 N.Y.S.2d 433, 435 (1982); *Cain v. Cleveland Parachute Training Center*, 9 Ohio App. 3d 27, 28, 457 N.E.2d 1185, 1187 (1983).

92. See, e.g., *Cumis Ins. Soc'y, Inc. v. Girard Bank*, 522 F. Supp. 414, 421-22 (E.D. Pa. 1981); *Goyings v. Jack & Ruth Eckerd Found.*, 403 So. 2d 1144, 1146 (Fla. Dist. Ct. App. 1981); *Krohnert v. Yacht Sys. Hawaii, Inc.*, 664 P.2d 738, 745 (Hawaii Ct. App. 1983); *Geise v. County of Niagara*, 117 Misc. 2d 470, 472, 458 N.Y.S.2d 162, 164-65 (N.Y. Sup. Ct. 1983); *Arnold v. Shawano County Agricultural Soc'y*, 111 Wis. 2d 203, 213, 330 N.W.2d 773, 777-78 (1983).

93. See, e.g., *ANR Prod. Co. v. Westburne Drilling, Inc.*, 581 F. Supp. 542, 547 (D. Colo. 1984) (applying Colorado law) (exculpatory clauses enforceable when "the parties are of equal bargaining power"); *Sea Land Indus., Inc. v. General Ship Repair Corp.*, 530 F. Supp. 550, 566-67 (D. Md. 1982) (exculpatory clause unilaterally inserted into contract was not part of agreement); *General Bargain Center v. American Alarm Co.*, — Ind. App. —, 430 N.E.2d 407, 411-12 (1982) (exculpatory clauses effective except when parties' unequal bargaining power renders the contract unconscionable); *Blanc v. Windham Mountain Club, Inc.*, 115 Misc. 2d 404, 406-12, 454 N.Y.S.2d 383, 387-90 (N.Y. Sup. Ct. 1982) (exculpatory clause in club by-laws ineffective as to guest who had not agreed to it or to member not given notice of it), *aff'd*, 92 A.D.2d 529, 459 N.Y.S.2d 447 (1983)).

balance the public policy interests concerning liability for negligence against the right of the parties to contract freely and have their contracts enforced.⁹⁴ The Restatement (Second) of Contracts has adopted a flexible rule consistent with this judicial treatment of exculpatory clauses.⁹⁵

There are other, less frequently litigated, common law public policy interests dealing with marriage and family relations,⁹⁶ the rights of third parties,⁹⁷ public or private fiduciary duty,⁹⁸ and the administration of justice.⁹⁹ While some courts have

94. See, e.g., *ANR Prod. Co. v. Westburne Drilling, Inc.*, 581 F. Supp. 542, 547 (D. Colo. 1984) (applying Colorado four-factor test for determining validity of exculpatory clause: existence of public duty, nature of service, fair bargaining, and lack of ambiguity); *Cregg v. Ministor Ventures*, 148 Cal. App. 3d 1107, 1111, 196 Cal. Rptr. 724, 726 (1983) (applying balancing despite state statute prohibiting exculpation for negligence); *Merten v. Nathan*, 108 Wis. 205, 213, 321 N.W.2d 173, 177-78 (1982) (applying the balancing test found in Restatement (Second) of Contracts § 195 comments a and b).

95. See RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 195 (1979).

96. See, e.g., *Poe v. Case*, 263 Ark. 488, 491, 565 S.W.2d 612, 613-14 (1978) (agreement between adoptive parents and natural parent permitting visitation by natural grandparents was unenforceable as contrary to public policy of strengthening adoptive families); *Thorpe v. Collins*, 245 Ga. 77, 78, 263 S.E.2d 115, 117 (1980) (promise to marry by person already married was unenforceable as contrary to public policy favoring stability in marriage); *In re Adoption of MM*, 652 P.2d 974, 978 (Wyo. 1982) (adoption agreement containing irrevocable consent was consistent with statutory public policy and enforceable).

97. See, e.g., *Thermice Corp. v. Vistron Corp.*, 528 F. Supp. 1275, 1285 (E.D. Pa. 1981) ("It is a generally accepted precept of contract law that where two parties knowingly enter into a contract contemplating the breach of the contractual rights of a third party, such a contract is illegal and unenforceable."), *aff'd mem.*, 688 F.2d 825 (3d Cir. 1982); *Blue Dolphin Invs., Ltd. v. Kane*, — Colo. App. —, 687 P.2d 533, 534 (1984) (court would not enforce a "contractual provision which has as its purpose wrongful preclusion of a third party's exercise of a valid contractual right"); *Lehigh v. Pittston Co.*, 456 A.2d 355, 361 (Me. 1983) ("[A] contract which operates to breach a prior contract involving a third party is illegal.").

98. See, e.g., *Cumana Invs. S.A. v. Fluor Corp.*, 593 F. Supp. 310, 312 n.3 (D. Del. 1984) (contract to sell influence by public official would be unenforceable as opposed to public policy protecting integrity of government); *Kallen v. Delug*, 157 Cal. App. 3d 940, 203 Cal. Rptr. 879, 883-85 (1984) (attorney's refusal to surrender former client's file to new attorney except in return for fee-splitting agreement rendered agreement unenforceable as contrary to professional code responsibility to surrender file upon discharge); *Marvin N. Benn & Assocs., Ltd. v. Nelsen Steel & Wire, Inc.*, 107 Ill. App. 3d 442, 448-49, 437 N.E.2d 900, 905 (1982) (agreement by law firm to solicit customers for business was unenforceable as against public policy prohibiting combining of law practice with other business).

99. See, e.g., *McKnight v. Rice, Hoppner, Brown & Brunner*, 678 P.2d 1330, 1334 (Alaska 1984) (assignment of contract prohibited by court order was unenforceable as contrary to strong public policy that court orders be obeyed); *State Dep't of Transp. & Dev. v. Stumpf*, 458 So. 2d 448, 454 (La. 1984) (con-

found agreements unenforceable as against these public policy interests, these same courts have also offered evidence to support the conclusion of other more frequent cases: courts must be careful not to apply public policy limits in an overly broad manner. *Gordon v. Cutler*,¹⁰⁰ an adoption case, is an example of a flexible approach in the marriage and family relations area. The Pennsylvania Superior Court held that money given to natural parents solely for the purpose of paying the expenses related to childbirth would not amount to the selling of children.¹⁰¹ The court concluded that this agreement was consistent with the public interest in encouraging the adoption of children, was in the best interest of the child, and would not provide the kind of financial benefit that might encourage the making of contracts to sell children.¹⁰² The *Gordon* court resisted any temptation to apply a wooden, inflexible rule that would deem any promise to pay money to the natural parents automatically as against public policy.¹⁰³

Another example of a flexible approach in the marriage and family relations area is found in section 190(2) of the Restatement (Second) of Contracts.¹⁰⁴ Section 190 deals with enforcement of promises that are detrimental to the marital relationship.¹⁰⁵ The 1977 draft of this section suggested a broad absolute rule that would make *all* agreements that tended to encourage separation or divorce unenforceable as against public policy.¹⁰⁶ The current section 190(2), however, includes a "rea-

tract to prevent party from exercising discovery rights or calling witness at trial would be void as against public policy).

100. 324 Pa. Super. 35, 471 A.2d 449 (1983).

101. *Id.* at —, 471 A.2d at 458-59.

102. *Id.*

103. *Id.* at —, 471 A.2d at 457.

104. RESTATEMENT (SECOND) OF CONTRACTS § 190(2) (1979). The entirety of the section reads:

§ 190. Promise Detrimental to Marital Relationship

(1) A promise by a person contemplating marriage or by a married person, other than as part of an enforceable separation agreement, is unenforceable on grounds of public policy if it would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship. A separation agreement is unenforceable on grounds of public policy unless it is made after separation or in contemplation of an immediate separation and is fair in the circumstances.

(2) A promise that tends *unreasonably* to encourage divorce or separation is unenforceable on grounds of public policy.

Id. § 190 (emphasis added).

105. *See id.*

106. *See* RESTATEMENT (SECOND) OF CONTRACTS § 332 (Tent. Draft No. 12, 1977).

sonableness" qualifier which suggests that courts should apply a flexible, rather than absolute, rule in determining whether the promise is in fact contrary to the public policy of maintaining marriages.¹⁰⁷ A Pennsylvania judge acknowledged the importance of flexibility when he observed that practically all separation agreements can be viewed as facilitating divorce in some way.¹⁰⁸ Nonetheless, separation agreements do serve a valid public service in allowing married couples to move in a cautious, orderly way toward dissolution of marriage when the parties have become convinced that dissolution is appropriate.¹⁰⁹

The above discussion demonstrates that there is a strong trend toward applying the public policy doctrine flexibly and consistently in many statutory and common law areas. The disparity in the recent decisions concerning cohabitation agreements and public policy,¹¹⁰ however, suggests that the doctrine is not being applied carefully or consistently in this area.

II. JUDICIAL APPLICATION OF THE PUBLIC POLICY DOCTRINE TO COHABITATION AGREEMENTS

*Hewitt v. Hewitt*¹¹¹ and *In Re Estate of Alexander*¹¹² are

107. See RESTATEMENT (SECOND) OF CONTRACTS § 190(2) (1979). A comment to this section explains:

Whether a promise tends unreasonably to encourage divorce or separation in a particular case is a question of fact that depends on all the circumstances, including the state of disintegration of the marriage at the time the promise is made. A promise that merely disposes of property rights in the event of divorce or separation does not of itself tend unreasonably to encourage either.

Id. comment c.

108. See *Lurie v. Lurie*, 246 Pa. Super. 307, 370 A.2d 739, 745 (1976) (Spaeth, J., concurring) ("All separation agreements 'facilitate' divorce. . . . The idea that a separation agreement is invalid if it 'facilitates' divorce seems to derive from careless language in the cases. The law used to be clear enough that the agreement is invalid only if it is the result of 'collusion.'"); see also *In re Marriage of Dawley*, 17 Cal. 3d 342, 350 n.5, 551 P.2d 323, 328 n.5, 131 Cal. Rptr. 3, 8 n.5 (1976) ("facilitates" terminology is misleading; it is only when agreement encourages or promotes that it offends public policy).

109. Cf. *In re Marriage of Dawley*, 17 Cal. 3d 342, 353, 551 P.2d 323, 333, 131 Cal. Rptr. 3, 13 (1976) ("Neither the reordering of property rights to fit the needs and desires of the couple, nor realistic planning that takes account of the possibility of dissolution, offends the public policy favoring and protecting marriage."); *Lurie v. Lurie*, 246 Pa. Super. 307, 370 A.2d 739, 741 (1976) ("The law is well settled that an agreement as to support, alimony, or an adjustment of property rights between a husband and wife is perfectly proper, valid and legal even though made in contemplation of divorce.").

110. See *supra* notes 20-22 and accompanying text.

111. 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

two decisions in which courts denied enforcement of cohabitation agreements¹¹³ on public policy grounds.¹¹⁴ These cases represent typical cohabitation scenarios. Consider the facts of *Hewitt v. Hewitt*,¹¹⁵ a 1979 case before the Illinois Supreme Court. Robert and Victoria Hewitt had lived together since their college days when Victoria had become pregnant with the first child of the relationship.¹¹⁶ Over the fifteen year period of the relationship, the Hewitts had two additional children. During this time, Victoria Hewitt was occupied with homemaking responsibilities, while Robert Hewitt completed studies for a dental degree and established a successful dental practice.¹¹⁷ Victoria Hewitt alleged that at the outset of the relationship Robert Hewitt had promised to share his future earnings and property with her and, upon the dissolution of the relationship, she brought suit to have that promise enforced.¹¹⁸ In reversing the intermediate court, the Illinois Supreme Court held that co-

112. 445 So. 2d 836 (Miss. 1984).

113. For a general description of cohabitation agreements, see *supra* note 19.

114. The popularity of unmarried cohabitation, see Note, *supra* note 23, at 335-36, has grown mostly from 1960 to the present. See Oldham & Candill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93, 107 n.62 (1984). How much it has grown is subject to varying opinion, but the Supreme Court of Oregon in the 1978 case of *Beal v. Beal*, 282 Or. 115, 118-19 n.2, 577 P.2d 507, 508 n.2 (1978), indicated that the growth from 1960 to 1970 had been 700%. A March 1983 study of the number of heterosexual, unmarried, cohabiting couples done by the U.S. Census Bureau showed an almost five-fold increase from 1970 to 1980 (523,000 to 2,589,000) and a three-fold increase from 1970 to 1983 (523,000 to 1,891,000). BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 389, MARITAL STATUS AND LIVING ARRANGEMENTS 6 table G (1983).

The apparent reasons for this growing desire to delay or avoid ceremonial marriage are career interests, tax advantages, preservation of social security or alimony payments, and fear of divorce and its legal and emotional consequences. See *Kozlowski v. Kozlowski*, 80 N.J. 378, 385, 403 A.2d 902, 907 (1979); *Bruch*, *supra* note 23, at 101-02; *Caudill*, *supra* note 23, at 540; *Fineman*, *supra* note 23, at 275; *Glendon*, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 687 n.99 (1976).

This growth has occurred despite some court decisions denying enforcement of cohabitation agreements on public policy grounds. See *infra* text accompanying notes 115-126. Given the continued growth in and the reasons for this type of living arrangement, it is doubtful that these adverse decisions have been or will be sufficient to discourage couples from cohabitation and persuade them into marriage.

115. 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

116. *Id.* at 53, 394 N.E.2d at 1205.

117. *Id.*

118. *Id.*

habitation agreements are not enforceable.¹¹⁹

A similar situation occurred in *In re Estate of Alexander*,¹²⁰ a 1984 decision of the Supreme Court of Mississippi. Margie Alexander lived with Sam Alexander for more than thirty-three years prior to his death.¹²¹ They did not marry because Margie Alexander had not obtained a divorce even though she had long been separated from her husband.¹²² The Alexanders pooled resources and shared expenses for the duration of the relationship.¹²³ Although the type of express promise to support for life found in *Hewitt* was absent in *Alexander*, there was arguably an implied-in-fact or an implied-in-law promise¹²⁴ to support.¹²⁵ The Mississippi court, in reasoning consistent with that of the *Hewitt* court, refused to enforce this implied agreement.¹²⁶

Courts that have considered the enforceability of cohabitation agreements, such as the courts in *Hewitt* and *Alexander*, have identified two relevant public policy interests: discouraging contracts for sexual relations and encouraging ceremonial marriages. There is a clear public interest in discouraging contracts for sexual relations. An early nineteenth-century South Carolina court phrased it this way: “[t]he law will not permit a woman to make her virtue an article of merchandise.”¹²⁷ Like-

119. *Id.* at 66, 394 N.E.2d at 1211.

120. 445 So. 2d 836 (Miss. 1984).

121. *Id.* at 837.

122. *Id.*; see also 445 So. 2d at 841 (Lee, J., dissenting) (indicating that Margie had been deserted by her husband and that she believed that she could not get a divorce because she did not know his address or location).

123. *Alexander*, 445 So. 2d at 837-38.

124. For a discussion of implied-in-fact and implied-in-law agreements, see *infra* note 157.

125. Although the title was in Sam's name, there was ample evidence that Margie and Sam Alexander had combined resources to purchase the residence in which Margie later sought a legal interest. Margie provided homemaking services for the couple throughout the relationship. The majority, however, denied the possibility of an implied-in-fact contract on the reasoning that there was no expectation between the parties that Margie would be compensated for her homemaking services. *Alexander*, 445 So. 2d at 840. Such mutual expectation would normally be required for an implied-in-fact contract. See RESTATEMENT (SECOND) OF CONTRACTS §§ 4, 19 (1979). Even conceding the lack of a “tacit” understanding as to the homemaking services, the majority still ignored Margie's monetary contribution toward the purchase of the residence. *Alexander*, 445 So. 2d at 842 (Lee, J., dissenting). It is difficult to imagine that Margie would have contributed to the purchase of the home without an implied mutual understanding that she would share an interest in the residence.

126. *Alexander*, 445 So. 2d at 840.

127. See E. GREENHOOD, *supra* note 41, at 202 (quoting *Cusack v. White*, 9 S.C.L. (2 Mill) 368, 371 (S.C. 1818)).

wise, the law will not permit a man to trade sexual services as consideration for contractual promises.¹²⁸ This public policy interest is essentially moralistic in nature, reflecting a view that sex outside of marriage should not be encouraged because it poses a harmful threat to society. Sex for money is perceived to be an even greater threat to society.¹²⁹ Consequently, laws against prostitution¹³⁰ are prevalent and often stringently enforced.¹³¹

A distinction should be noted, however, between the public interest in discouraging prostitution and in discouraging other sexual relations outside of marriage. The public policy interest in discouraging sexual relations outside of marriage stands on less certain footing than the prohibition against prostitution.¹³² For example, although fornication, adultery, and even unmarried cohabitation, are still against the law in several jurisdictions, such laws appear to be waning in number and are rarely enforced.¹³³ Many states have removed them from criminal statutes, and other states make no concerted effort to enforce

128. See *Jones v. Daly*, 122 Cal. App. 3d 500, 507-09, 176 Cal. Rptr. 130, 132-34 (1981) (agreement between two male cohabitants which included as inseparable consideration the obligation of one cohabitant to publicly acknowledge the other as a lover was disallowed on public policy grounds); *Siple v. Corbett*, 447 A.2d 1184, 1186 (Del. 1982) (agreement for male to provide sexual services to female employer held unenforceable on grounds of public policy).

129. The public interest in discouraging prostitution or commercial sex has several underlying concerns. People believe that prostitution is closely related to other problems such as organized criminal activity, illegal drug traffic, various street crimes, and venereal disease. Additionally, people feel that prostitution is basically contrary to moral decency and has a destructive effect on those involved. See Parnas, *Legislative Reform of Prostitution Laws: Keeping Commercial Sex Out of Sight and Out of Mind*, 21 SANTA CLARA L. REV. 669, 679-80 (1981); Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1215-22 (1979).

130. "For contemporary purposes, prostitution is usually defined in terms of 'an individual who indiscriminately provides sexual relations in return for money payments.'" Richards, *supra* note 129, at 1203 (footnote omitted) (quoting A. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 595 (1948)); see also Parnas, *supra* note 129, at 671 ("Increasing recognition of that which distinguishes prostitution from other sexual behavior—namely the commercial element, with special attention directed toward public solicitation—has not been limited to the courts.").

131. See generally Parnas, *supra* note 129, at 676 & n.26; Richards, *supra* note 129, at 1202 n.31.

132. The public concerns related to prostitution or commercial sex, see *supra* note 129, seem hardly related to cohabitation.

133. See Bruch, *supra* note 23, at 108; Fineman, *supra* note 23, at 277 n.6; Glendon, *supra* note 114, at 685.

them.¹³⁴ The constitutionality of these statutes has even been questioned.¹³⁵ Finally, it is noteworthy that at common law only open and notorious extramarital sexual relations were deemed offensive to public policy.¹³⁶

The split of authority in the cohabitation cases¹³⁷ almost certainly results, in part, from the failure of courts to define adequately the relevant public policy interests in this area. In this area of sex outside marriage there are two ends of the spectrum: two unmarried persons platonically sharing a residence on one end and prostitution on the other. In between these two extremes lies cohabitation that involves sexual relations. It is hard to determine which extreme this type of cohabitation is closer to, but it is probably not very close to prostitution.¹³⁸ Even though sexual relations are undeniably an important part of the overall cohabitation arrangements, the nature of those sexual relations is qualitatively different from those found in straightforward prostitution cases. Arguably, then, the public policy interests in discouraging prostitution or meretricious sex, either because of statutory law or strictly on moral grounds,¹³⁹ are not served effectively by refusing to enforce the types of agreements involved in *Hewitt* and *Alexander*.¹⁴⁰ Perhaps rec-

134. See Fineman, *supra* note 23, at 282-84 (summarizing conclusions of American Law Institute made during drafting of Model Penal Code).

135. See Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 627-29 (1980); Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252, 254-55 (1978).

136. See Fineman, *supra* note 23, at 312.

137. See *supra* notes 20-22 and accompanying text.

138. A recent example of a case involving actual prostitution is *Cougler v. Fackler*, 510 S.W.2d 16 (Ky. 1974). That case involved a loan agreement between an admitted prostitute and a customer in which the sex-for-money relationship was very possibly partial consideration for the other transaction. No cohabitation was involved. *Id.* at 17. The court reversed the lower court's decision to enforce the loan agreement because the question of whether sexual relations were consideration for the agreement had not been properly addressed. *Id.* at 19; see also *Siple v. Corbett*, 447 A.2d 1184, 1186 (Del. 1982) (plaintiff alleged "a contract for employment and compensation in exchange for renewed romantic involvement including sexual favors" which court found unenforceable on grounds of public policy); *State v. Clark*, 102 Idaho 693, 695, 638 P.2d 890, 892 (1981) (contract to accept money in exchange for service of procuring customers for prostitutes was in violation of public policy). On the prospects for recovery on an implied contract by a mistress, see Hunter, *An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse*, 64 VA. L. REV. 1039, 1078-80 (1978).

139. See *supra* note 129.

140. This distinction between cohabitation and prostitution was recognized by the dissent in *Alexander* and the intermediate appellate court which was reversed in *Hewitt*. The dissent in *Alexander* emphasized that the majority's

ognition of this tenuous connection between nonenforcement of cohabitation agreements and the public policy interest in discouraging prostitution or meretricious sex caused both the *Hewitt* and *Alexander* courts to make only peripheral use of this first public policy interest.¹⁴¹

description of Margie as simply a "mistress" was quite inappropriate in light of the 33 years that she had shared a home with Sam that she had helped purchase. *Alexander*, 445 So. 2d at 842 (Lee, J., dissenting).

The appellate court of Illinois, which decided in favor of Victoria Hewitt, identified the difference between long-term cohabitation and prostitution or meretricious relationships:

In argument, defendant has referred to plaintiff as a meretricious spouse living in a meretricious relationship. The adjective should be examined in its precise meaning, i.e., "Of pertaining to, befitting or of a character of a harlot" (Shorter Oxford English Dictionary, 1934), or, "Of or relating to a prostitute" (Webster's New Collegiate Dictionary, (1973)). Neither is it correct to refer to plaintiff as a concubine which is defined as "1: a woman living in a *socially recognized* state of concubinage . . . MISTRESS." (Emphasis supplied). Webster's New Collegiate Dictionary (1973).

The well-pleaded facts contradict the terms in showing that the parties lived, and for a time, enjoyed a most conventional, respectable and ordinary family life. The single flaw is that for reasons not explained, the parties failed to procure a license, a ceremony, and a registration of a marriage. Upon the present pleading nothing discloses a scandal, an affront to family living or society, or anything other than that the parties were known as husband and wife. We refuse to weigh defendant's claim in the context of such epithets.

Hewitt v. Hewitt, 62 Ill. App. 3d 861, 863, 380 N.E.2d 454, 456-67 (1978), *rev'd*, 77 Ill. 2d 49, 394 N.E.2d 454 (1979).

141. Other courts have seemed to rely primarily on this public interest in discouraging prostitution, meretricious sex, or illicit relations. In the case of *Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977), the supreme court of Georgia was confronted with a couple that had lived together for 18 years and had jointly made payments to purchase the home throughout their cohabitation. The woman had also provided homemaking services throughout the period. After the man left the home and demanded that the woman leave also (title to the home apparently being in the man's name although the opinion does not expressly so state), she brought suit to recover on her interest in the home and the value of the homemaking services rendered throughout their eighteen-year cohabitation. *Id.* at 541-42, 238 S.E.2d at 81-82.

The Supreme Court affirmed the trial court's grant of summary judgment for the man indicating that the cohabitation constituted immoral consideration under state statutory law, unless the woman could rebut that conclusion. Based upon this presumption of illegal or immoral consideration, the court upheld the decision and thereby denied the woman recovery for any claim. *Id.* at 543, 238 S.E.2d at 82. It is interesting to note in *Rehak* that neither the cited statutory section nor a subsequent section with illustrations (§ 20-504) expressly listed cohabitation as immoral or illegal. Furthermore, the statute expressly incorporated the principle of severability and the case law in the state evinced a presumption of legality of contracts. See *Potts v. Riddle*, 5 Ga. App. 378, 63 S.E. 253 (1908); see also *Emory Univ. v. Porubiansky*, 248 Ga. 391, 393, 282 S.E.2d 903, 904 (1981) ("It is well settled that contracts will not be avoided

The *Hewitt* and *Alexander* courts primarily focused on the other public interest offered as a basis for discouraging cohabitation: channeling persons into ceremonial marriage in accordance with state law.¹⁴² This public interest is predicated on the view that marriage is the best means of providing stability for rearing children, a goal thought to be essential for the stability of the larger society.¹⁴³ Additionally, the rights to property and economic support that attach to the marriage relationship are designed to prevent spouses and children from becoming wards of the state upon dissolution of the marriage.¹⁴⁴ Other jurisdictions have also focused on this interest and, like the courts in *Hewitt* and *Alexander*, have refused to enforce express or implied cohabitation agreements.¹⁴⁵ These court decisions seem to indicate that whenever parties engage in unmarried cohabitation that involves sexual relations, implied, and perhaps even

by the courts as against public policy, except 'where the case is free from doubt and an injury to the public clearly appears.' ' ' (quoting *Phenix Ins. Co. v. Clay*, 101 Ga. 331, 332, 28 S.E. 853, 854 (1897)). In *Rehak v. Mathis* the mere presence of a cohabitation arrangement seemed to create a presumption of immoral consideration and unenforceability for any agreement between cohabiting parties. *Rehak*, 239 Ga. at 543, 238 S.E.2d at 82.

142. See *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979):

There are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from such relationships. Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage. Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as "illicit" or "meretricious" relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society? In the event of death shall the survivor have the status of a surviving spouse for purposes of inheritance, wrongful death actions, workmen's compensation, etc.? And still more importantly: What of the children born of such relationships?

Id. at 58, 394 N.E.2d at 1207.

The *Alexander* court, in denying relief on an implied-in-law contract, cited *Hewitt* and other cases suggesting that enforcement of cohabitation agreements would resurrect the old common-law marriage doctrine previously abolished by the respective legislatures. *In re Estate of Alexander*, 445 So. 2d 836, 839 (Miss. 1984).

143. See Caudill, *supra* note 23, at 556-59; Wietzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169, 1241-45 (1974).

144. See Fineman, *supra* note 23, at 321; Kay & Amyx, *supra* note 56, at 939-40.

145. See *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. Ct. App. 1983), *cert. denied*, 443 So. 2d 1122 (La.), *cert. denied*, 104 S. Ct. 2389 (1984); *Merrill v. Davis*, 100 N.M. 552, 673 P.2d 1285 (1983); *Morone v. Morone*, 50 N.Y.2d 481, 407 N.E.2d 438, 429 N.Y.S.2d 592 (1980).

express, contracts between them related to the cohabitation are likely to be deemed unenforceable as contrary to the public policy that favors ceremonial marriage.¹⁴⁶

The current strength and vitality of the societal preference for formal, legalized marital arrangements is reflected in the relatively recent actions of many state legislatures in eradicating laws recognizing common-law marriage.¹⁴⁷ The effect of the common-law marriage doctrine and statutes, where still found, is to give the status accoutrements of ceremonial marriage to less formal cohabitation arrangements that meet certain requirements but fail to qualify as a ceremonial marriage.¹⁴⁸ The purpose in repealing common-law marriage statutes was to deny couples selecting informal, non-ceremonial arrangements the status benefits of marriage.¹⁴⁹ There were two reasons for the repeals: a denial of status benefits would encourage people to operate within the legal framework for creating marital relationships,¹⁵⁰ and the difficulty of determining whether there was a valid common-law marriage invited perjury and fraud.¹⁵¹

The *Hewitt* court¹⁵² assumed that the legislatures would be as unreceptive to cohabitation agreements as they were to common-law marriage, because of the perception that cohabitation agreements would allow parties to achieve by private contract what legislatures had decreed could not be accomplished

146. The *Hewitt* court did allow for the possibility that there might be some enforceable agreements that were separable from the cohabitation. See *Hewitt*, 77 Ill. 2d at 57, 394 N.E.2d at 1208.

147. See Caudill, *supra* note 23, at 562-63; Fineman, *supra* note 23, at 321-23. Fineman notes that as of 1978, common-law marriage was still recognized in the District of Columbia and twelve states. *Id.* at 323 n.191.

148. See Caudill, *supra* note 23, at 563.

149. See *id.*

150. See *id.*

151. See *id.* at 562.

152. Other courts, like the *Alexander* court, have taken a narrower stance than the *Hewitt* court and have barred enforcement of implied-in-fact and implied-in-law agreements, but not express agreements. See *supra* notes 22, 120-126 and accompanying text. Consequently, the following criticism of the *Hewitt* reasoning does not apply in full to *Alexander*. The criticism does apply, however, for the most part because the decision to deny enforcement or deny recognition of implied agreements is based directly on the reasoning that such enforcement would be inconsistent with public policy favoring marriage and disfavoring common-law marriage. Moreover, the courts which enforce some, but not all, forms of contract seem to straddle the fence of logic by suggesting that an express cohabitation agreement would not be inconsistent with the public policy but that an implied agreement to the same effect would be contrary. See *infra* notes 179-186, 195-201 and accompanying text.

through use of common-law marriage doctrines or statutes.¹⁵³ The court's assumption of legislative hostility to cohabitation agreements can be challenged on several grounds. First, the parties could not accomplish everything through private agreement that would be accomplished by application of the common-law marriage doctrine. Rights to insurance proceeds and employment retirement benefits, the ability to sue to protect spousal interest in the event of injury to the other party, and other status rights attach to common-law marriages but would not necessarily attend cohabitation agreements.¹⁵⁴ Even those states that still recognize common-law marriages do not grant that doctrine's automatic status benefits to mere cohabitators.¹⁵⁵

Second, part of the legislative hostility toward common-law marriage stems from problems of proof and uncertainty as to when those relationships actually exist.¹⁵⁶ For cohabitation agreements, the parties must provide sufficient proof of the existence of the agreement to satisfy existing contract law doctrine.¹⁵⁷ Some cohabitation agreements may be easy to prove, others may be difficult, but the standards would simply be

153. See *Hewitt v. Hewitt*, 77 Ill. 2d 49, 62, 394 N.E.2d 1204, 1209 (1979).

154. The court in *Hewitt* acknowledged, but seemed to discount, the distinction between the results of common-law marriage and the results possible with cohabitation agreements. *Hewitt*, 77 Ill. 2d at 63, 394 N.E.2d at 1210.

155. See, e.g., *Knauer v. Knauer*, 323 Pa. Super. 206, 228, 470 A.2d 553, 564 (1983).

156. See *Caudill*, *supra* note 23, at 562. The requirements for establishing a common-law marriage generally are: a mutual, present intent to be married; actual cohabitation; and a reputation in the community as husband and wife. See *Etheridge v. Yeager*, 465 So. 2d 378, 379-80 (Ala. 1985); *Nestor v. Nestor*, 15 Ohio St. 3d 143, 145, 472 N.E.2d 1091, 1094 (1984).

157. As noted above, see *supra* note 19, alleged cohabitation agreements can be either express or implied. If the alleged agreement is express, then the party will have to show that there were words, written or oral, or conduct manifesting mutual assent to exchange promises or performances, but no real distinction should attach between express and implied-in-fact agreements. See RESTATEMENT (SECOND) OF CONTRACTS §§ 3, 4 (1979). If an agreement can be inferred from the conduct of the parties, it is called an implied-in-fact agreement. See RESTATEMENT (SECOND) OF CONTRACTS § 19 comment a (1979); E. FARNSWORTH, CONTRACTS § 3.10, at 124 (1982).

A different rule applies to contracts that are implied-in-law or quasi-contracts. In this instance there is no apparent intention of the parties to enter into an express agreement. The law implies an obligation primarily to avoid unjust enrichment and to achieve justice through restitution. See RESTATEMENT (SECOND) OF CONTRACTS § 4 comment b (1979).

One significant recurrent difficulty in cohabitation cases is in determining whether there is an implied-in-fact agreement. The standard normally applied for an implied-in-fact agreement is whether the conduct reflects a mutual expectation of the parties that there would be compensation for whatever services might be rendered by one party to another. See *Marvin v. Marvin*, 18 Cal.

those that apply to any other type of contract. Furthermore, the cohabitation arrangements have little direct effect on third parties, since the agreements are essentially *inter se* and no status rights attach, so there is less need than in common-law marriages for others to be on notice of the arrangement.

Third, and perhaps most important, the *Hewitt* court used rather strained reasoning in drawing an inference that the legislatures wanted to promote ceremonial marriage by prohibiting enforcement of private contracts relating to cohabitation arrangements.¹⁵⁸ There is a well-established principle, however, that legislative intent to restrict the freedom of contract should not be lightly inferred.¹⁵⁹ Even the Illinois court that had decided *Hewitt* acknowledged this in a later case.¹⁶⁰ The legislative enactments against common-law marriages, when specifically construed, reflect a decision not to grant the status consequences of marriage to non-ceremonial cohabitation ar-

3d 660, 665, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1976); *In re Estate of Alexander*, 445 So. 2d 836, 840 (Miss. 1984).

Another difficulty in cohabitation cases involves implied-in-law promises. If an express or implied-in-fact agreement is missing, the question of the impact of public policy becomes somewhat different. This is true because the award of quasi-contractual relief is generally viewed as an exercise of equitable discretion rather than simple enforcement of a contract. Of course, enforcement of a contract is more obligatory than is granting purely equitable remedies. For this reason, a decision to refuse quasi-contractual remedies to a party without a contract raises special issues concerning restitution and contract treated below. See *infra* notes 179-186 and accompanying text.

158. The *Hewitt* court not only found evidence of legislative disfavor of cohabitation agreements in the general "promarriage" policy of the Marriage Act and in the statutory abolition of common-law marriage, but also perceived evidence of disfavor in the legislature's rejection of the "no-fault" divorce concept and its adoption of the putative spouse concept. *Hewitt*, 77 Ill. 2d at 61-64, 394 N.E.2d at 1209-11. The court failed to give proper recognition to the obvious arguments for and against these latter concepts that have no relevance to possible enforcement of cohabitation agreements.

159. See, e.g., *Scarborough v. Travelers Ins. Co.*, 718 F.2d 702, 709 (5th Cir. 1983) (applying Louisiana law); *Hixon v. Durbin*, 560 F. Supp. 654, 662 (E.D. Pa. 1983); *Shepard v. Farmers Ins. Co.*, 678 P.2d 250, 251 (Okla. 1983).

160. See *Roanoke Agency, Inc. v. Edgar*, 101 Ill. 2d 315, 461 N.E.2d 1365, 1371 (1984) ("Voluntary agreements are to be honored unless they are *clearly* contrary to a policy declared by the Constitution, the legislature or court decisions or unless they are manifestly injurious to the public welfare.") (emphasis added) (citing *Stroh v. Black Hawk Holding Corp.*, 48 Ill. 2d 471, 483, 272 N.E.2d 1, 7 (1971)); see also *Schniederjon v. Krupa*, 130 Ill. App. 3d 656, 474 N.E.2d 805, 808 (1985) ("Our courts apply a strict test in determining whether a contract violates public policy. A court, therefore, will not declare a contract illegal unless it expressly contravenes the law or a known public policy of this state. Moreover, public policy itself strongly favors freedom to contract.") (citations omitted).

rangements. This legislative disdain, however, should not necessarily be extended to parties who decide not to enter into a formal, legalized marital arrangement with its package of rights and duties, choosing instead the more restricted alternative of a cohabitation agreement with its limited rights and duties. Cohabitation agreements are indisputably different in effect from common-law marriage.¹⁶¹ The public interests associated with each of these arrangements are also different. Therefore, the public policy behind repealing common-law marriage statutes should never be enough to invalidate a private cohabitation contract.¹⁶² The *Hewitt* court, however, seems to have extended the public policy behind the repeal of the common-law marriage statute to invalidate all cohabitation agreements on the mere assumption that they might contradict that public policy. The court's reasoning reflected both speculation on whether enforcing cohabitation agreements would lure people away from ceremonial marriage and the lack of any evidence of legislative intent in the repeal statute to disallow cohabitation agreements.¹⁶³

This inference of legislative hostility against cohabitation

161. See *supra* notes 154-155 and accompanying text.

162. Courts have used the recommended cautious approach to public policy limitations by deciding that cohabitation agreements are not sufficiently or specifically inconsistent with those types of statutes to warrant non-enforcement on that basis. See, e.g., *Poe v. Estate of Levy*, 411 So. 2d 253, 255-56 (Fla. Dist. Ct. App. 1982) (unmarried cohabitant could not recover marital property rights in light of abolition of common-law marriage but could recover on express contract or equitable theory); *Glasgo v. Glasgo*, — Ind. App. —, 410 N.E.2d 1325, 1330 (1980) ("We do not find that recognition of a claim for a declaration of property rights in specific property [on contractual and equitable grounds] to be a claim which reinstates common law marriages."); *Carlson v. Olson*, 256 N.W.2d 249, 255 (Minn. 1977) (equitable partition of property allowed despite state statute abolishing common-law marriage; also suggested express or implied agreements would be enforced); *Kozlowski v. Kozlowski*, 80 N.J. 378, 387, 403 A.2d 902, 907-08 (1979) ("[O]ur decision today [allowing recovery on theory of express or implied agreement] has not judicially revived a form of common law marriage which has been proscribed in New Jersey since 1939 . . .").

163. See *Hewitt*, 77 Ill. 2d at 61-62, 394 N.E.2d at 1209. The *Hewitt* court stated:

Although the [Illinois Marriage and Dissolution of Marriage Act] does not specifically address the subject of nonmarital cohabitation, we think the legislative policy quite evident from the statutory scheme.

The Act provides:

"This Act shall be liberally construed and applied to promote its underlying purposes, which are to:

- (1) provide adequate procedures for the solemnization and registration of marriage;
- (2) strengthen and preserve the integrity of marriage and

agreements is especially weak in light of the fact that legislatures are free to directly proscribe cohabitation agreements through legislation, if they so choose. The Minnesota state legislature, for example, has enacted legislation requiring that cohabitation agreements between heterosexual couples be in writing and signed.¹⁶⁴ Faced with such explicit legislative directive, Minnesota courts are bound to deny enforcement of oral cohabitation agreements.¹⁶⁵ By contrast, when faced with only

safeguard family relationships." (Ill. Rev. Stat. 1977, ch. 40, par. 102.)

We cannot confidently say that judicial recognition of property rights between unmarried cohabitants *will not make* that alternative to marriage more attractive by allowing the parties to engage in such relationships with greater security. As one commentator has noted, it *may make* this alternative especially attractive to persons who seek a property arrangement that the law does not permit to marital partners. . . . In thus *potentially* enhancing the attractiveness of a private arrangement over marriage, we believe that [enforcing the cohabitation agreement] contravenes the Act's policy of strengthening and preserving the integrity of marriage.

Id. (emphasis added) (citation omitted).

164. See MINN. STAT. §§ 513.075-.076 (1984). These statutes read:

513.075 COHABITATION, PROPERTY AND FINANCIAL AGREEMENTS.

If sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if:

- (1) the contract is written and signed by the parties, and
- (2) enforcement is sought after termination of the relationship.

513.076 NECESSITY OF CONTRACT

Unless the individuals have executed a contract complying with the provisions of section 513.075, the courts of this state are without jurisdiction to hear and shall dismiss as contrary to public policy any claim by an individual to the earnings or property of another individual if the claim is based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock within or without this state.

Id.

165. *But see In re Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983). The Minnesota Supreme Court severely restricted the scope of the above statutes by holding that the statutes would "apply only where the *sole* consideration for a contract between cohabiting parties is their 'contemplation of sexual relations . . . out of wedlock.'" *Id.* at 674 (quoting MINN. STAT. § 513.076 (1984)). The court reached the decision despite its apparent recognition that the legislation was intended to curtail the type of result obtained in *Marvin v. Marvin*, see *supra* note 53, and in its prior decision, *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977), which allowed recovery in cohabitation arrangements on express or implied contract or equitable theories. *Eriksen*, 337 N.W.2d at 673. It is obvious from the legislative history that the legislative intent was to only allow enforcement of written cohabitation agreements without restriction to sexual relationships being the *sole* consideration. See Note, *supra* note 23, at 338.

statutes endorsing ceremonial marriage or disallowing common-law marriage, as in *Hewitt*, courts make an inferential leap when they find that cohabitation agreements run contrary to statutory policy. Therefore, the *Hewitt* approach was patently inconsistent with the principle that public policy limits are to be narrowly and exactly applied.¹⁶⁶

Nonetheless, the *Hewitt* and *Alexander* courts did rely on the public interest in channeling parties into ceremonial marriages rather than other types of cohabitation arrangements.¹⁶⁷ Even assuming that the laws that endorse ceremonial marriages and proscribe common-law marriages do reflect a public interest in discouraging cohabitation arrangements, it is still questionable whether the *Hewitt* and *Alexander* decisions actually furthered those public policy interests. There are three options open to courts, such as the *Hewitt* and *Alexander* courts, in disposing of the cohabitation agreement cases. The courts could leave the parties where they found them, the female cohabitants with no benefit from fifteen or thirty-three years of pooled resources and efforts and the male cohabitant with all the accumulated resources of the arrangement. Another option would be to enforce the alleged cohabitation agreements and to allow the female parties some portion of the collected resources or the right to promised future payments. Alternatively, the courts could deny enforcement but use some other contract or equitable law theory, such as finding an implied-in-law or quasi-contract, to afford a just measure of relief in lieu of full enforcement of the cohabitation agreement promises. Finally, the courts could sever any portions of the agreement they felt were against public policy and enforce the remaining portions.

The *Hewitt* and *Alexander* courts chose the first and possibly the least just option. They left the parties where they found them,¹⁶⁸ so that the males who had title to property put in their names routinely, due to society's gender-bias, retained that property.¹⁶⁹ Not only is this remedy unfair,¹⁷⁰ but it is also

166. See *supra* note 39 and accompanying text.

167. See *supra* note 142.

168. Victoria Hewitt received child support for the children of the marriage, but no share of acquired property or earnings. *Hewitt*, 77 Ill. 2d at 54, 66, 394 N.E.2d at 1206, 1211. Margie Alexander received no interest in the estate of the deceased Sam Alexander. *Alexander*, 445 So. 2d at 840.

169. See Bruch, *supra* note 23, at 134-35; see also Blumberg, *supra* note 23, at 1160 (Blumberg points out that "gender-related wage differentials, gender-related family roles, and female susceptibility to pregnancy are likely to produce severe economic inequality between unmarried cohabitants . . .") (footnotes omitted).

doubtful whether the twin justifications supporting application of the public policy doctrine to refuse enforcement, discouraging wrongful conduct and not allowing misuse of the courts,¹⁷¹ are effectively served by leaving the parties in a cohabitation case where the court found them.¹⁷² The growing presence and popularity of cohabitation arrangements and the often compelling monetary reasons for delaying or avoiding ceremonial marriage¹⁷³ make it doubtful that decisions like *Hewitt* and *Alexander* will be sufficient to discourage couples from cohabitation arrangements. Since it is very questionable whether any public policy interests are actually served by not enforcing cohabitation agreements, the courts should have enforced the agreements.

Alternatively, if the *Hewitt* and *Alexander* courts were persuaded that any prospective enforcement of the cohabitation agreement would encourage wrongful conduct or constitute misuse of the courts, they could have denied enforcement, but at the same time made the implied-in-law contract remedy of restitution¹⁷⁴ available to the women solely for the purpose of preventing forfeiture by the women and unjust enrichment of the men. It is difficult to argue that such a resolution would en-

170. *In re Estate of Alexander*, 445 So. 2d 836, 840 (Miss. 1984) (Lee, J., dissenting); see also *supra* text accompanying notes 67-68.

171. See *supra* text accompanying notes 32-34.

172. See *Hay v. Hay*, — Nev. —, 678 P.2d 672 (1984):

We hasten to point out that Nevada does not recognize common law marriage. NRS 122.010. We recognize that the state has a strong interest in encouraging legal marriage. We do not, however, believe that policy is well served by allowing one participant in a meretricious relationship to abscond with the bulk of the couple's acquisitions.

Id. at —, 678 P.2d at 674; see also *Glasgo v. Glasgo*, — Ind. App. —, 410 N.E.2d 1325 (1980). The court stated:

To apply the traditional rationale denying recovery to one party in cases where contracts are held to be void simply because illegal sexual relations are posited as consideration for the bargain is unfair, unjust and unduly harsh. Such unnecessary results probably do more to discredit the legal system in the eyes of those who learn of the facts of the case than to strengthen the institution of marriage or the moral fiber of our society. To deny recovery to one party in such a relationship is in essence to unjustly enrich the other.

Id. at —, 410 N.E.2d at 1330; *Kozlowski v. Kozlowski*, 80 N.J. 378, 387-88, 403 A.2d 902, 908 (1979) (preventing one party from retaining all acquired property is not likely to discourage marriage because to reach the contrary result could “only encourage a partner with obvious income-producing ability to avoid marriage and to retain all earnings”) (quoting *Hewitt v. Hewitt*, 62 Ill. App. 3d 861, 868-69, 380 N.E.2d 454, 460 (1978), *rev'd*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979)).

173. See *supra* note 114.

174. See *supra* note 157.

courage activity in contravention of the relevant public interest since neither party experiences any real gain by virtue of the court's action. This partial enforcement is as likely to steer parties toward marriage as is complete denial of relief. Similarly, any decision by a court that prevents disproportionate forfeiture and unjust enrichment can hardly be considered a misuse of the courts. One could imagine different facts, such as action to recover on a loan agreement made to finance the distribution of prohibited drugs,¹⁷⁵ an illegal bribery agreement,¹⁷⁶ or a financing agreement for the making of an obscene film in contravention of local statutes,¹⁷⁷ where the courts might indeed wish to leave the parties where they are found, even if there is a forfeiture involved. This result would be warranted because of the egregious nature of the transaction and misconduct of the parties. Moreover, any effort to aid the parties might unduly be construed as condoning or encouraging the wrongful conduct.¹⁷⁸

Some courts have refused to give relief on the basis of implied-in-law contracts in cohabitation cases because they view it as inconsistent with the elimination of common-law marriage statutes.¹⁷⁹ This reasoning is flawed, however, because as previ-

175. See *Dodd v. Harper*, 670 S.W.2d 646 (Tex. Civ. App. 1983).

176. See *Frohlich & Newell Foods, Inc. v. New Sans Souci Nursing Home*, 109 Misc. 2d 974, 441 N.Y.S.2d 335 (N.Y. Civ. Ct. 1981).

177. See *Braunstein v. Jason Tarantella, Inc.*, 87 A.D.2d 203, 450 N.Y.S.2d 862 (1982).

178. Cases that involve the paying of compensation in exchange for consent to adoption particularly demonstrate the need for flexibility in a court's disposition of a case. See *Barwin v. Reidy*, 62 N.M. 183, 307 P.2d 175 (1957). The *Barwin* court was certain that the natural parents could not "sell their children, enjoy the proceeds, and then come into court and demand the return of their children." *Id.* at 196, 307 P.2d at 184. But the adoptive parents had also engaged in wrongful conduct. *Id.* at 195, 307 P.2d at 183. The court concluded that ultimate disposition must be guided by the welfare of the children since that, of course, is the very essence of the adoption statutes. *Id.* at 190, 307 P.2d at 180.

179. See *Carnes v. Sheldon*, 109 Mich. App. 204, 216-27, 311 N.W.2d 747, 753 (1981); *Morone v. Morone*, 50 N.Y.2d 481, 489, 407 N.E.2d 438, 442, 429 N.Y.S.2d 592, 596 (1980); see also *In re Estate of Alexander*, 445 So. 2d 836, 839 (Miss. 1984) (expressly adopting the reasoning in *Carnes*). The *Carnes* court stated:

We are of the opinion that public policy questions of such magnitude are best left to the legislative process, which is better equipped to resolve the questions which inevitably will arise as unmarried cohabitation becomes an established feature of our society. While the judicial branch is not without power to fashion remedies in this area, . . . we are unwilling to extend equitable principles to the extent plaintiff would have us do so, since recovery based on principles of contracts implied in law essentially would resurrect the old common-law marriage doctrine which was specifically abolished by the Legisla-

ously asserted, there is a marked difference between the consequences of achieving common-law marriage status and a decision that cohabitation agreements, express or implied, are enforceable.¹⁸⁰

These courts also have suggested that the parties in a cohabitation case have less of a right to implied-in-law contract remedies than other contract relief. This reasoning is undoubtedly related to the view that restitution in quasi-contractual cases is based in equity rather than in contract law.¹⁸¹ This view is subject to challenge.¹⁸² Professor Joseph Perillo notes that restitution may be related to either a contracting or noncontracting situation.¹⁸³ What distinguishes the two situations, in large part, is the lack of an "antecedent right-duty relationship" between the relevant parties in a noncontracting situation.¹⁸⁴ The noncontracting category is exemplified by the person who voluntarily pays the funeral bill of a stranger without any prior arrangement of any sort with the decedent or his relatives. Restitution that relates to a contract that does not work out, however, under the Perillo view, is essentially contractual in nature since the antecedent relationship does exist; it is not simply based on equitable notions of avoiding unjust enrichment.¹⁸⁵ Similarly, in cases involving express cohabitation agreements, there is a preexisting right-duty relationship, so even if the court finds the agreement unenforceable, any restitution would fall into the group that Perillo calls contractual in nature.¹⁸⁶ Even if there is no express contract, there is still a preexisting relationship prior to the rendering of the services and a consensual transfer of benefit, unlike the example of the

ture. Although, as previously noted, the *Marvin* court denied that the effect of its decision would be to resurrect the principle of common-law marriages, commentators have been less certain.

Carnes, 109 Mich. App. at 216-17, 311 N.W.2d at 753.

180. See *supra* notes 154-155 and accompanying text.

181. See Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208, 1208 (1973).

182. See *id.* at 1210; see also C. KNAPP, PROBLEMS IN CONTRACT LAW 948-49 (1976) (summarizing and commenting on the Perillo article).

183. See Perillo, *supra* note 181, at 1213-14.

184. *Id.* at 1214.

185. *Id.* at 1214-15.

186. Professor Perillo has subsequently observed that the Restatement (Second) of Contracts has treated restitution expansively, supporting his thesis that restitution in the contracting context is a part of contract law. Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37, 37-38 (1981).

funeral bill payer.¹⁸⁷ Therefore, courts like those in *Hewitt* and *Alexander* should be more amenable to quasi-contractual claims and remedies in a cohabitation case because of the essentially contractual rather than purely equitable nature of the claim for relief.¹⁸⁸

The courts in *Hewitt* and *Alexander* erroneously perceived a public policy interest in the non-enforcement of cohabitation agreements. Other courts have suffered from similar confusion but many of these have avoided the painfully unfair outcomes of *Hewitt* and *Alexander* by using mitigating doctrines, such as severability.¹⁸⁹ Courts have used severability in an analysis that presumes that sexual relations as consideration for a cohabitation agreement renders the agreement unenforceable. These courts, however, find the agreement enforceable if the sexual relations can be separated from alternative good consideration underlying the agreement,¹⁹⁰ yet the concept of severability in the cohabitation agreement cases takes on a shape somewhat different from its normal use. For example, in a covenant not to compete agreement, the terms that are overly

187. A particularly illuminating discourse on problems in distinguishing express and implied-in-fact contracts from quasi-contract is found in Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1135-54 (1971). In discussing these problems, Professor Henderson attributes much of the uncertainty about quasi-contract to the fact that it very often finds application in fact situations which contain the outline of exchange or contract. *Id.* at 1142. This observation has great relevance to cohabitation cases because the consensual nature of the relationship and related transfers of benefits make these cases markedly distinguishable from other quasi-contract situations involving unilateral conferral of benefit.

188. The argument here is limited to quasi-contractual relief tied to principles of restitution and avoidance of unjust enrichment. Purely equitable relief, beyond restitution of benefit conferred, would be subject to further challenge. *Cf.* *Marvin v. Marvin*, 122 Cal. App. 3d 871, 875-76, 176 Cal. Rptr. 555, 558-59 (1981) (denying purely equitable remedy where there was neither an express nor implied-in-fact agreement nor any element of unjust enrichment).

189. *See* *McCall v. Frampton*, 81 A.D.2d 607, 608, 438 N.Y.S.2d 11, 13 (1981); J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 22-4(d) (2d ed. 1977) ("If a contract contains an illegal provision that is not central to the parties agreement and the illegal provision does not involve serious moral turpitude, the illegal portion of the agreement is disregarded and the balance of the agreement is enforceable.") (footnote omitted); *see also supra* text accompanying notes 72-74.

190. *See, e.g., Marvin v. Marvin*, 18 Cal. 3d 660, 672, 557 P.2d 106, 114, 134 Cal. Rptr. 815, 823 (1976); *Kozlowski v. Kozlowski*, 80 N.J. 378, 386-87, 403 A.2d 903, 907 (1979); *accord* *Donovan v. Scuderi*, 51 Md. App. 217, 228, 443 A.2d 121, 127 (1982); *cf.* *Jones v. Daly*, 122 Cal. App. 3d 500, 509, 176 Cal. Rptr. 130, 134 (1981) (rendition of sexual services and public acknowledgement of status as "lover" were inseparable part of consideration for agreement).

broad and offensive can be separated without affecting the essence of the agreement.¹⁹¹ The excised portion is considered expendable because it was a minor part of the overall transaction and not a "but for" factor in bringing about the contract.¹⁹² While it is entirely possible that sexual relations may be either a minor or collateral element in a contractual transaction,¹⁹³ this is usually not the case in cohabitation agreements. The living arrangement and sexual relations probably provide the true impetus for the usual promise to share income or jointly acquire property. For this reason, the use of the severability concept in cohabitation agreement cases may require a rather unrealistic application of the concept.¹⁹⁴ The significance of this strained use of the severability doctrine is that it underscores the judicial uneasiness with the notion that cohabitation agreements are against public policy just because sexual relations are a part of the arrangement.

191. See RESTATEMENT (SECOND) OF CONTRACTS § 184 comment b, illustration 2 (1979). Illustration 2 reads:

2. A, who is engaged in business as a baker and confectioner, sells the business to B, and as part of the bargain promises not to engage in the business of "baker, confectioner, or other business" within the same town for three years. The provision is fairly bargained for. A's promise is so broad as to be unreasonably in restraint of trade because A's business is only that of baker and confectioner. Although part of A's promise is unenforceable on grounds of public policy (§ 188), it is enforceable with respect to the business of baker or confectioner.

Id.

192. *Id.* at § 184(1).

193. The mere fact that parties are engaged in sexual relations does not prevent them from entering into contracts about other matters. In *Siple v. Corbett*, 447 A.2d 1184 (Del. 1982), the court seemed persuaded that the parties entered into a valid employment agreement despite past romantic involvement. *Id.* at 1186. There was no cohabitation involved in *Siple*. Although the facts and findings are less clear, courts seemed to have reached similar conclusions in *Donovan v. Scuderi*, 51 Md. App. 217, 443 A.2d 121 (1982) and *Hawes v. Pendrak*, 13 Mass. App. Ct. 1052, 434 N.E.2d 678 (1982). The courts seemed to conclude that parties who were engaged in sexual relations, but not cohabiting, did enter into separate business or employment contracts. See *Donovan*, 51 Md. App. at 224-25, 443 A.2d at 127; *Hawes*, 13 Mass. App. Ct. at 1053, 434 N.E.2d at 679.

194. This fact did not go unnoticed by the court in *Hewitt v. Hewitt*, 77 Ill. 2d 49, 60, 394 N.E.2d 1204, 1209 (1979). The court stated:

[I]t would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naïvete we believe involved in the assertion that there are involved in these relationships contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity.

Id.

Similar ambivalence in the application of public policy limits to cohabitation agreements can be found in cases which allow enforcement of express, but not implied-in-fact, cohabitation agreements.¹⁹⁵ An implied-in-fact contract with homemaking services¹⁹⁶ as consideration was asserted in *Morone v. Morone*.¹⁹⁷ The court acknowledged that an express contract might be enforceable but refused to allow for the possibility of an implied-in-fact contract:

The major difficulty with implying a contract from the rendition of services for one another by persons living together is that it is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were rendered gratuitously. As a matter of human experience personal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do.¹⁹⁸

The problem with the implied-express distinction is that if there is sound public policy against enforcement of cohabitation agreements then, logically it ought to apply equally to express and implied contracts.¹⁹⁹ The continued use of this distinction again reflects the courts' recognition that disallowing cohabitation agreements because of the public policy interest in discouraging cohabitation outside of marriage is on less than solid footing.

Despite reasoning like that found in *Morone*, cohabitants should be allowed to prove an implied-in-fact agreement. Although it can hardly be doubted that cohabitants do not expect a weekly paycheck for their homemaking services, it is equally obvious that the parties do not expect the party contributing such services to derive nothing from their efforts. Some benefit or consideration, other than emotional satisfaction, is almost certainly contemplated by both parties in return for the pooling of their resources and concentration of their efforts.²⁰⁰ There may be, of course, some instances when both parties understand that a rendered service is gratuitous, but the cohabi-

195. See *supra* note 22 and cases cited therein. For a discussion of the differences between express and implied agreements, see *supra* note 157.

196. Some courts adopting a restrictive position regarding homemaking services are receptive to business or personal services as a basis for implied-in-fact or implied-in-law contracts. See, e.g., *Tapley v. Tapley* 122 N.H. 727, 730-31, 449 A.2d 1218, 1220 (1982).

197. 50 N.Y.2d 481, 407 N.E.2d 438, 429 N.Y.S.2d 592 (1980).

198. *Id.* at 489, 407 N.E.2d at 441, 429 N.Y.S.2d at 596 (citations omitted).

199. See *Mason v. Rostad*, 476 A.2d 662, 665-66 (D.C. 1984) (questioning the distinction and refusing to adopt it as law in that jurisdiction).

200. See *Bruch*, *supra* note 23, at 117-21; *Casad*, *supra* note 23, at 56-58.

tants should at least have the opportunity to prove the contrary.²⁰¹

To the extent that courts are recognizing that cohabitation agreements, whether express or implied, are not *per se* contrary to public policy and should be enforced within limits, it should not be viewed as an unprecedented shift in public policy interests or public morals. Rather, the courts may be more correctly described as refining and more carefully determining the relevant public policy interests involved in a cohabitation agreement and the types of agreements that should be considered unenforceable.²⁰² Indeed, there were decisions pre-dating even the landmark case of *Marvin v. Marvin* that reflected a judicial approach that was considerably more discerning and less hostile to cohabitation agreements than one might expect.²⁰³ In addition to applying the doctrine of severability,²⁰⁴ some courts have long held that while contracts contemplating future illicit relations should be deemed unenforceable, contracts involving consideration for past relations may be enforced.²⁰⁵ These older decisions succeeded where some modern courts seem to be failing, that is, in strictly limiting the public policy against meretricious relationships to those cases involving straightforward contracts for sexual relations.

CONCLUSION

King Solomon is credited with having written "there is nothing new under the sun."²⁰⁶ The import of such wisdom is that the likelihood of any new, totally unprecedented situations arising is quite minimal. So it has been with public policy interests. The popular perception has been that because society is

201. *In re Estate of Steffes*, 95 Wis. 2d 490, 501-05, 290 N.W.2d 697, 702-04 (1980).

202. See *supra* notes 55-62 and accompanying text.

203. See *Kay & Amyx*, *supra* note 56, at 942-45 (detailing five California cases predating *Marvin* and going back to 1932 in which it was clear that cohabitants could enter into separate contracts but that no rights attached merely because of cohabitation); see also *Knauer v. Knauer*, 323 Pa. Super. 206, 219-220, 470 A.2d 553, 560 (1983); *Bruch*, *supra* note 23, at 107-08.

204. See *supra* text accompanying notes 189-194.

205. See *E. GREENHOOD*, *supra* note 41, at 205.

206. *Ecclesiastes* 1:9-10 (Revised Standard Version). The passage reads:

⁹What has been is what will be, and what has been done is what will be done; and there is nothing new under the sun.

¹⁰Is there a thing of which it is said, "See, this is new"?

It has been already, in the ages before us.

Id. Many anonymous parties have uttered the refrain, "The more things change, the more they stay the same."

dynamic it follows that markedly new areas of public policy interests are emerging. However, a review of recent decisions and related writings yields no evidence of drastically new judicially-recognized public policy. There are situations posing novel applications of preexisting public policy and there are also some public policy areas with a growing infrequency of cases, but the courts have not proliferated any new public policy interests or related rules. Moreover, courts seem to respond to repeated admonitions to hesitate in resorting to public policy as a basis for refusing to enforce the contracts of parties so as not to be led away from sound policy. In this respect public policy limitations have proven to be less like Justice Burrough's unruly horse and more like the proverbial circus pony.²⁰⁷

The real problems in the public policy doctrine lie in the courts' imprecise and overbroad application of overly simple notions of public policy interests and also in their inflexible approaches to remedies. The recent spate of inconsistent cohabitation agreement decisions with some starkly unjust solutions have brought these problems sharply into focus. First, some courts routinely assume that cohabitation agreements violate certain public policy interests without critically defining those interests. This leaves the court unable to effectively determine whether the cohabitation agreements do in fact fall within the boundaries of those interests and whether those interests are well served by refusals to enforce the agreements. Another problem is that some courts completely deny any remedy for breach of promises determined to be in conflict with public policy, rather than adopting a more flexible approach, such as that found in the relevant provisions of the Restatement (Second) of Contracts.

This flexible approach would more likely assure that justice is done in each case, but at the same time discourage wrongful conduct and prevent misuse of the courts. A more precise, restrictive definition of public policy interests and a more flexible, goal-oriented approach to remedial questions would greatly increase the courts' effectiveness in implementing the overarching public policy interest in this area: to allow parties the maximum freedom of contract with assurance that courts will enforce promises in accordance with the fairly and freely achieved mutual intent of the parties.

207. See *supra* text accompanying note 1.

